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BEING ABLE TO PROSECUTE SAIF AL-ISLAM GADDAFI: APPLYING ARTICLE 17(3) OF THE ROME STATUTE TO LIBYA

INTRODUCTION

The Arab Spring was a series of revolutions and demonstrations occurring in several nations throughout the Middle East and North Africa.¹ One such revolution was the Libyan Civil War, which ended the forty-year reign of Colonel Muammar Gaddafi.² While the revolution certainly affected the lives of Libyans, it also left its mark on international criminal law. On February 26, 2011, the United Nations Security Council passed Resolution 1970, which referred the situation in Libya to the International Criminal Court's Office of the Prosecutor (OTP) for an investigation into any international crimes committed by Muammar Gaddafi and his regime since February 15, 2011.³ As a result, the Pre-Trial Chamber (Chamber)⁴ of the International Criminal Court (ICC) issued warrants for the arrest of Muammar Gaddafi, Saif al-Islam Gaddafi (Gaddafi),⁵ and Abdullah al-Senussi,⁶ alleging their responsibility for committing crimes against humanity during the conflict.⁷ The charges against

¹ See generally Fouad Ajami, *The Arab Spring at One: A Year of Living Dangerously*, FOREIGN AFF., Mar./Apr. 2012, at 56, available at <http://www.foreignaffairs.com/articles/137053/fouad-ajami/the-arab-spring-at-one?page=show>.

² See *id.* at 59.

³ S.C. Res. 1970, para. 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

⁴ The Pre-Trial Chamber of the ICC is the division responsible for overseeing a case or situation until the accused has been charged and the Prosecutor is ready to proceed to trial. *Pre-Trial Division*, INT'L CRIM. CT., http://www.iccpi.int/en_menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/Pages/pre%20trial%20division.aspx (last visited Oct. 25, 2013). Among its other various functions, the Chamber may authorize the Prosecutor to investigate a situation on her own motion, issues warrants for arrest, and otherwise ensure the integrity of the investigative proceedings. *Id.*

⁵ Saif al-Islam Gaddafi is one of the sons of Muammar Gaddafi and was the honorary chairman of the Gaddafi International Charity and Development Foundation and acting Prime Minister of Libya under his father's government. *Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Case Information Sheet*, INT'L CRIM. CT. <http://www.icc-cpi.int/iccdocs/PIDS/publications/SaifAlIslamSenussiEng.pdf> (last visited Oct. 3, 2013) [hereinafter Case Information Sheet].

⁶ Abdullah al-Senussi was a colonel in the Libyan Armed Forces and the head of Military Intelligence under Muammar Gaddafi. *Id.*

⁷ See Situation in the Libyan Arab Jamahiriya, 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," para. 41 (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101337.pdf> [hereinafter Prosecutor's Warrant Application]; Case Information Sheet, *supra* note 5.

Muammar Gaddafi were dropped due to his death,⁸ but the case against Saif Gaddafi and al-Senussi has continued and become an important issue for the new Libyan government, which has challenged the admissibility of the Gaddafi case before the ICC.⁹ The Chamber denied Libya's admissibility challenge on May 31, 2013.¹⁰

What is perhaps most exceptional about this case is the admissibility exception that the parties originally talked about the least: inability. A case is inadmissible in the ICC if "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution."¹¹ A state is considered unable to investigate or prosecute a defendant when, "due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."¹² Libya, in its original challenge, addressed the issues of whether it is investigating the same crime before the ICC¹³ and whether it is willing to carry out the prosecution.¹⁴ However, Libya barely spoke to the issue of whether it is "unable to genuinely" investigate or prosecute Gaddafi outside of mere policy arguments.¹⁵ The OTP also barely touched on the issue of inability in its response to Libya's motion, dedicating only about two paragraphs of its motion to whether Libya is able to investigate and prosecute the case.¹⁶ Indeed, even the Office of Public Counsel for the Defense (OPCD) talked

⁸ Case Information Sheet, *supra* note 5.

⁹ Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, para. 1 (May 1, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf> [hereinafter Libya's Admissibility Motion].

¹⁰ Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif al-Islam Gaddafi, para. 219 (May 31, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf> [hereinafter Admissibility Decision].

¹¹ The Rome Statute of the International Criminal Court art. 17, para. 1(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹² *Id.* art. 17(3).

¹³ See Libya's Admissibility Motion, *supra* note 9, paras. 39–52.

¹⁴ See *id.* paras. 53–67.

¹⁵ See generally *id.* paras. 96–102.

¹⁶ See Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Prosecution Response to Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, paras. 8, 41 (June 5, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1423546.pdf> [hereinafter Prosecutor's Admissibility Response].

comparatively little about Libya's ability to investigate and prosecute when compared to other sections of its brief.¹⁷

That the parties spent so little time discussing the inability exception is unfortunate, because it eventually became one of the issues the Chamber talked about the most in its decision on the admissibility challenge.¹⁸ Regrettably, the Chamber decided that Libya was genuinely unable to investigate or prosecute Gaddafi in obiter dictum.¹⁹ The situation in Libya offered the ICC a unique opportunity to address the issue of inability, because the decision the Court made in this case may not only affect how it views the ability of a state to prosecute a suspect in the future, but it may also affect the ICC's policy toward the principle of complementarity²⁰ and, ultimately, the ICC's relationship with state-parties and states recovering from internal conflict for years to come.²¹ By declaring that Libya was genuinely unable to investigate or prosecute Gaddafi, the ICC missed an opportunity to implement a policy of positive complementarity to address the possible inability of a state to prosecute a defendant. Such a policy would help build a transitional government's justice system rather than deprive that country of the ability to prosecute a former regime for wrongdoing against its people.²²

This Comment argues that the Chamber wrongly decided the issue of Libya's ability to investigate and prosecute Gaddafi because it should have never reached the question. Even if it had, the Chamber's analysis under Article 17(3) of the Rome Statute was inherently flawed. Rather, out of respect for state sovereignty and the strict circumstances under which the drafters of the Rome Statute wished to place the inability exception to Articles 17(1)(a) and (b), the Chamber should have found Gaddafi's case inadmissible. Part I will address the background of the situation in Libya and the case against Gaddafi, the arguments offered by Libya in support of its admissibility challenge, and the OTP's and the OPCD's responses. Part II will discuss the Chamber's decision on Libya's admissibility challenge. Part III will discuss the

¹⁷ See Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Defense Response to the Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, (July 31, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1446165.pdf> [hereinafter Defense's Admissibility Response]. Compare the OPCD's discussion of Libya's investigation in paragraphs 67–154 and its discussion of unwillingness in paragraphs 155–353 with their discussion on inability in paragraphs 354–408. *Id.*

¹⁸ See Admissibility Decision, *supra* note 10, paras. 199–215.

¹⁹ Admissibility Decision, *supra* note 10, para. 215.

²⁰ See *infra* notes 175–77 and accompanying text.

²¹ See Libya's Admissibility Motion, *supra* note 9, para. 101.

²² See *id.* para. 102.

history of Article 17(3) of the Rome Statute, explore why the inability provision was added, and analyze how Article 17 is currently construed. Part IV will discuss Jean-Pierre Bemba Gombo's case before the ICC, a case in which the issue of inability has also arisen, and compare it to the situation in Libya. Part V will discuss the case against Gaddafi in light of complementarity and the *Bemba* case and give reasons why the ICC should find that Gaddafi's case is, at this time, inadmissible.

I. BACKGROUND

To understand the context and substance of the case against Gaddafi, as well as why Libya is at this time genuinely able to investigate and prosecute the case, it is important to know the history of the case, the arguments of the parties in their motions and at the admissibility hearing, and developments in Libya since the admissibility challenge has been submitted. This Comment will discuss each in turn.

A. *History of the Case Against Gaddafi*

Before the National Transitional Council of Libya (NTC or Libya) gained control of Libya, the country was ruled by Colonel Muammar Gaddafi following his *coup d'état* in 1969.²³ Muammar Gaddafi's control over Libya began to slip after protests arose in Libya, despite a regime crackdown, in what was called a "day of rage" on February 17, 2011.²⁴

Muammar Gaddafi, Saif Gaddafi, and al-Senussi met to "plan the repression of the protest" by mobilizing Libyan Security Forces, recruiting mercenaries, and releasing prisoners convicted of minor crimes so that they could participate in pro-Gaddafi protests and otherwise create chaos.²⁵ Saif Gaddafi in particular "took an active role in the recruitment of foreign mercenaries."²⁶ The protests quickly escalated into conflicts between the

²³ Gregory Viscusi, *Qaddafi Is No Mubarak as Regime Overthrow May Trigger a 'Descent to Chaos'*, BLOOMBERG (Feb. 23, 2011), <http://www.bloomberg.com/news/2011-02-23/qaddafi-is-no-mubarak-overthrow-may-mean-descent-to-chaos-.html>.

²⁴ See *Deadly 'Day of Rage' in Libya*, AL-JAZEERA (Feb. 18, 2011, 5:34 AM), <http://www.aljazeera.com/news/africa/2011/02/201121716917273192.html>.

²⁵ Prosecutor's Warrant Application, *supra* note 7, para. 9.

²⁶ *Id.* para. 10.

demonstrators and Muammar Gaddafi's regime.²⁷ The killing of protesters was allegedly expressly authorized by Muammar Gaddafi and coordinated by al-Senussi as a means of suppressing the protests.²⁸ Not surprisingly, larger demonstrations against Muammar Gaddafi's regime resulted from the killings of these protesters, bringing about "a systematic and even more violent response" from the Security Forces.²⁹ On February 20, 2011, Saif Gaddafi threatened a civil war that would be "worse than Iraq and worse than in Yugoslavia that would cause thousands of deaths" if the protests did not stop.³⁰

Once the protests escalated into civil war, the NTC was created in Benghazi on February 27, 2011 to serve as the "political face . . . for the revolution" against Muammar Gaddafi and his regime.³¹ During a speech renouncing the Gaddafi regime, Libya's deputy ambassador to the United Nations, Ibrahim Dabbashi, issued perhaps the first call from the Libyan Mission to the United Nations to have the ICC investigate Muammar Gaddafi for war crimes and crimes against humanity.³² On February 26, 2011, the Security Council unanimously passed Resolution 1970 which, among other things, referred the situation in Libya to the OTP for an investigation of any international crimes since February 15, 2011.³³

²⁷ *Deadly 'Day of Rage' in Libya*, *supra* note 24. In Benghazi, for instance, an eyewitness reported that police killed six unarmed protesters and the police further released thirty people from jail, paying and arming them so that they could fight the protesters. *Id.*

²⁸ Situation in the Libyan Arab Jamahiriya, *supra* note 7, para. 12.

²⁹ *See id.* paras. 13–17 (noting that demonstrations continued to take place in Tripoli and that the protesters were fired upon by the Security Forces). Subsequently, the protesters began to set fire to government buildings. *Id.*

³⁰ *Id.* para. 16 (internal quotation marks omitted).

³¹ *Libya: Timeline of the Conflict*, EURONEWS (Aug. 29, 2011, 3:14 PM), <http://www.euronews.com/2011/08/29/libya-timeline-of-the-conflict/>. Mustafa Mohamed Abdel Jalil, a former member of Muammar Gaddafi's cabinet, became the head of the NTC after its formation. *Libya Opposition Launches Council*, AL-JAZEERA (Feb. 27, 2011, 8:00 PM), <http://www.aljazeera.com/news/africa/2011/02/2011227175955221853.html>.

³² Houda Mzioudet, *First Diplomat To Denounce Qaddafi Returns to NY as UN Ambassador*, LIBYA HERALD (June 17, 2013), <http://www.libyaherald.com/2013/06/17/first-diplomat-to-denounce-qaddafi-returns-to-ny-as-un-ambassador/>.

³³ S.C. Res. 1970, *supra* note 3, para. 4. This was the second time that the Security Council has made such a referral, and the first time that such a referral was made unanimously. Edward Wyatt, *Security Council Refers Libya to Criminal Court*, N.Y. TIMES, Feb. 27, 2011, at 14; *India Backs UN Sanctions Against Libya*, IBN LIVE (Feb. 27, 2011, 11:18 AM), <http://ibnlive.in.com/news/india-backs-un-sanctions-against-libya/144537-3.html>. The first Security Council referral to the ICC occurred in 2005 with the adoption of Resolution 1593 which referred the situation in Darfur to the OTP. *See* Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005) available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>. The vote, however, was not unanimous, with only eleven countries voting in favor of the resolution, none voting against the resolution, and Algeria, Brazil, China, and the United States abstaining. *Id.*

In a decision rendered on June 27, 2011, the Chamber issued warrants for the arrest of Muammar Gaddafi, Saif Gaddafi and al-Senussi for their alleged responsibility in committing murder as a crime against humanity under Article 7(1)(a) of the Rome Statute and persecution as a crime against humanity under Article 7(1)(h).³⁴ Saif Gaddafi was indicted as an indirect co-perpetrator of these crimes, and al-Senussi was indicted as an indirect perpetrator.³⁵ However, gaining custody over the Gaddafis and al-Senussi has proven difficult for the ICC.³⁶ Muammar Gaddafi died from wounds sustained during the Battle of Sirte.³⁷ Because of his death, the Chamber formally dropped the charges against Muammar Gaddafi.³⁸

On November 19, 2011, militia forces in Zintan, Libya captured Saif Gaddafi.³⁹ Immediately after his arrest, Libya resisted turning him over to the ICC and began to investigate him for financial and corruption crimes.⁴⁰ The Libyan Prosecutor-General did not begin investigating Gaddafi for serious crimes such as murder and rape until January 2012.⁴¹ The Zintan militia has held Gaddafi in Zintan since his capture.⁴²

³⁴ Prosecutor's Warrant Application, *supra* note 7, paras. 95, 99, 102. According to Article 7(1)(h), a crime against humanity exists when there is "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court." Rome Statute, *supra* note 11, art. 7. Persecution is defined in Article 7(2)(g) as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." *Id.*

³⁵ Case Information Sheet, *supra* note 5.

³⁶ On the day the warrants were issued, Muammar Gaddafi's regime was still in control of Tripoli, even though rebel forces were making a push for the capital. *Libya: Fierce Fighting South-West of Tripoli*, BBC NEWS (June 27, 2011, 5:54 AM), <http://www.bbc.co.uk/news/world-africa-13921665>.

³⁷ Rania El Gamal & Tim Gaynor, *Gaddafi Killed as Libya's Revolt Claims Hometown*, REUTERS (Oct. 20, 2011), <http://af.reuters.com/article/topNews/idAFJ0E79J09O20111020>.

³⁸ Case Information Sheet, *supra* note 5.

³⁹ Marie-Louise Gumuchian, *Gaddafi's Son Captured, Scared and Without a Fight*, REUTERS (Nov. 19, 2011), <http://www.reuters.com/article/2011/11/19/us-libya-idUSTRE7AI0G820111119>.

⁴⁰ *Id.*; Libya's Admissibility Motion, *supra* note 9, para. 23. Several non-governmental organizations, including Amnesty International and Human Rights Watch, were calling on the NTC to turn Gaddafi over to the ICC. Gumuchian, *supra* note 39.

⁴¹ Libya's Admissibility Motion, *supra* note 9, para. 25. Libya initially stated that the investigation of Gaddafi for more serious crimes began January 8, 2012. *Id.* Confusingly, in a response filed on January 23, 2012 to the ICC, the NTC stated that it was still "considering whether to also institute national proceedings 'in relation to the same conduct for which [Gaddafi] is sought by the [ICC].'" *Id.* para. 26.

⁴² *Libya Challenges International Criminal Court's Order to Hand Over Saif Gadhafi*, CNN (Oct. 9, 2012, 7:55AM), <http://www.cnn.com/2012/10/09/world/africa/netherlands-saif-gadhafi-appeal/index.html>.

Al-Senussi was not captured until March 17, 2012, at the Nouakchott airport in Mauritania.⁴³ Eventually al-Senussi was extradited to Libya on September 5, 2012,⁴⁴ and there were reports that Libya paid as much as \$200 million to Mauritania to secure his transfer.⁴⁵ The NTC began investigating al-Senussi for his participation in the atrocities during the Libyan Civil War almost immediately after his capture.⁴⁶

On January 23, 2012, the NTC began to fight Gaddafi's surrender, requesting a postponement of the surrender request under Article 94(1) of the Rome Statute so that Libya could finish investigating and prosecuting Gaddafi for various national crimes.⁴⁷ On March 7, 2012, the Chamber denied the postponement request and stated that "Libya must grant the surrender request."⁴⁸ On March 22, 2012, Libya again tried to postpone Gaddafi's surrender to the ICC by expressing their intent to challenge the admissibility of Gaddafi's case and seeking suspension of the surrender under Article 95 of the Statute.⁴⁹ This request was also denied because there was no actual admissibility challenge being considered by the Chamber.⁵⁰

B. *The Parties' Arguments*

On May 1, 2012, the NTC challenged the admissibility of the case against Gaddafi in the ICC.⁵¹ The OTP followed with its response, filed on June 5, 2012,⁵² and the OPCD filed its response on July 31, 2012.⁵³ The Chamber held

⁴³ *Gaddafi Spy Chief Abdullah al-Senussi Held in Mauritania*, BBC NEWS (Mar. 17, 2012, 4:16 PM), <http://www.bbc.co.uk/news/world-africa-17413626>.

⁴⁴ *Mauritania Departs Libya Spy Chief Abdullah al-Senussi*, BBC NEWS (Sept. 5, 2012 1:45 PM), <http://www.bbc.co.uk/news/world-africa-19487228>. Al-Senussi was not immediately deported to Libya because there was a dispute between France and Libya about who should gain custody of him. *Gaddafi Spy Chief Abdullah al-Senussi Held in Mauritania*, *supra* note 43. French President Nicolas Sarkozy called for al-Senussi to be extradited to France because he was convicted by a French court of being involved in an attack on a French plane in 1989 that killed 170 people. *Id.*

⁴⁵ George Grant, *Government Struck Financial Deal with Mauritania over Senussi Handover*, LIBYA HERALD (Sept. 5, 2012), <http://www.libyaherald.com/2012/09/05/govt-struck-financial-deal-with-mauritania-over-senussi-handover/>.

⁴⁶ Libya's Admissibility Motion, *supra* note 9, paras. 23, 25.

⁴⁷ *Id.* para. 26. Article 94(1) allows for the postponement of a request if such "immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates." Rome Statute, *supra* note 11, art. 94, para. 1.

⁴⁸ *Id.* para. 29.

⁴⁹ Libya's Admissibility Motion, *supra* note 9, para. 31. Article 95 allows for the postponement of a request when a case's admissibility is challenged. Rome Statute, *supra* note 11, art. 95.

⁵⁰ Libya's Admissibility Motion, *supra* note 9, para. 32.

⁵¹ *Id.* para. 6.

⁵² *See generally* Prosecutor's Admissibility Response, *supra* note 16.

a hearing on the admissibility challenge on October 9 and 10, 2012.⁵⁴ This Part will discuss the arguments made by each party in their court filings and will then discuss the new assertions brought by the parties during the admissibility hearing and the parties' submissions after the hearing.

1. *Libya's Admissibility Challenge*

As mentioned above, the parties barely touched on the issue of whether Libya is able to investigate and prosecute Gaddafi in their original submissions.⁵⁵ Libya did state that the inability exception will determine whether complementarity will become "a realistic and reasonable system, or a utopian concept with no practical application;" that "the purpose of transitional justice is to provide an opportunity for post-conflict judicial capacity building;"⁵⁶ and that it could "become a tool for overly harsh assessments of the judicial machinery in developing countries."⁵⁷ Referring to the Thomas Lubanga Dyilo case, which was also before the ICC, Libya further asserted that even if a state is presently unable to prosecute a defendant, an unable state can quickly become able to prosecute a defendant.⁵⁸ Outside of policy arguments, Libya merely mentioned that it had custody of Gaddafi, that the evidence of Gaddafi's crimes existed in Libya, and that Libya had requested al-Senussi's extradition from Mauritania.⁵⁹ Libya further claimed that it would be able to carry out the necessary proceedings to prosecute Gaddafi because it had requested help from the "UN High Commissioner for Human Rights and other organizations with respect to strengthening the capacity of the judiciary and the legal profession in general and to provide specialized training for judges and prosecutors, with a particular focus on litigation related to transitional justice."⁶⁰ Still, the heart of Libya's argument for its admissibility motion was that the Court denying Libya the chance to prosecute Gaddafi "would be

⁵³ See generally *id.*

⁵⁴ Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Hearing on the Admissibility Challenge (Oct. 9, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1481845.pdf> [hereinafter Admissibility Hearing Day 1 Transcript]; Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Hearing on the Admissibility Challenge (Oct. 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1487823.pdf> [hereinafter Admissibility Hearing Day 2 Transcript].

⁵⁵ See *supra* notes 10–16 and accompanying text.

⁵⁶ Libya's Admissibility Motion, *supra* note 9, para. 98.

⁵⁷ *Id.* para. 99 (quoting Sharon A. Williams & William A. Schabas, *Article 17: Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 605, 624 (Otto Triffterer ed., 2d. ed. 2008)).

⁵⁸ *Id.* para. 100.

⁵⁹ *Id.* para. 96.

⁶⁰ *Id.* para. 97.

manifestly at variance with the principle of complementarity,” despite indications that Libya was able to carry out a prosecution with international assistance.⁶¹

Outside of its explicit arguments, Libya offered other facts that serve as indicia that Libya is genuinely able to investigate and prosecute Gaddafi. For instance, Libya mentioned that it has a Code of Criminal Procedure that directs investigatory processes, trials, and appeals, and that such investigations be done confidentially.⁶² Libya also claimed that it followed that code while extending Gaddafi’s detention in Zintan.⁶³ The Prosecutor-General, who is overseeing the investigation of Gaddafi, began the process of investigating Gaddafi for war crimes committed during the Libyan Civil War by intercepting calls and conducting interviews with witnesses.⁶⁴

Further, the Libyan Constitutional Declaration of 2011 made a provision for an independent judiciary and prohibited any “exceptional courts” that were used during the Colonel Gaddafi regime to effect human rights violations.⁶⁵ The judiciary has already expressed this independence by overturning a law enacted by the NTC that “penalizes anyone who praises Muammar Gaddafi or his sons, or refers to them as ‘reformers,’ or states anything against the interests of the state or the February revolution.”⁶⁶ The 2011 Libyan Constitution further guarantees fairness by providing access to a defense attorney, even if it has to be appointed by the court free of cost.⁶⁷ The defendant is also guaranteed a right to present evidence in his defense, to request a written judgment, and to various forms of appeal.⁶⁸ Finally, Libya has a Criminal Code that would allow it to charge Gaddafi, if the evidence is sufficient, for crimes such as intentional murder, torture, arresting people without just cause.⁶⁹

⁶¹ *Id.* para. 98.

⁶² *Id.* paras. 39–40.

⁶³ *Id.* paras. 42–43.

⁶⁴ *Id.* paras. 44–47.

⁶⁵ *Id.* paras. 53–54 (citation omitted).

⁶⁶ Defense’s Admissibility Response, *supra* note 17, para. 316.

⁶⁷ Libya’s Admissibility Motion, *supra* note 9, para. 59, 62.

⁶⁸ *Id.* paras. 63, 65.

⁶⁹ *Id.* para. 75.

2. *The OTP's Response*

The OTP also barely touched upon the issue of inability in its response to Libya's motion.⁷⁰ To the extent that the OTP did raise the issue of Libya's ability to prosecute Gaddafi, it simply observed that the militia in Zintan that captured and held Gaddafi may not be part of the NTC.⁷¹ This fact raises a concern that the NTC does not actually have, and may not be able to gain, custody over Gaddafi, a requirement under Article 17(3).⁷² The OTP also pointed out that a defense counsel has yet to be appointed for Gaddafi in Libya, perhaps due in part to his captors in Zintan.⁷³ In raising this concern, the OTP did not argue that Libya's criminal justice system must conform to international due process standards⁷⁴ but instead argued that the fact that Libya had not appointed an attorney might be evidence that it is unable to prosecute Gaddafi.⁷⁵ Thus, even though the OTP believed that Libya was investigating Gaddafi for the same crimes as the ICC,⁷⁶ it submitted that the NTC should provide further evidence to the ICC that they are able to actually prosecute Gaddafi.⁷⁷

3. *The OPCD's Response*

The OPCD, in contrast, provided a thorough argument against Libya's admissibility challenge. First, it argued that the NTC did not have effective custody over Gaddafi because he was held by the Zintan militia, which, according to the OPCD, was an entity completely distinct from the NTC.⁷⁸ Second, the OPCD argued that the NTC lacked the authorities and judges to

⁷⁰ See Prosecutor's Admissibility Response, *supra* note 16, paras. 8, 41.

⁷¹ *Id.* para. 8.

⁷² Rome Statute, *supra* note 11, art. 17, para. 3.

⁷³ Prosecutor's Admissibility Response, *supra* note 16, para. 41.

⁷⁴ *Id.* para. 28.

⁷⁵ *Id.* para. 41.

⁷⁶ *Id.* para. 46.

⁷⁷ *Id.* paras. 8, 41.

⁷⁸ Defense's Admissibility Response, *supra* note 17, paras. 358–68. In relation to Gaddafi's custody in Zintan, the OPCD claimed that in the time that Gaddafi has been held in Zintan, he has been:

(1) not brought before a judge; (2) not granted effective access to lawyers; (3) denied the means to communicate with friends and family for the purpose of selecting lawyers, (4) questioned . . . without the presence of a lawyer and without any waiver being obtained; and (5) not provided any written information or evidence concerning the status of domestic proceedings (and requests for the same by the OPCD on his behalf have been rebuffed).

Id. para. 214.

effectively investigate and prosecute any case against Gaddafi.⁷⁹ The OPCD also argued that the NTC lacked the ability to keep any judges, prosecuting authorities, defendants, and witnesses safe from harm.⁸⁰ The OPCD further argued that if a judge were to give an order in the Gaddafi case, the NTC would be unable to implement that order.⁸¹

With regard to Libya's lack of judicial and police authorities, the OPCD submitted that few judges and prosecuting authorities are versed in "basic legal and human rights standards."⁸² Further, some officials have said that the prosecuting authorities in Libya did not have the ability to properly gather evidence and that, if Gaddafi were brought to trial in Libya in May, 2012, he might be found innocent.⁸³ The OPCD also expressed concerns that under Article 305(1) of the Libyan Criminal Procedure Code, if any evidence, particularly intercept evidence, against Gaddafi was illegally obtained, such evidence would have to be excluded, making it possible that not enough evidence would be admissible to effectively prosecute Gaddafi.⁸⁴ The OPCD also pointed out that there were legal impediments to any Gaddafi trial in Libya if he were to stay in Zintan. For instance, Libyan law does not allow for *in absentia* trials unless the accused is outside of the country, thus making it necessary to transport Gaddafi to Tripoli for any trial to begin.⁸⁵ On this point, the OPCD observed that the Zintan militia has not transferred Gaddafi because of security concerns in Tripoli.⁸⁶

Judges also feared for their safety due to the lack of security in cities, preventing them from returning to work.⁸⁷ This lack of security also affected prosecuting authorities from being able to investigate the case unless they depended upon local militia for security.⁸⁸ The OPCD further argued that the

⁷⁹ *Id.* paras. 369–81.

⁸⁰ *Id.* paras. 382–404.

⁸¹ *Id.* paras. 405–08.

⁸² *Id.* para. 370 (quoting U.N. Human Rights Council, Rep. of the Int'l Comm'n of Inquiry on Libya, U.N. Human Rights Council, 19th Sess., Mar. 8, 2012, para. 12, U.N. Doc. A/HRC/19/68 (2008)).

⁸³ Defense's Admissibility Response, *supra* note 17, paras. 373–74 (citations omitted).

⁸⁴ *Id.* para. 217. The intercept evidence to which the OPCD referred concerns phone calls that were recorded at the order of Muammar Gaddafi by the two major Libyan phone companies. Admissibility Hearing Day 2 Transcript, *supra* note 54, at 56–57. After the fall of Muammar Gaddafi's regime, these records were widely available and made their way to the general public. *Id.* The legal impact of this evidence and how it became available is discussed below. *See infra* notes 334–39 and accompanying text.

⁸⁵ Defense's Admissibility Response, *supra* note 17, para. 358.

⁸⁶ *Id.* para. 360.

⁸⁷ *Id.* para. 384 (citing BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: LIBYA 10 (2012)).

⁸⁸ *Id.* para. 385.

arrest and detention of several of its employees by the Zintan militia may further discourage witnesses from cooperating with a defense attorney in Libya.⁸⁹ Finally, there is some speculation as to whether Libya would be able to effectuate any judicial order if Gaddafi were to be found guilty of any crimes.⁹⁰

The OPCD also argued that Libya's belief regarding its capacity to investigate and prosecute Gaddafi is irrelevant.⁹¹ To support this argument, the defense pointed to the case of Jean-Pierre Bemba Gombo.⁹² In the *Bemba* case, the ICC determined the admissibility of a case that was referred to it by the Central African Republic (CAR).⁹³ The ICC acknowledged that a national court's determination of inability was not relevant⁹⁴ but then made a determination largely based on the same factors considered by the CAR's national court.⁹⁵ Thus, the OPCD concluded, the Chamber, not Libya, determines whether Libya can actually investigate and, if necessary, prosecute Gaddafi.⁹⁶

4. *The Admissibility Hearing*

The Chamber convened an admissibility hearing so that the parties could discuss all of the issues relevant to the admissibility challenge.⁹⁷ At the hearing, Libya responded to some of the allegations made by the OPCD. First, in regards to the security situation in Libya, it stated that the new Libyan government and army were undertaking a "large scale disarmament drive targeting militia groups."⁹⁸ Second, in response to the accusation that Libya is taking too long to move the Gaddafi investigation along, Libya pointed out that even the ICC has required many years to bring accused persons to justice.⁹⁹

⁸⁹ *Id.* para. 393.

⁹⁰ *Id.* paras. 405–06.

⁹¹ Defense's Admissibility Response, *supra* note 17, para. 355.

⁹² *Id.*

⁹³ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, para. 15 (June 24, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc899684.pdf> [hereinafter Bemba Admissibility Decision]. The *Bemba* case is discussed more fully below. *See infra* Part IV.

⁹⁴ *See* Bemba Admissibility Decision, *supra* note 93, para. 261.

⁹⁵ *See infra* note 299 and accompanying text.

⁹⁶ Defense's Admissibility Response, *supra* note 17, para. 355.

⁹⁷ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 4.

⁹⁸ *Id.* at 10.

⁹⁹ *Id.* at 12.

Thus Libya, a country that is coming out of a four-decade dictatorship,¹⁰⁰ will need more time to complete the judicial process.¹⁰¹ Libya also confronted the allegation that the intercept evidence it recovered may be found inadmissible in a Libyan court of law.¹⁰² On that point, Libya noted that the evidence in question were the recordings of telephone conversations which were made on Muammar Gaddafi's orders.¹⁰³ Those records were made publicly available after the downfall of Muammar Gaddafi's government and, consequently, would raise unique questions of law for a Libyan court.¹⁰⁴ Finally, to show that its judicial system was working, Libya pointed not only to the fact that the Libyan Supreme Court overturned a law that "criminalized the glorification of [Muammar Gaddafi,]" but also to the case of Buzeid Dorda.¹⁰⁵ In the *Dorda* case, the trial court suspended proceedings until the Libyan Supreme Court could decide whether the proceedings were unconstitutional because of the use of procedures that had been used in the People's Court under the reign of Muammar Gaddafi.¹⁰⁶ Moreover, a declaration by the Libyan Supreme Court that such procedures were unconstitutional would help combat some of the due process arguments expressed by the OPCD.¹⁰⁷

The OTP continued to support Libya's admissibility challenge during the hearing. The OTP's support of Libya's admissibility challenge seemed a bit counterintuitive, a fact that the OTP pointed to during the admissibility hearing.¹⁰⁸ However, the OTP seemed sympathetic to the complexities of transitional justice and, more importantly, the concern that impunity be avoided.¹⁰⁹ On this latter point, the OTP first supported the assertion by Libya that it was actively investigating the case against Gaddafi to the same extent as

¹⁰⁰ Admissibility Hearing Day 2 Transcript, *supra* note 54, at 45.

¹⁰¹ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 12.

¹⁰² Admissibility Hearing Day 2 Transcript, *supra* note 54, at 56–57.

¹⁰³ *Id.* at 56.

¹⁰⁴ *Id.* at 56–57.

¹⁰⁵ *Id.* at 46–47.

¹⁰⁶ *Libya Court Suspends Trial of Top Gaddafi-Era Intelligence Official*, REUTERS (Sept. 11, 2012), <http://www.reuters.com/article/2012/09/11/us-libya-trials-suspension-idUSBRE88A0ZU20120911>. People's Courts were emergency courts used by Muammar Gaddafi "to try opposition members and political prisoners, [wherein] one or more people with no legal training could pass judgments without the need for a judge, jury or lawyers to be present in court." *Id.* The People's Courts were banned after the fall of the Gaddafi regime, but the law governing them was still in use; thus their application in the *Dorda* case may have rendered it unconstitutional. *Id.*

¹⁰⁷ *See, e.g.*, Admissibility Hearing Day 2 Transcript, *supra* note 54, at 18–19.

¹⁰⁸ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 58–59.

¹⁰⁹ *Id.*

the OTP.¹¹⁰ The OTP echoed Libya's concern that Libya needed more time to recover from its era of tyranny, stating that giving Libya only one week per year of oppression is not enough time to expect it to be as fully capable as a functioning state and that the ICC should not "push [itself] to the front and elbow aside the states that are genuinely able and willing to prosecute their nationals for their crimes."¹¹¹

The OPCD advanced other arguments during the admissibility hearings to show that Libya is unable to investigate or prosecute Gaddafi. The OPCD argued that the fairness of legal proceedings can be indicative of a judicial system that is substantially collapsed or, when systematic, can cause the substantial collapse of the justice system.¹¹² The OPCD argued that the due process violations, such as not being brought before a judge, not having legal representation, and not having the proper "time and facilities" to prepare his defense have rendered Libya's judicial system unavailable to former officials in the Muammar Gaddafi government.¹¹³ By extension, the defense argued, the same violations were likely to occur in Gaddafi's case.¹¹⁴ It also argued that, based on testimony from some human rights activists, there is a "systemic inability within Libya for authorities to understand the proper procedures that should be applied within a criminal trial and to persons detained under the protection of the state."¹¹⁵

The OPCD also attacked the presumption that, even if Libya received international assistance and monitoring from the ICC, it would comply with the monitoring.¹¹⁶ To support this argument, it pointed to the fact that since Gaddafi's capture, Libya has been under the obligation to extradite Gaddafi to the ICC and has yet to do so.¹¹⁷ There was also an actual occurrence of monitoring by the United Nations Commission of Inquiry where Libya asked for the monitoring to stop on condition that Libya would implement recommendations by the Commission.¹¹⁸ The OPCD asserted that Libya failed

¹¹⁰ *Id.* at 55–56.

¹¹¹ *Id.* at 59.

¹¹² Admissibility Hearing Day 2 Transcript, *supra* note 54, at 18.

¹¹³ *Id.* at 18.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Admissibility Hearing Day 2 Transcript, *supra* note 54, at 27.

¹¹⁷ *Id.* at 27–28.

¹¹⁸ *Id.* at 28.

to implement these recommendations even after having seven months to do so.¹¹⁹

Finally, the OPCD also referred to a quote from Dr. Ali Tarhouni, a former interim Prime Minister for the NTC, who stated that there was a security breakdown ongoing in Libya to the point that there was “no national army[,] . . . no internal security agency[,] . . . [and] no police.”¹²⁰ The lack of security, especially police forces, would “inevitably impact . . . Libya’s ability to identify relevant witnesses and physical evidence and to monitor the security and safety of witnesses.”¹²¹ The OPCD bolstered this argument at the admissibility hearing by referring to recent reports of Muammar Gaddafi’s former subordinates in Benghazi.¹²²

5. *Parties’ Submissions After the Admissibility Hearing*

On the Chamber’s order, Libya submitted further information regarding issues surrounding the admissibility challenge on January 23, 2013.¹²³ First, Libya noted that on December 23, 2012, the Supreme Court of Libya unanimously found that the People’s Court procedures used in the *Dorda* case were unconstitutional.¹²⁴ As a result of this holding, People’s Court procedures cannot be applied to any future cases, including to Gaddafi’s trial.¹²⁵ Libya hailed this decision not only as a demonstration of an impartial judiciary in Libya but also as an expression of Libya’s intent to conduct fair criminal trials.¹²⁶ Second, Libya also submitted that Gaddafi would be able to be tried as a public officer in Libya¹²⁷ because even though he did not have a *de jure* position within the Libyan government before the Libyan Revolution, he was the *de facto* prime minister.¹²⁸ Libyan law recognizes this distinction, and a

¹¹⁹ *Id.*

¹²⁰ *Id.* at 25.

¹²¹ Admissibility Hearing Day 2 Transcript, *supra* note 54, at 25.

¹²² *Id.* at 26.

¹²³ *See generally* Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Libyan Government’s Further Submissions on Issues Related to the Admissibility of the Case Against Saif al-Islam Gaddafi (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1545015.pdf> [hereinafter Libya’s Further Submissions].

¹²⁴ *Id.* paras. 75–76.

¹²⁵ *Id.* para. 77.

¹²⁶ *See id.* para. 76.

¹²⁷ *Id.* paras. 84–85.

¹²⁸ *Id.* para. 85.

showing that a person holds de facto public office allows that person to be charged with crimes that may only be committed by public officers.¹²⁹

Libya also detailed the international assistance it received in relation to its criminal justice system.¹³⁰ A large share of the international support to Libya came from the U.N. Support Mission in Libya, which traveled across Libya to: (1) discuss issues of transitional justice with local political and community leaders; (2) advise Libya on its detention centers and help facilitate transfers to government-controlled facilities in Tripoli; (3) work with Libya to increase its prison capacity; (4) advise the Libyan Ministry of Justice on how to reconcile Libyan laws with international standards and develop programs for public defenders and military prosecutors; and (5) hold workshops for judges and prosecutors to prepare them for litigation involving serious crimes.¹³¹ Libya also received funding and training from the European Union and other countries.¹³²

The OTP submitted a response to the submissions made by Libya on February 12, 2013.¹³³ Among other things, the OTP uncovered that Libyan law actually does allow for *in absentia* trials.¹³⁴ The OTP retracted this statement a week later stating that whether Libya can conduct an *in absentia* trial is irrelevant because, by implication, such a proceeding admits that Libya could not obtain the accused.¹³⁵ There was no indication that this change of mind signified that the OTP had also stopped believing Libya was not genuinely able to prosecute Gaddafi.¹³⁶ In either case, these arguments negate the claim by the OPCD that the lack of *in absentia* trials made the prosecution of Gaddafi otherwise unable to proceed.

¹²⁹ *Id.*

¹³⁰ *See generally id.* paras. 103–13.

¹³¹ *See id.* paras. 104, 106–10.

¹³² *Id.* para. 105.

¹³³ *See generally* Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Prosecution's Response to Libyan Government's Further Submissions on the Issues Related to the Admissibility of the Case Against Saif al-Islam Gaddafi (Feb. 12, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1551639.pdf>.

¹³⁴ *Id.* para. 44.

¹³⁵ Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Prosecution's Notice of Withdrawal Regarding a Reference in its Prosecution's Response to Libyan Government's Further Submissions on Issues Related to the Admissibility of the Case Against Saif al-Islam Gaddafi (ICC-01/11-02/22-276-Red2), para. 3 (Feb. 19, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1555477.pdf>.

¹³⁶ *See id.*

The OPCD also responded to Libya's submissions after the admissibility hearing on February 18, 2013.¹³⁷ In regards to the Libyan Supreme Court ruling that overturned the People's Court procedures, the OPCD submitted that Libyan courts have already acted in opposition to the ruling.¹³⁸ For example, Gaddafi was recently brought straight to trial to face charges that were unrelated to the Libyan Civil War, rather than first being brought to an accusation chamber as required by Libyan law.¹³⁹ The OPCD attacked claims that Libya's judiciary was impartial based on a law passed by Libya that aimed to remove judges who had served during Muammar Gaddafi's regime.¹⁴⁰ It also argued that Libya did not provide enough information to alleviate concerns that the lack of security would dissuade witnesses from testifying, making legal proceedings "otherwise unavailable."¹⁴¹ Finally, the OPCD dismissed the international assistance received by Libya as either irrelevant to the Gaddafi case or charged that Libya was too vague in explaining its relevance.¹⁴²

C. Developments In Libya Since the Admissibility Challenge

Since the admissibility challenge there have been other indicia of Libya's ability to investigate and prosecute Gaddafi. For instance, Libya was able to secure the extradition of al-Senussi from Mauritania for \$200 million.¹⁴³ This may be an indication that Libya has the resources available to carry out further investigations and prosecute Gaddafi. Additionally, Libya held its first "fully free parliamentary election" since 1952, with a voter turnout of roughly sixty-two percent.¹⁴⁴ The new government should soon begin drafting a new constitution for the country.¹⁴⁵ The new non-transitional government is expected to appoint a new Prosecutor-General who will then be responsible for

¹³⁷ See generally Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Public Redacted Version of the Response to the Libyan Government's Further Submissions on Issues Related to Admissibility of the Case Against Saif Al-Islam Gaddafi (Feb. 18, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1555252.pdf>.

¹³⁸ *Id.* para. 169.

¹³⁹ *Id.*

¹⁴⁰ *Id.* paras.170–73.

¹⁴¹ *Id.* paras. 222–57.

¹⁴² *Id.* para. 284.

¹⁴³ Grant, *supra* note 45.

¹⁴⁴ See *Libya Election Success for Secularist Jibril's Bloc*, BBC NEWS (July 18, 2012), <http://www.bbc.co.uk/news/world-africa-18880908>.

¹⁴⁵ Hadeel al Shalchi & Marie-Louise Gumuchian, *Libya's Jibril in Election Landslide over Islamists*, REUTERS (July 12, 2012), <http://www.reuters.com/article/2012/07/12/us-libya-elections-idUSBRE86B0J120120712>.

transferring Gaddafi from Zintan to “purpose-built trial and detention facilities” in Tripoli.¹⁴⁶

However, progress has been met with major setbacks. For instance, the lack of security persisted after the parties submitted their motions on the admissibility challenge. In what was called “one of the worst breakdowns in security in [Tripoli] since Muammar Gaddafi’s fall,” rival militias fought each other on November 4, 2012, resulting in five people being wounded and an intelligence building being set on fire.¹⁴⁷ More notable to Americans was the attack on the American embassy in Benghazi on September 11, 2012, which claimed the life of U.S. Ambassador Christopher Stevens and other consulate employees.¹⁴⁸ However, there is some evidence that Libyan security forces had word of the attack weeks before and warned the U.S. Embassy of the impending attack.¹⁴⁹

II. THE CHAMBER’S DECISION

The Chamber issued its decision rejecting Libya’s admissibility challenge on May 31, 2013.¹⁵⁰ The Chamber did not base its decision on Libya’s ability to investigate or prosecute Gaddafi, but on whether Libya was investigating the same case as the ICC.¹⁵¹ However, the Chamber’s holding on whether Libya was investigating the same case was informed, at least in part, by the Chamber’s opinion on whether Libya was genuinely able to investigate and prosecute Gaddafi.¹⁵² Thus, to understand the Chamber’s opinion on Libya’s ability in context and why the Chamber got its analysis wrong, it is important to first understand the Chamber’s decision on whether Libya was investigating the same case as the ICC and then discuss the Chamber’s decision regarding

¹⁴⁶ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 29.

¹⁴⁷ *UPDATE 4-Rival Libya Militias Battle on Streets of Tripoli*, REUTERS (Nov. 4, 2012, 12:31 PM), <http://www.reuters.com/article/2012/11/04/libya-attack-idUSL5E8M42RE20121104>.

¹⁴⁸ *Benghazi US Consulate Attack: Timeline*, BBC NEWS (Nov. 16, 2012, 11:23 AM), <http://www.bbc.co.uk/news/world-africa-19587068>.

¹⁴⁹ See Julian Pecquet, *Timeline of Libya Consulate Attack Reveals Administration Contradictions*, HILL (Oct. 14, 2012, 6:00 AM), <http://thehill.com/blogs/global-affairs/terrorism/261839-timeline-of-libya-attack-reveals-administration-contradictions>.

¹⁵⁰ Admissibility Decision, *supra* note 10.

¹⁵¹ *Id.* paras. 134–35.

¹⁵² *Id.* para. 137. As a general matter, the analysis of an admissibility challenge is a two-step process. *Id.* para. 58. First is whether a state with jurisdiction is investigating or prosecuting the same case as the ICC. *Id.* If the answer is in the affirmative, then the second question is whether the state is genuinely willing or able to investigate or prosecute the accused. *Id.* See *infra* Part II.B.1 for a fuller discussion of this two-step analysis.

Libya's ability to genuinely investigate and prosecute Gaddafi. Each issue will be taken in turn.

A. *Whether Libya was Investigating the "Same Case"*

As noted by the Chamber, the determination of an admissibility challenge consists of two steps: first, whether the state with jurisdiction is investigating or prosecuting the same case as the ICC, and second, if the answer is in the affirmative, whether the state is genuinely able and willing to prosecute the accused.¹⁵³ With regard to the defining the same "case" that is before the ICC, the Chamber looked to whether the state is investigating or prosecuting the same person for substantially the same conduct alleged before the ICC.¹⁵⁴ While it was generally not an issue whether Libya was investigating the same person as the ICC, the Chamber was concerned about whether Libya was investigating and could prosecute Gaddafi for the same conduct.¹⁵⁵

First, the Chamber characterized the exact nature of the conduct that was alleged before the ICC and used that characterization as the basis for its analysis concerning whether Libya was investigating substantially the same conduct.¹⁵⁶ The Chamber defined such conduct as Gaddafi using "the Security Forces under his control to kill and persecute hundreds of civilian demonstrators alleged dissidents to Muammar Gaddafi's regime, across Libya, in particular in Benghazi, Misrata, Tripoli and other neighbouring cities" from February 15 to 28 of 2011.¹⁵⁷ It is with that characterization that the Chamber then turned to whether Libya had sufficient legislation to investigate and prosecute Gaddafi for crimes that encompassed that conduct and whether Libya was actually investigating said conduct.¹⁵⁸

Ultimately, the Chamber held that Libya's current legislation could allow for the investigation and prosecution of Gaddafi for the conduct that was alleged before the ICC.¹⁵⁹ In arriving at that conclusion, the Chamber noted that it was not necessary for Libya to enact legislation that would allow them to prosecute Gaddafi for international crimes, despite prior suggestions by

¹⁵³ Admissibility Decision, *supra* note 10, para. 58.

¹⁵⁴ *Id.* paras. 58, 76–77.

¹⁵⁵ *See generally id.*

¹⁵⁶ *Id.* para. 83.

¹⁵⁷ *Id.* para. 83.

¹⁵⁸ *Id.* paras. 84–88, 106–37.

¹⁵⁹ *Id.* para. 113.

Libya that it was going to enact such legislation.¹⁶⁰ Even still, the Chamber was concerned that the fact that Gaddafi did not hold an official position within his father's regime would prevent Libya from being able to prosecute him.¹⁶¹ Despite this reservation, the Chamber found that, at least from a legal perspective, Libya had the ability to charge and prosecute Gaddafi for crimes that encompassed the conduct alleged before the ICC.¹⁶²

The Chamber then questioned whether Libya was actually investigating Gaddafi for the same conduct alleged before the ICC.¹⁶³ Under this inquiry, the Chamber looked to the documents, witness statements, and other evidence provided by Libya to demonstrate its investigation of Gaddafi.¹⁶⁴ First, the Chamber noted that the witness statements provided by Libya do have "discrete aspects of the conduct alleged" before the ICC.¹⁶⁵ Moreover, the Chamber was not particularly concerned with the authentication, or lack thereof, of the intercept evidence relied upon by Libya.¹⁶⁶ However, documents provided by Libya, which were relevant to the investigation of Gaddafi, did not contain enough specific information to allow the Chamber to discern the scope and nature of the investigation.¹⁶⁷ Overall, the Chamber observed that, while the evidence presented did indicate that Libya was taking steps to hold Gaddafi criminally responsible for his acts, the evidence did not rise to the standard required to demonstrate that Libya was investigating Gaddafi for the same conduct.¹⁶⁸ Thus, the Chamber held that Libya had not demonstrated that it was investigating Gaddafi for the same case as the ICC, thus making the case admissible.¹⁶⁹ However, the Chamber then went a step further, rejecting Libya's request to make further submissions of evidence because such further evidence "would not be determinative at this stage because . . . serious concerns remain with respect to . . . Libya's ability genuinely to carry out the investigation or prosecution against Mr. Gaddafi."¹⁷⁰ Thus, the Chamber then turned to determining whether Libya was able to investigate Gaddafi.

¹⁶⁰ *Id.* paras. 84–88.

¹⁶¹ *Id.* para. 109.

¹⁶² *Id.* para. 113.

¹⁶³ *Id.* para. 114.

¹⁶⁴ *See generally id.* paras. 115–31.

¹⁶⁵ *Id.* para. 121.

¹⁶⁶ *Id.* paras. 128–31.

¹⁶⁷ *Id.* paras. 116–17.

¹⁶⁸ *Id.* paras. 132–35.

¹⁶⁹ *Id.* para. 135.

¹⁷⁰ *Id.* para. 137.

B. Whether Libya Is Genuinely Able to Investigate and Prosecute Gaddafi

There are two important aspects of the Chamber's analysis of Libya's ability to investigate Gaddafi. The first aspect is the substance of the Chamber's analysis, i.e., those facts upon which the Chamber relied in making its ultimate determination. The second aspect is the form of the Chamber's analysis and how the analysis compared to Article 17(3). This Comment will take each in turn.

1. The Substance of the Chamber's Inability Analysis

At the outset of its discussion, the Chamber held that, despite progress made by the Libyan government since acquiring power, Libya's national judicial system was unavailable to Gaddafi.¹⁷¹ It made this determination without any discussion as to whether the national judicial system was also in a state of substantial or total collapse, or why the national judicial system was unavailable as opposed to being collapsed.¹⁷² The Chamber based its decision that Libya's judicial system was unavailable on three main points.

First, the Chamber observed that Libya was unable to obtain Gaddafi.¹⁷³ The Chamber noted that Gaddafi was still under the custody of the Zintan militia and had yet to be transferred to Libya since his capture on November 19, 2011.¹⁷⁴ The Chamber did not believe, despite Libya's assurances, that any transfer would be conducted in the near future.¹⁷⁵ Further, the Chamber stated that *in absentia* trials are not available under Libyan law and, as a consequence, Gaddafi's trial could not take place until Gaddafi was transferred to Tripoli.¹⁷⁶

Second, the Chamber was also concerned that Libya would be unable to obtain some witness statements for the trial against Gaddafi.¹⁷⁷ The Chamber observed that some witnesses that Libya expressed it wanted to interview have not yet been interviewed because those witnesses, like Gaddafi, are still not under Libyan control.¹⁷⁸ The Chamber was concerned that some witnesses

¹⁷¹ *Id.* paras. 204–05.

¹⁷² *See generally id.*

¹⁷³ *Id.* paras. 206–08.

¹⁷⁴ *Id.* paras. 206–07.

¹⁷⁵ *Id.* para. 207.

¹⁷⁶ *Id.* para. 208.

¹⁷⁷ *Id.* paras. 209–11.

¹⁷⁸ *Id.* para. 210.

under Libyan control have been subjected to torture in Libyan prisons, thus calling Libya's ability to protect such witnesses into question.¹⁷⁹ There was also concern that unclear evidence regarding witness protection programs in Libya would be a hindrance to witnesses being willing to testify in Gaddafi's case.¹⁸⁰

Finally, the Chamber also found that Libya would be otherwise unable to carry out its proceedings against Gaddafi because he had not yet selected defense counsel, nor had Libya appointed an attorney to represent him.¹⁸¹ In particular, the Chamber was concerned that finding a defense attorney for Gaddafi would be difficult not only because of the security situation in Libya, but also because of "the risk faced by lawyers who act for associates of the former regime."¹⁸² This concern was amplified by the fact that Libya had tried to secure counsel for Gaddafi by contacting local law societies without success, though the extent of how much effort was expended and how difficult it had been to secure an attorney is unclear.¹⁸³ The Chamber was worried that Libya would be unable to find representation for Gaddafi and, as a result, be unable to move forward with the prosecution, thus rendering the national justice system unavailable.¹⁸⁴

In conclusion, the Chamber noted that despite the fact that "authorities for the administration of justice may exist and function in Libya, a number of legal and factual issues result in the unavailability of the national justice system for the purpose of the case against Mr. Gaddafi."¹⁸⁵ Therefore, according to the Chamber, Libya was genuinely unable to investigate and prosecute Gaddafi.¹⁸⁶

2. *The Structure of the Chamber's Inability Analysis*

What is particularly important about the Chamber's analysis of the inability question is the comparison of the language of Article 17(3) and the elements on which the Chamber focused in its analysis. At the beginning of its findings on Libya's ability to investigate Gaddafi, the Chamber recited Article 17(3),

¹⁷⁹ *Id.* para. 209.

¹⁸⁰ *Id.* para. 211.

¹⁸¹ *See id.* paras. 212–14.

¹⁸² *Id.* para. 212.

¹⁸³ *Id.* para. 213.

¹⁸⁴ *Id.* para. 214.

¹⁸⁵ *Id.* para. 215.

¹⁸⁶ *Id.*

which defines inability for the purposes of an admissibility challenge.¹⁸⁷ Article 17(3) states that a Chamber “shall consider whether, due to a total and substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise is unable to carry out its proceedings.”¹⁸⁸ After reciting the Rome Statute’s inability definition, the Chamber then lists the applicable Libyan law that give Libyan authorities the ability to charge Gaddafi with specific ordinary crimes, to carry out proceedings against him, and to collect admissible evidence for the case.¹⁸⁹

There are some significant points with regard to the structure of the Chamber’s analysis that should be noted. The Chamber begins its findings with a determination that Libya’s national judicial system is “unavailable” as opposed to being collapsed.¹⁹⁰ Despite this determination, there is no discussion as to why Libya’s national judicial system is “unavailable” rather than being in a state of substantial or total collapse.¹⁹¹ In fact, the only justification that the Chamber gives for finding that Libya’s national judicial system is unavailable is that “it is apparent from the submissions [of the parties] that multiple challenges remain and that Libya continues to face substantial difficulties in exercising its judicial powers fully across the entire territory.”¹⁹² However, the Chamber did not elaborate immediately on what those difficulties are; rather, the Chamber noted that the difficulties that render the national justice system unavailable “are further explained below.”¹⁹³ Those difficulties are also the reasons why, in the Chamber’s view, Libya is unable to obtain Gaddafi, testimony, and otherwise carry out its proceedings.¹⁹⁴

The Chamber’s lack of analysis concerning the unavailability of Libya’s national judicial system is deficient for determining inability under Article 17(3). In fact, a clear understanding of complementarity and the development of the inability exception not only demonstrate why the analysis of the Chamber is deficient, but also why the Chamber should have ruled in favor of Libya. In the next Part, this Comment will discuss the development of complementarity and the inability exception, its current understanding by the

¹⁸⁷ *Id.* para. 199; accord Rome Statute, *supra* note 11, art. 17, para. 3.

¹⁸⁸ Rome Statute, *supra* note 11, art. 17, para. 3; Admissibility Decision, *supra* note 10, para. 199.

¹⁸⁹ See Admissibility Decision, *supra* note 10, paras. 201–02.

¹⁹⁰ *Id.* para. 205.

¹⁹¹ See *id.* paras. 204–05.

¹⁹² *Id.* para. 205.

¹⁹³ *Id.*

¹⁹⁴ See *id.* paras. 206–14

ICC, the notion of positive complementarity, and the post-challenge procedures that are applicable when the ICC finds a case inadmissible.

III. DEVELOPMENT OF COMPLEMENTARITY AND THE INABILITY EXCEPTION

This Part will first discuss complementarity and the role it plays in determining the admissibility of a case generally followed by Subpart A, which will discuss the history of Article 17; Subpart B, which will discuss the modern interpretation of the Article; Subpart C, which will discuss the concept of positive complementarity; and Subpart D, which will discuss procedural elements after an admissibility challenge has been submitted. The issue of admissibility is defined in Article 17 of the Rome Statute and has been described as the Statute's "cornerstone."¹⁹⁵ The determination of admissibility may be reached by three tests: complementarity, covered under Article 17(1)(a) and 17(1)(b); *ne bis in idem*, covered under Article 17(1)(c); and gravity, under Article 17(1)(d).¹⁹⁶ This Comment is chiefly concerned with the tests provided for under complementarity because it is under this test that inability of a state to investigate or prosecute may become an issue. Inability is particularly relevant here because Libya offers a unique situation to analyze the inability exception. Inability is also relevant because, depending on if and how the Chamber decides this issue in the context of recent developments in Libya, the exception could "become a tool for overly harsh assessments of the judicial machinery in developing countries."¹⁹⁷

The Rome Statute outlines two ways in which the ICC may otherwise find the case admissible. Under Article 17(1)(a), a case is admissible if the state is currently investigating or prosecuting the same case as the ICC but the state "is unwilling or unable genuinely to carry out the investigation or prosecution" of the case.¹⁹⁸ Likewise, in Article 17(1)(b), a case is admissible if the state investigated the case and decided not to prosecute the defendant before the ICC, and "the decision resulted from the unwillingness or inability of the State genuinely to prosecute."¹⁹⁹ In essence, if there is no investigation or prosecution, or there has not been an investigation and subsequent decision not

¹⁹⁵ Sharon A. Williams & William A. Schabas, *Article 17: Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 605, 606 (Otto Triffterer ed., 2008).

¹⁹⁶ *See id.*

¹⁹⁷ *Id.* at 624.

¹⁹⁸ Rome Statute, *supra* note 11, art. 17, para. 1(a).

¹⁹⁹ *Id.* art. 17(1)(b).

to prosecute, then the case is admissible to the ICC.²⁰⁰ Article 17 also defines “inability” in Article 17(3), stating that a state is unable to investigate or prosecute the accused when “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”²⁰¹

In addition to Article 17, there are two more aspects of an admissibility challenge that are important in consideration of the Gaddafi case. First, the Appeals Chamber has held that “the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge.”²⁰² This requirement recognizes that the admissibility of a case may change. To support this holding, the Appeals Chamber has pointed to Article 19(10) of the Rome Statute.²⁰³ Second, the state challenging the admissibility of a case “bears the burden of proof to show that the case is inadmissible.”²⁰⁴

To determine whether the Chamber may find that Libya is able to investigate and prosecute Gaddafi, it is pertinent to look to the development of the “inability” exception of the complementarity test, the principles of classic and positive complementarity, and the procedures the ICC has for the determination and possible re-consideration of a case’s admissibility.

²⁰⁰ Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07 OA 8, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, para. 78 (Sept. 25, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf> [hereinafter Katanga Appeal]. It should be observed that the Chamber may find that Libya is currently not investigating the case against Gaddafi and, consequently, find the case admissible. See Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Decision Requesting Further Submissions on Issues Related to the Admissibility of the Case Against Saif al-Islam Gaddafi, para. 14 (Dec. 7, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1522448.pdf>. [hereinafter Requesting Further Submissions]. An admissibility challenge must be determined “on the circumstances prevailing at the time of” the decision. See *id.* (citation omitted). After the admissibility hearing, the Chamber requested further evidence from Libya that it had carried out further investigations on the Gaddafi case after submitting its admissibility challenge in May 2012. *Id.* The Chamber noted that such evidence was necessary “for Libya to discharge its burden of proof that currently there is not a situation of ‘inaction’ at the national level.” *Id.*

²⁰¹ Rome Statute, *supra* note 11, art. 17, para. 3.

²⁰² Katanga Appeal, *supra* note 200, para. 56.

²⁰³ *Id.* Article 19(10) of the Rome Statute allows prosecutors to review admissibility decisions if “new facts have arisen which negate the basis on which the case had previously been found inadmissible under Article 17.” Rome Statute, *supra* note 11, art 19, para. 10.

²⁰⁴ Requesting Further Submissions, *supra* note 200, para. 8.

A. *The History of Article 17 and the Complementarity Principle*

Understanding the history of the development of the complementarity principle is important in appreciating how the ICC should decide the admissibility of a case such as that of Gaddafi and al-Senussi. The ICC can trace its origin back to 1989 when the U.N. General Assembly asked the International Law Commission (ILC) to consider creating an international criminal court while it was drafting a code of international crimes.²⁰⁵ However, the ILC did not begin to draft a statute for the ICC until 1992, after the General Assembly voted to make the creation of the Court a priority for the ILC.²⁰⁶ In 1994, New Zealand implored the ILC to include a provision that described the relationship between the national and international courts and “the respective roles and complementarity of the national and international processes.”²⁰⁷ This encouragement contributed toward including complementarity in the Preamble of a draft later that year by the ILC, which stated that “such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.”²⁰⁸ Today, the Preamble further insists that states have a duty to exercise “criminal jurisdiction over those responsible for international crimes,”²⁰⁹ which, with the principle of complementarity, creates the theoretical possibility of the ICC having no cases before it.²¹⁰

Even with the notion that the ICC was to be complementary to the national courts, the ILC’s draft statute still allowed for concurrent jurisdiction of the same case between the ICC and national courts.²¹¹ Concurrent jurisdiction, of course, allows for multiple courts to exercise jurisdiction over the same case simultaneously.²¹² Both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) were created with concurrent jurisdiction with the respective national

²⁰⁵ See KRISTINA MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION* 13 (2000).

²⁰⁶ *Id.*

²⁰⁷ *Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court*, 46th Sess., June 29, 1994, para. 35, (1994), reprinted in 2 Y.B. INT’L L. COMM., 21 U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part I), U.N. Sales No.E.96.V.Z. (Part I) (1994).

²⁰⁸ Rep. of the Working Grp. on the Question of a Draft Statute for an International Criminal Court Revision, Int’l Law Comm’n, 46th Sess., 4/L.491/Rev.2; GAOR, 46th Sess., at 8 (July 14, 1994).

²⁰⁹ Rome Statute, *supra* note 11, pmb1.

²¹⁰ John T. Holmes, *Complementarity: National Courts versus the ICC*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 667 (Antonio Cassese et al. eds., 2002)

²¹¹ *Id.* at 670–71.

²¹² BLACK’S LAW DICTIONARY 928 (9th ed. 2009).

courts to prosecute persons for international crimes.²¹³ However, both the ICTR and the ICTY held primacy over the national courts, wherein the tribunals could require the national courts to defer to the tribunals and hand cases over to them.²¹⁴ Concurrent jurisdiction for the ICC was eliminated with the Preparatory Committee's draft of the Rome Statute, which stated that the ICC would find a case inadmissible if it was "being investigated or prosecuted by a State . . . unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."²¹⁵ A case would also be held inadmissible if the state decided not to prosecute a defendant unless the decision itself was based on a state's unwillingness or inability.²¹⁶ This language was adopted, in large part, in the final version of the Rome Statute.²¹⁷

A large factor in removing concurrent jurisdiction from the ICC and, in fact, in the formation of the unwillingness and inability exceptions of the complementarity test, was the international environment in which the ICC was created. When the ILC was preparing its draft for the creation of the ICC, the ICTY had just been created and the Security Council was dealing with the genocide in Rwanda.²¹⁸ The Security Council created the ICTY because Yugoslavia's functioning criminal justice system at the time was not initiating

²¹³ S.C. Res. 955, art. 8, U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 827, U.N. Doc. S/RES/827 (May. 25, 1993) (establishing ICTY); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, para. 65, U.N. Doc S/25704 (May 3, 1993); *accord* Holmes, *supra* note 213, at 669.

²¹⁴ S.C. Res. 955, *supra* note 213, art. 8(2); S.C. Res. 827, *supra* note 213, U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, para. 65, U.N. Doc S/25704 (May 3, 1993); *accord* Holmes, *supra* note 210, at 669.

²¹⁵ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, art. 15, U.N. Doc. A/Conf.183/2/Add.1 (Apr. 14, 1998) [hereinafter *Preparatory Committee Draft*].

²¹⁶ *Id.*

²¹⁷ *Compare id.* ("Having regard to paragraph 3 of the Preamble, the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."), *with* Rome Statute, *supra* note 11, art. 17 ("Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."); *accord* Johan D. van der Vyver, *The Principle of Complementarity and the Rules of Admissibility 6* (2013) (unpublished manuscript) (on file with author).

²¹⁸ Holmes, *supra* note 210, at 670.

prosecutions against those who were committing war crimes, and the international community feared that the country might shield those who were responsible from punishment.²¹⁹ The ICTR was similarly created by the Security Council because the genocide crippled Rwanda's criminal justice system to the point that it was unable to initiate any criminal proceedings without substantial international assistance to first rebuild its system.²²⁰ During the formation of the ICC, however, more states supported national jurisdictional primacy unless the accused were "not prosecuted or duly tried by national authorities."²²¹ Thus, the emphasis on creating an international criminal court that implements complementary jurisdiction, rather than concurrent, jurisdiction is an indication that state sovereignty is an important, underlying interest protected in the Statute.²²²

The introduction and development of the inability exception under Article 17(3) is also crucial to understand how the ICC should view a state as being unable to investigate or prosecute a defendant. The Preparatory Committee first introduced a definition of inability in its draft of the statute with very little controversy.²²³ Since its introduction, some commentators have noted the parallel that this exception to the complementarity principle has in common with the extraordinary circumstances that brought about the creation of the ICTR.²²⁴ The most significant change in this provision of the Statute came between the Preparatory Committee's draft and the finalized draft that was eventually approved. Originally, the inability exception to the complementarity test allowed a case to be admissible to the ICC if the state could not obtain the accused, obtain evidence, or otherwise carry out prosecutorial proceedings if such circumstances were "due to a total or partial collapse or unavailability of its national judicial system."²²⁵ The "partial collapse" language became a point of contention in Rome during the final deliberations for the statutory language.²²⁶ According to the objectors, a state could suffer from a partial collapse of its national judicial system and still be able to conduct an

²¹⁹ *Id.* at 668–69.

²²⁰ *Id.*

²²¹ MISKOWIAK, *supra* note 205, at 42.

²²² Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, in 7 MAX PLANCK Y.B. UNITED NATIONS L. 591, 595 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2004).

²²³ Williams & Schabas, *supra* note 198, at 610.

²²⁴ Holmes, *supra* note 210, at 668–70.

²²⁵ Preparatory Committee Draft, *supra* note 214, art. 15 (emphasis added).

²²⁶ Williams & Schabas, *supra* note 195, at 612.

investigation or carry out a prosecution in good faith, i.e., genuinely.²²⁷ Thus, based on a suggestion from Mexico, the final language was changed to “substantial collapse.”²²⁸ This change in language is important, of course, because it narrows the field of admissible cases to the ICC while making other cases, such as situations where a state is engaged in armed conflict but can “shift[] resources” or transfer venues in order to effect prosecution, inadmissible.²²⁹

The drafting history of Article 17 points to two important matters that must be considered when the ICC is determining whether a state is “unable” to investigate a situation or prosecute a defendant. First, “the complementarity regime of the [ICC] is designed to protect and serve . . . the sovereignty both of the State parties and third states.”²³⁰ Second, when complementarity is upset, it must be done only in a narrow set of circumstances reflected in the narrow language of the “inability” exception contained in Article 17.²³¹ Thus, for a case to fall within this inability exception, the situation within that state must be particularly extraordinary.

As stated by one commentator though, the ICC is the “arbiter of its own jurisdiction” because only it can determine whether a case is admissible.²³² Consequently, it is important to examine the current construction of Article 17(1)(a) and 17(3), procedural elements of an admissibility determination, and how complementarity is currently perceived to gain a better perspective of how the ICC is able to handle a situation like Libya.

B. Current Construction of Article 17 Provisions

As discussed in above, Article 17 underwent some significant changes during the drafting process. Today, Article 17(1)(a) of the Rome Statute provides: “[T]he Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”²³³ Currently, the ICC takes this as a two-part

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Holmes, *supra* note 210, at 677.

²³⁰ Benzing, *supra* note 222, at 595 (emphasis in original).

²³¹ *See* Rome Statute, *supra* note 11, art. 17.

²³² Holmes, *supra* note 210, at 672.

²³³ Rome Statute, *supra* note 11, art. 17, para. 1(a).

inquiry.²³⁴ First, it must determine whether a state is actively investigating or prosecuting the accused. Thus, if a state is “inactive” in prosecuting a particular case, the case is admissible. Second, if a state is investigating or prosecuting a case, then the case only becomes admissible if that state is “unwilling or unable genuinely to carry out” the proceedings.

1. *Whether There Is an Actual Investigation*

In order to keep the Gaddafi trial, Libya must first establish it is actively investigating the case against Gaddafi and must show that the case “encompass[es] both the person and the conduct which is the subject of the case before the [ICC].”²³⁵ During the admissibility hearing, the OTP argued that Libya was both “taking the same serious tack and the serious approach that the OTP brought to [Gaddafi’s] investigation” and that Libya was “tak[ing] concrete steps to investigate [Gaddafi] for substantially the same conduct.”²³⁶ However, after Gaddafi made a court appearance in Zintan on January 17, 2012, a spokesman for the prosecutor told reporters that the “[i]nvestigations for trying [Gaddafi] for war crimes are over and he will be put on trial for that at a later time.”²³⁷ Such a statement could be a reason for the Chamber to deny Libya’s admissibility challenge because there must be either an active investigation or prosecution and, by this statement, there is apparently neither.²³⁸ Ultimately, the Chamber found that Libya did not provide sufficient evidence to establish that it was investigating Gaddafi for the same case as alleged in the ICC.²³⁹ Assuming the Chamber had found that Libya was actually investigating the case against Gaddafi and that Libya was not genuinely unwilling to prosecute Gaddafi, the next question would be whether Libya was genuinely able to investigate and prosecute Gaddafi.

²³⁴ See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Document into the Record of the Case Against Mr. Thomas Lubanga Dyilo, art. 58, paras. 30, 32 (Feb. 24, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc236260.pdf> [hereinafter Dyilo Warrant].

²³⁵ *Id.* para. 31.

²³⁶ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 55–56.

²³⁷ Ali Shuaib, *Gaddafi’s Son Appears in Libyan Court for First Time*, REUTERS (Jan. 17, 2013, 10:49 AM), <http://www.reuters.com/article/2013/01/17/us-libya-gaddafi-idUSBRE90G0QR20130117>.

²³⁸ Kevin Jon Heller, *Libya Admits It Should Lose Its Complementarity Challenge Re: Saif*, OPINIO JURIS (Jan. 18, 2013, 12:53 AM), <http://opiniojuris.org/2013/01/18/libya-admits-it-should-lose-its-complementarity-challenge-re-saif/>.

²³⁹ Admissibility Decision, *supra* note 10, paras. 134–37.

2. *Whether Libya is Genuinely Able to Investigate and Prosecute*

Article 17(3) sets out the definition for a state being genuinely unable to carry out proceedings. It states that “the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”²⁴⁰ It is not enough, as the Chamber did, to merely show that the state is unable to investigate or obtain the accused.²⁴¹ To meet the inability standard of Article 17(3) it would have to be shown that Libya is unable to do so because there has been a total or substantial collapse of the national judicial system or that the justice system is unavailable.²⁴²

The OTP tried to set some rough definitions for these phrases with its 2003 Informal Expert Paper (Informal Expert Paper).²⁴³ Aside from discussing the more philosophical side of complementarity,²⁴⁴ the Informal Expert Paper also discussed the more practical application of complementarity and, especially, the inability exception. First, the OTP observed that even though a determination of inability may be easier than any determination of unwillingness, the ICC should still remain cautious in its application of inability because of sovereignty issues.²⁴⁵ It concluded that any inability standard “should be a stringent one.”²⁴⁶ However, what constitutes a collapsed judicial system and an unavailable judicial system is still very ambiguous and, potentially, very broad.²⁴⁷ Thus, the OTP also listed these following factors as being indicative, though perhaps not dispositive, of a collapsed or unavailable criminal justice system: “lack of necessary personnel, judges, investigators, prosecutor; lack of judicial infrastructure; lack of substantive or procedural

²⁴⁰ *Id.* art. 17, para. 3.

²⁴¹ Admissibility Decision, *supra* note 10, paras. 205, 215.

²⁴² Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 264 (2006); INT’L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, No. ICC-01/04-01/07, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 15 (2003), available at <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf>.

²⁴³ The Informal Expert Paper came about as the OTP was trying to decide how its office would deal with issues of complementarity in practice. OFFICE OF THE PROSECUTOR, *supra* note 242, at 2. The paper reflects a collaborative work between the OTP and a variety of experts known for their research about the topic of complementarity. *Id.*

²⁴⁴ *See id.* at 3–4.

²⁴⁵ *Id.* at 15.

²⁴⁶ *Id.*

²⁴⁷ *See* Gregory S. McNeal, *ICC Inability Determinations in Light of the Dujail Case*, 39 CASE W. RES. J. INT’L L. 325, 325–28 (2006).

penal legislation rendering [the] system ‘unavailable’; lack of access rendering [the] system ‘unavailable’; obstruction by uncontrolled elements rendering [the] system unavailable; [and] amnesties, immunities rendering [the] system ‘unavailable.’”²⁴⁸

It should be noted that in Gaddafi’s case, the OTP still appeared to be following the criteria outlined in the Informal Expert Paper. In its response to Libya’s admissibility challenge, the OTP was particularly concerned about Gaddafi’s lack of access to the Libyan criminal justice system because he had yet to receive a defense lawyer within Libya.²⁴⁹ It noted that without a defense attorney, Libya would be unable to charge Gaddafi and complete “the investigation under Libyan law.”²⁵⁰ Moreover, it observed that the Zintan militia’s control over Gaddafi may be playing a part in obstructing Gaddafi from receiving a defense attorney.²⁵¹ This concern would therefore likely be listed in the “lack of access rendering the system unavailable” factor.

However, lack of access to an attorney may not be enough under Article 17(3) to make a criminal system “unavailable” to the defendant. For instance, there may be unavailability “on account of legislative impediments, such as an amnesty law, or a statute of limitations, making it impossible for the national judge to commence proceedings against the suspect or the accused.”²⁵² Moreover, a collapsed or unavailable judicial system is not one that lacks or denies due process rights to the accused, but rather exists because of “a political situation that makes holding trials impossible or a debilitating lack of judges, prosecutors, and other court personnel.”²⁵³ This distinction is key; for a state to be unable under Article 17(3) it is not enough that the state is prevented “from fairly investigating or prosecuting,” the state must be prevented from “effectively investigating or prosecuting the accused.”²⁵⁴ As indicated above, the Libyan Criminal Procedure Code allows for a suspect to have an attorney at the investigation stage if one is desired.²⁵⁵ In the case of Gaddafi, there have

²⁴⁸ OFFICE OF THE PROSECUTOR, *supra* note 242, at 15.

²⁴⁹ Prosecutor’s Admissibility Response, *supra* note 16, para. 41.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 344 (2d ed. 2008).

²⁵³ Heller, *supra* note 242, at 264.

²⁵⁴ *Id.* The fact that the Rome Statute does not seem to protect international standards of due process, or any due process for that matter, is not lost upon the author of this comment or Professor Heller. See *id.* at 265 for a deeper discussion of the issue.

²⁵⁵ Prosecutor v. Saif al-Islam Gaddafi & Abdullah al-Senussi, Case No. ICC-01/11-01/11, Libyan Government’s Filing of Compilation of Libyan Law Referred to in Its Admissibility Challenge, 2 (May 28,

apparently been conflicting reports as to whether Gaddafi actually wants defense counsel; on one hand, Libyan authorities are told that Gaddafi does not want counsel, and, on the other hand, Gaddafi requested Libyan defense counsel from the OPCD.²⁵⁶ Regardless, once Gaddafi's case reaches trial in Libya, defense counsel will be appointed because having defense counsel is required under Libyan law.²⁵⁷ In sum, being without representation, at least at this time, is not enough to declare that Libya is not able to investigate or prosecute Gaddafi under the definition of Article 17(3).

Finally, it must be stressed that to qualify under the inability exception, the state must be "genuinely" unable to investigate or prosecute the case.²⁵⁸ The word "genuinely" is included to prevent any national action as precluding interference with the ICC.²⁵⁹ Thus, at least under the OTP's interpretation of the term, the issue with genuineness is "whether the proceedings are so inadequate that they cannot be considered 'genuine' proceedings."²⁶⁰ As noted above, the OTP asserted at the admissibility hearing that it appeared to it that Libya was investigating the case against Gaddafi at least as seriously as the OTP.²⁶¹ This means that under the OTP's own definition of "genuine," Libya is genuinely investigating Gaddafi as required under Article 17(1)(a).

C. Positive Complementarity

Since the development of complementarity in the drafting of the Statute, both commentators and the ICC have discovered two sides to its implementation: passive complementarity and positive (or proactive) complementarity. Passive complementarity entails a strict adherence to Article 17 of the Rome Statute, whereby the Prosecutor and the ICC will only investigate and prosecute a suspect "where national governments fail to prosecute and where the Court has jurisdiction."²⁶² Positive complementarity provides a more hands-on approach to international criminal justice, allowing the ICC to use its resources to encourage and even assist national governments

2012), <http://www.icc-cpi.int/iccdocs/doc/doc1418852.pdf> (citing CODE CRIMINAL PROCEDURE [C. CRIM. PRO.] art. 106 (Libya)); Libya's Admissibility Motion, *supra* note 9, para. 59.

²⁵⁶ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 20.

²⁵⁷ *Id.*

²⁵⁸ Williams & Schabas, *supra* note 195, at 617.

²⁵⁹ OFFICE OF THE PROSECUTOR, *supra* note 242, para. 22.

²⁶⁰ *Id.* para. 23.

²⁶¹ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 55–56.

²⁶² William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 56 (2008).

in the investigation and prosecution of international crimes.²⁶³ In contrast, if the ICC had concurrent jurisdiction and primacy over national courts, it could simply require the state to hand it the case and “accept the fact that certain domestic crimes are really international in character and endanger international peace and that such international crimes should be tried by an international tribunal.”²⁶⁴ Early on, it appeared as if the Prosecutor and the ICC would adopt a more passive approach to complementarity.²⁶⁵ However, some have suggested that this early policy was aimed at filling the ICC’s docket rather than trying to help states meet their duty to prosecute.²⁶⁶

The OTP has expressed its willingness to take on a positive or proactive approach to the complementarity principle. In the Informal Expert Paper, the OTP recognized that the ICC would still be a success if an international system were in place whereby every nation was effective in prosecuting international crimes and no cases were before the Court.²⁶⁷ Viewing complementarity as the method by which it could “encourage and facilitate the compliance of states with their primary responsibility to investigate and prosecute core crimes,”²⁶⁸ the OTP defined two aspects to guide its decisions on complementarity: partnership and vigilance.²⁶⁹ Under the partnership aspect, the OTP could encourage national proceedings, “help develop cooperative anti-impunity strategies . . . provide advice and certain forms of assistance to facilitate national efforts,” and possibly “agree that a consensual division of labour is in the best interests of justice.”²⁷⁰ The vigilance aspect is essentially passive complementarity: the OTP defined vigilance as the ICC “diligently carry[ing] out its responsibilities under the Statute.”²⁷¹ The OTP noted that the two aspects

²⁶³ *Id.*

²⁶⁴ Prosecutor v. Tadic, Case No. IT-94-1-I, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 83 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

²⁶⁵ See Luis Moreno-Ocampo, Prosecutor of the ICC, Address at the International Conference in Nuremberg: Building a Future on Peace and Justice (June 24–25, 2007), available at http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf (“[F]or each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on the ground, to indict or withdraw indictments according to short term political goals These proposals are not consistent with the Rome Statute”).

²⁶⁶ William A. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 CRIM. L.F. 5, 6 (2008) (“[F]rom the beginning of the work of the International Criminal Court, there have been initiatives aimed at attracting cases for prosecution rather than insisting that States fulfill their obligations.”).

²⁶⁷ OFFICE OF THE PROSECUTOR, *supra* note 242, para. 1.

²⁶⁸ *Id.* para. 2.

²⁶⁹ *Id.* para. 3.

²⁷⁰ *Id.*

²⁷¹ *Id.*

do not work to the mutual exclusion of one another, but rather work in tandem to help the State overcome “shortcomings in the national proceedings” and “complementarity fact-finding activities will often encourage genuine and effective national proceedings.”²⁷² Finally, the OTP observed that there may be a statutory basis for positive complementarity in Article 93(10) of the Rome Statute.²⁷³ Article 93(10) states that “[t]he Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court.”²⁷⁴

From its thoughts on partnership and vigilance, we can see that the OTP is amenable to a supportive relationship between the ICC and the state whose ability to carry out an investigation or prosecution of a person accused of a crime is questionable. During the admissibility hearing, Libya suggested that such a relationship may take the form of the OTP monitoring the trial in Libya with the option of reporting back to the ICC if necessary.²⁷⁵ Libya also suggested that the ICC could put conditions on a finding of inadmissibility by requiring all of the parties to report back periodically.²⁷⁶ Moreover, Libya has actually requested such help, not only from the ICC but from the United Nations and other organizations, in order to strengthen its judiciary and to “provide specialized training for judges and prosecutors.”²⁷⁷ This Comment will next focus on procedures available to the Chamber that may allow it to take a more positive approach to the admissibility of Gaddafi’s case.

D. Procedural Elements After an Admissibility Challenge

There are numerous provisions within the Rome Statute and the Rules of Procedure and Evidence (RPE) that deal with the issue of admissibility after a challenge of admissibility has been submitted to a pre-trial chamber.²⁷⁸

If the Chamber had held that the Gaddafi case was inadmissible, such a decision would not necessarily be the final determination on the matter. Under

²⁷² *Id.* para. 4.

²⁷³ *Id.* para. 10 (“Article 93(10) of the [Rome] Statute . . . contemplates ICC assistance to national investigations and prosecutions”).

²⁷⁴ Rome Statute, *supra* note 11, art. 93(10).

²⁷⁵ Admissibility Hearing Day 2 Transcript, *supra* note 54, at 50.

²⁷⁶ *Id.*

²⁷⁷ Libya’s Admissibility Motion, *supra* note 9, para. 97; *see also supra* notes 149–51.

²⁷⁸ See Johan D. van der Vyver, Trigger Mechanisms and Admissibility Constraints 74 (2013) (unpublished manuscript) (on file with author), for a greater discussion of these provisions.

Article 19(10) of the Rome Statute, if such a case was inadmissible, the Prosecutor still would still have the option to request a review of admissibility from the same pre-trial chamber which offered the original holding.²⁷⁹ This request could occur once “new facts have arisen which negate the basis on which the case had previously been found inadmissible.”²⁸⁰ Once the Prosecutor makes such a request, the state whose challenge led to the inadmissibility decision will be notified of the request and given time to respond.²⁸¹ According to Rule 59 of the RPE, interested parties, such as the organization or state who referred the situation to the ICC and the victims of the defendant’s crimes, will also be notified of the request made by the Prosecutor and may be given time to respond to the Prosecutor’s request.²⁸²

Accordingly, a determination of inadmissibility does not preclude the ICC from being able to reopen the Gaddafi case if circumstances arise that definitively prove Libya as being unable to handle it. Libya commented on the statutory scheme during the first day of the admissibility hearing, stating that the Rome Statute only allows a state to challenge admissibility of a case once.²⁸³ If the Chamber had found that a case is inadmissible, that holding could always be reconsidered in light of new facts surrounding the investigation or the prosecution.²⁸⁴ On the other hand, once a case is found to be admissible, that decision is final.²⁸⁵ Being able to regain jurisdiction over a defendant if new circumstances arise which conflict with a previous determination of inadmissibility fits perfectly with the concept of “positive complementarity” discussed above.

In considering not only why the Chamber was wrong in denying Libya’s admissibility challenge, but also how the Chamber should have decided the challenge, it is pertinent to review a case in which another Chamber discussed the issue of inability. The next Part of this Comment discusses the case of Jean-Pierre Bemba Gombo (Bemba) and its discussion of a state’s inability.

²⁷⁹ Rome Statute, *supra* note 11, art. 19, para. 10.

²⁸⁰ *Id.*

²⁸¹ Preparatory Commission for the International Criminal Court, Mar. 13–31, 2000, June 12–30, 2000, *Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Rules of Procedure and Evidence*, Rule 62(2), U.N. Doc. PCNICC/2000/INF/3/Add.1 (July 12, 2000).

²⁸² *Id.* rule 59(1).

²⁸³ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 50; *see also* Rome Statute, *supra* note 11, art. 19, para. 4.

²⁸⁴ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 50.

²⁸⁵ *Id.*

IV. THE CASE OF JEAN-PIERRE BEMBA GOMBO AND ITS APPLICABILITY TO LIBYA'S ADMISSIBILITY CHALLENGE

One case in which the ICC addressed the issue of the inability of a state was *Prosecutor v. Jean-Pierre Bemba Gombo*. This case is of particular importance because the OPCD relied on it to claim that the Court has held that a state's belief as to its ability to prosecute is irrelevant and that the ICC has the responsibility to determine admissibility.²⁸⁶ Bemba was the Vice-President of the Democratic Republic of Congo (DRC)²⁸⁷ and the leader of the *Mouvement de Libération du Congo* (MLC), which allied with the President of the CAR during an armed conflict that occurred between October 26, 2002 and March 15, 2003.²⁸⁸ During this conflict, Bemba committed crimes against humanity within the CAR, particularly in the cities of Bangui, Boy-Rabé, and Mongoumba.²⁸⁹ A prosecutor for a superior court in the CAR originally investigated this case, and the senior investigating judge initiated legal proceedings against Bemba for using troops to "undermine the security of the CAR and with aiding and abetting murder, rape and pillage."²⁹⁰ However, the same judge eventually dropped the charges against Bemba, citing Bemba's diplomatic immunity as the Vice-President of the DRC and the lack of sufficient incriminating evidence.²⁹¹ An appeal followed until the *Procureur Général*, the prosecutor for the Bangui Court of Appeal, requested that the court refer the situation to the ICC.²⁹² On December 16, 2004, the Indictment Chamber of the Bangui Court of Appeal granted that request.²⁹³ The CAR's *Cour de Cassation* affirmed this judgment, holding that the "CAR judicial services are clearly unable to investigate or prosecute the alleged perpetrators."²⁹⁴

Eventually the case against Bemba made its way to a Trial Chamber of the ICC, where it considered, inter alia, whether the judge's decision to drop the charges against Bemba constituted an effective investigation and a genuine decision not to prosecute the accused, thus making Bemba's case inadmissible

²⁸⁶ Defense's Admissibility Response, *supra* note 17, para. 355.

²⁸⁷ Bemba Admissibility Decision, *supra* note 93, para. 6.

²⁸⁸ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08; Case Information Sheet, <http://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf> [hereinafter Bemba Case Information Sheet].

²⁸⁹ *Id.*

²⁹⁰ Bemba Admissibility Decision, *supra* note 93, paras. 2–3.

²⁹¹ *Id.* para. 6.

²⁹² *Id.* paras. 7–9.

²⁹³ *Id.* para. 12.

²⁹⁴ *Id.* para. 15.

before the ICC under Article 17(1)(b).²⁹⁵ The defense argued that the CAR was able to prosecute Bemba for several reasons. First, there was “no cessation of activities . . . with respect to the [CAR] judicial system.”²⁹⁶ The defense also pointed out that the CAR still had means to obtain Bemba, either through an international arrest warrant or voluntary appearance.²⁹⁷ Moreover, the defense asserted that the CAR was “fully capable” of obtaining evidence and concluding the prosecution against Bemba, especially since Bemba was no longer the vice president of the DRC and thus not protected by diplomatic immunity.²⁹⁸ In furtherance of this point, the defense pointed to a trial taking place in courts in Bangui²⁹⁹ and the fact that the CAR had already gathered more than 203 statements from victims of the crimes of which Bemba was accused.³⁰⁰ Finally, the defense pointed out the odd contradiction which would arise if the ICC accepted the *Cour de Cassation’s* determination that the CAR was unable to prosecute Bemba because “if the *Cour de [C]assation* is the source of reliable judicial determination, doesn’t that tend to prove the opposite, that is, that the courts of the country are functional?”³⁰¹

Despite this contradiction, the OTP relied on the *Cour de Cassation’s* ruling to argue that the CAR was unable to prosecute Bemba.³⁰² The OTP additionally asserted that the investigative judge was unable to conduct field investigations due to security concerns and was unable to interview members of the MLC, which Bemba led, because they were located in the DRC.³⁰³ The OTP distinguished the defense’s argument by saying that it rested on

²⁹⁵ *Id.* para. 74.

²⁹⁶ Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2)(a) of the Rome Statute, para. 76 (Feb. 25, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc881209.pdf> [hereinafter Bemba Defense Admissibility Challenge].

²⁹⁷ *Id.* Bemba was living in Portugal as an exile at the time. Bemba Admissibility Decision, *supra* note 96, para. 78.

²⁹⁸ See Bemba Defense Admissibility Challenge, *supra* note 296, paras. 72, 77.

²⁹⁹ *Id.* para. 88 n.63.

³⁰⁰ *Id.* para. 91 n.64.

³⁰¹ *Id.* para. 92 (quoting William A. Schabas, *Complementarity in Practice: Creative Solution or a Trap for the Court?*, in *THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS* (Mauro Politì & Federico Gioia, eds., 2008)). In fact, the CAR, after referring the Bemba case to the ICC, went on to try Ange-Félix Patassé, former President of the CAR. Bemba Case Information Sheet, *supra* note 291. Patassé was a co-defendant with Bemba and resided outside of the CAR at the beginning of his trial. Bemba Defense Admissibility Challenge, *supra* note 296, para. 94.

³⁰² See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Prosecution’s Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo Pursuant to Articles 17 and 19(2)(a) of the Rome Statute, paras. 61–64 (Mar. 29, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc881209.pdf> [hereinafter OTP’s Admissibility Response to Bemba].

³⁰³ See *id.* para. 62.

combating the notion of a collapsed criminal justice system, rather than the unavailability of the justice system, the second situation in which inability may arise under Article 17(3).³⁰⁴ In this regard, the OTP argued that the CAR's judicial system was unavailable because the "judiciary was rendered 'ineffective, unaccountable, corrupt, and dependent on the executive' following [a prominent Central African politician's] ascension, thereby substantiating the argument that the judiciary was genuinely unable to proceed against the accused."³⁰⁵ Thus, the OTP argued that these factors pointed to unavailability and not the collapse of the CAR criminal justice system in Bemba's case.³⁰⁶

Ultimately, the Trial Chamber agreed with the CAR and the OTP, though its concurrence with the arguments of the CAR and OTP constituted obiter dictum.³⁰⁷ In its discussion, the Trial Chamber relied on submissions by the CAR that it lacked the human resources, judges, and budget to carry on a trial, which would be necessary to effectively prosecute Bemba.³⁰⁸ The Trial Chamber also cited ongoing operations by the MLC that contributed to the instability of the area as another reason why the CAR was unable to prosecute.³⁰⁹ Lastly, the Trial Chamber did rely on the *Cour de Cassation's* judgment in which it found that there were neither the "investigative resources" nor the judicial capacity to handle Bemba's trial and that the lack of progress since the Senior Investigative Judge's dismissal was indicative of this inability.³¹⁰

At first, the *Bemba* case seems to be at odds with the notion of limited findings of inability. According to the *Bemba* case, a state can be unable to prosecute an accused person if the high court simply states that it lacks the resources, judges, and budget to carry out the proceedings,³¹¹ even if the state actually does have the resources to allow its own high court to make rulings on

³⁰⁴ *Id.* para. 75.

³⁰⁵ Bemba Admissibility Decision, *supra* note 93, para. 107 (citing Prosecutor v. Jean-Pierre Bemba Gombo, Case, No. ICC-01/05-01/08, Prosecution's Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo Pursuant to Articles 17 and 19(2)(a) of the Rome Statute, para. 67 (Mar. 29, 2010)).

³⁰⁶ OTP's Admissibility Response to Bemba, *supra* note 302, para. 64.

³⁰⁷ See Bemba Admissibility Decision, *supra* note 93, paras. 242–47. The Trial Chamber III decided that the dismissal by the Senior Investigating Judge was not a "decision not to prosecute" under Article 17(1)(b), thereby rendering discussion on inability unnecessary. *Id.* para. 242.

³⁰⁸ *Id.* para. 245.

³⁰⁹ *Id.*

³¹⁰ *Id.* para. 246.

³¹¹ *Id.* para. 245.

its own inability.³¹² Moreover, this finding can be made despite evidence of other trials taking place in the court system.³¹³ Per the *Bemba* decision, a state is unable to prosecute a defendant if there is merely enough instability in a particular region to prevent an investigating judge from investigating the case.³¹⁴ This reason for finding inability of a state to investigate or prosecute for mere security concerns is in direct contradiction of the change of the wording of Article 17(3) from partial collapse to substantial collapse, wherein a state may still be able to investigate or prosecute a case despite suffering some hindrances of its judicial system.³¹⁵ Finally, it is observed that the *Bemba* case is a situation in which the prosecuting state found itself to be unable to prosecute Bemba and submitted the case to the ICC.³¹⁶ Thus, the argument could be made that the ICC was only able to make this finding of inability on the part of the CAR because there was no actual sovereignty issue at stake; the CAR conceded their sovereignty over this case by voluntarily submitting it to the ICC.

A few key distinctions separate the *Bemba* case from the situation in Libya at the time of this writing. First, all indications point to an independent and impartial judiciary currently in Libya. Libya mentioned in its admissibility challenge that the Libyan Constitutional Declaration of 2011 provides for an independent judiciary that is not subject to any other part of the government.³¹⁷ As evidence of this independence, the judiciary has declared a law passed by the NTC unconstitutional³¹⁸ and has done the same thing to the People's Court procedures in the *Dorda* case.³¹⁹ Thus, the judiciary is not dependent upon the executive, as was the case in the CAR.³²⁰ Second, Libya also seems ready to invest a large amount of resources into the investigation and possible prosecution of Gaddafi and al-Senussi. For instance, as mentioned above,

³¹² See *Bemba* Defense Admissibility Challenge, *supra* note 302, para. 92 (quoting William A. Schabas, *Complementarity in Practice: Creative Solution or a Trap for the Court?*, in *THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS* 25, 36 (Mauro Politi & Federico Gioia, eds., 2008)).

³¹³ *Id.* para. 88 n.63.

³¹⁴ OTP's Admissibility Response to Bemba, *supra* note 302, para. 62.

³¹⁵ Rome Statute, *supra* note 11, art. 17, para. 3; Holmes, *supra* note 210, at 677; see also Williams & Schabas, *supra* note 198, at 612.

³¹⁶ Bemba Admissibility Decision, *supra* note 93, para. 15.

³¹⁷ Libya's Admissibility Motion, *supra* note 9, paras. 53–54.

³¹⁸ Defense's Admissibility Response, *supra* note 17, para. 316.

³¹⁹ See *supra* notes 107–09 and accompanying text.

³²⁰ See Bemba Admissibility Decision, *supra* note 93, para. 107 (citing Prosecutor v. Jean-Pierre Bemba Gombo, Case, No. ICC-01/05-01/08, Prosecution's Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo Pursuant to Articles 17 and 19(2)(a) of the Rome Statute, para. 67 (Mar. 29, 2010)).

Libya reportedly secured the extradition of al-Senussi from Mauritania for \$200 million.³²¹ Libya also indicated at the admissibility hearing that the investigation team that is investigating the alleged crimes against Gaddafi comprises no less than twelve people: four senior investigators with two junior investigators working under each senior investigator.³²² Third, Libya did not refer the *Gaddafi* case to the ICC; it was a Security Council referral.³²³ Thus, unlike the *Bemba* case, it cannot be said that Libya had ceded jurisdiction over the case to the ICC. The fact that Libya submitted an admissibility challenge indicates that it wishes to investigate and prosecute Gaddafi. With regard to the question of Libya's genuine ability to investigate and prosecute Gaddafi, enough differences exist between the situation in Libya and the *Bemba* case to distinguish Libya from the CAR and point to Libya being genuinely able to pursue Gaddafi's prosecution.

V. THE ADMISSIBILITY OF GADDAFI'S CASE: WHY THE CHAMBER IS WRONG AND WHAT THE COURT SHOULD HAVE DECIDED

This Part will discuss two questions. First, it will discuss why the Chamber was wrong not only in its conclusion, but in the structure of its analysis. Second, it will discuss how the Chamber should have decided the question of admissibility. Each question will be taken in turn.

A. *The Chamber's Deficient Analysis and Obiter Dictum*

The Chamber's analysis of Libya's genuine ability to prosecute Gaddafi is undermined by the fact that the analysis is insufficient in light of the text of Article 17(3). Moreover, the Chamber's analysis is arguably obiter dictum, thus reducing the authoritative value of its decision.

1. *The Chamber's Analysis in Light of Article 17(3)*

As noted above, it is not enough to show that Libya is unable to obtain the accused, evidence, or otherwise carry out its proceedings; it must be unable to do these things because of a substantial or total collapse or the unavailability of the national judicial system.³²⁴ Moreover, the development of the inability exception suggests that the drafters of the Rome Statute desired a high

³²¹ Grant, *supra* note 42.

³²² Admissibility Hearing Day 2 Transcript, *supra* note 54, at 43.

³²³ S.C. Res. 1970, *supra* note 3, para. 4.

³²⁴ Heller, *supra* note 242, at 264–65; OFFICE OF THE PROSECUTOR, *supra* note 242, para. 49.

threshold to be met before a state's national judicial system could be determined to be collapsed or unavailable for the purposes of Article 17(3).³²⁵

In light of the development of Article 17(3), the Chamber's inability analysis is deficient because it fails to adequately explain why the difficulties that it highlights in its analysis make the Libyan judicial system substantially or totally unavailable.³²⁶ For instance, the Chamber asserted that Libya is unable to obtain Gaddafi because Libya has not yet transferred Gaddafi from Zintan to Tripoli and this fact renders the judicial system unavailable.³²⁷ However, the Court does not discuss why this makes the national judicial system unavailable when Libya has continued to investigate Gaddafi for the alleged crimes; Libya has continued to build facilities that will be adequate to house and secure Gaddafi for his trial in Tripoli, and Gaddafi's detention in Zintan has had Libyan judicial oversight.³²⁸

The Chamber also stated that Libya is unable to obtain testimony from witnesses, two in particular, because Libya does not have full control of some of the prisons in its territory.³²⁹ The Chamber is unclear in its discussion as to why the testimony of these two particular witnesses is enough to render the Libyan judicial system unavailable, especially in light of the fact that the Chamber acknowledges that Libya has obtained statements from other witnesses in regards to Gaddafi's alleged crimes.³³⁰ Moreover, the Chamber asserted that the Libyan judicial system is unavailable because the evidence provided by Libya is unclear on the methods and means by which it can protect witnesses who may testify in the trial against Gaddafi.³³¹ However, the Chamber does not discuss why this is a particular concern when the trial is not yet imminent and the Chamber has acknowledged Libya's progress and plans to increase the security for trial participants.³³² This is particularly important because the Chamber should consider the facts as they exist at the time of the admissibility challenge.³³³

³²⁵ See *supra* notes 252–60 and accompanying text.

³²⁶ See Admissibility Decision, *supra* note 10, paras. 204–15.

³²⁷ *Id.* paras. 205–06.

³²⁸ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 19–20; see also Libya's Admissibility Motion, *supra* note 9, paras. 42–44.

³²⁹ Admissibility Decision, *supra* note 10, paras. 209–10.

³³⁰ *Id.* paras. 209–10. The Chamber in referring to these two witnesses cites Annex C to Libya's Admissibility Challenge. *Id.* para. 210 n.346. The author of this Comment could not find a publicly available copy of this annex, suggesting that the annex has not been released for confidentiality reasons.

³³¹ *Id.* para. 211.

³³² *Id.* paras. 204, 208, 211.

³³³ Katanga Appeal, *supra* note 200, para. 56.

Finally, the Chamber tried to assert that Libya's judicial system is unavailable because Gaddafi has not yet been appointed defense counsel.³³⁴ However, at the time of this proceeding, Libya was currently in the investigation phase.³³⁵ During this investigation phase, Gaddafi may have counsel, but only if he requests such counsel.³³⁶ As noted above, there have been conflicting reports as to whether Gaddafi actually wanted defense counsel.³³⁷ This distinction is key because, as discussed above, Article 17(3) appears to be most concerned about a state that is prevented from effectively prosecuting someone, not fairly prosecuting someone.³³⁸

The fatal flaw in the Chamber's inability analysis is its unfocused discourse on why Libya's national judicial system is unavailable as opposed to substantially or totally collapsed. Libya has not yet transferred Gaddafi to Tripoli because of inadequate detention facilities for someone of his notoriety.³³⁹ This situation is most comparable, if anything, to the lack of judicial infrastructure noted by the OTP as being indicia of a collapsed judicial system.³⁴⁰ Inadequate control of detention facilities, something that the Chamber was concerned about for the purposes of obtaining witness testimony, would also fall under that category. The inability of Libya to find defense counsel for Gaddafi may be indicia of a collapsed national judicial system because the failure involves the Government actually seeking counsel for Gaddafi, but that failure is not causing Libya to be unable to proceed with the investigation and prosecution of Gaddafi at this time.³⁴¹ Additionally, there is nothing to suggest that Libya's inability to do so is the result of at least a substantially collapsed system required by Article 17(3).

The unavailability of a national judicial system, on the other hand, has often been construed to incorporate legislative or legal impediments that render the system completely or substantially unavailable.³⁴² The Chamber held that ordinary crimes were sufficient for the purposes of determining whether Libya

³³⁴ Admissibility Decision, *supra* note 10, paras. 212–14.

³³⁵ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 15; *see also* Libya Admissibility Motion, *supra* note 9, para. 59.

³³⁶ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 20.

³³⁷ *Id.*

³³⁸ *See* Part III.B.2.

³³⁹ Admissibility Decision, *supra* note 10, paras. 190–91; *see* Admissibility Hearing Day 1 Transcript, *supra* note 54, at 19–20.

³⁴⁰ OFFICE OF THE PROSECUTOR, *supra* note 242, para. 50.

³⁴¹ Rather, as discussed above, Libya is not mandated to ensure that Gaddafi has legal counsel until the trial phase begins. *See* Admissibility Hearing Day 1 Transcript, *supra* note 54, at 20.

³⁴² *See* CASSESE, *supra* note 252, at 344.

was investigating the same case that was before the ICC.³⁴³ The Chamber also reviewed the various applicable laws in Libya that make it possible for the Libyan government to investigate and prosecute Gaddafi for his alleged crimes during the Libyan Civil War.³⁴⁴ In fact, the Chamber arguably only pointed to two main deficiencies in the law that might make the judicial system “unavailable.” The first deficiency is the possible lack of protective measures designed to protect witnesses who may give testimony at trial.³⁴⁵ However, there is not a total lack of witness protection measures; rather, Libya indicated that some protective measures are within the discretion of the trial judge.³⁴⁶ Thus, the Chamber’s concern was not knowing the exact scope and nature of all protective measures available in Libya. Even then, there is no discussion as to why this particular concern renders the judicial system unavailable at a time when the case against Gaddafi is still in the investigatory stage. Second, the Chamber was concerned with the fact that *in absentia* trials are not permitted when the accused is in Libyan territory and his location is known.³⁴⁷ However, Libya was in the process of securing the transfer of Gaddafi from Zintan to Tripoli,³⁴⁸ which is not comparable to a situation where the state lacks sufficient procedural legislation or laws granting amnesties and immunities.

2. *The Chamber’s Inability Discussion Is Obiter Dictum*

The Chamber’s discussion of Libya’s inability to investigate or prosecute Gaddafi is also undermined by the fact that it is obiter dictum. As discussed above, the ICC considers an admissibility challenge to involve a two-part inquiry.³⁴⁹ In this case, the Chamber should not have even reached a discussion about Libya’s ability or lack thereof to investigate or prosecute Gaddafi. As discussed above, the Chamber found that Libya was not investigating the same case as the ICC.³⁵⁰ The Chamber made this decision because, while some of the evidence obtained by Libya in its investigation of Gaddafi contained information related to Gaddafi’s use of the Security Forces to kill civilians, the Chamber did not believe that the evidence as a whole sufficiently demonstrated

³⁴³ Admissibility Decision, *supra* note 10, paras. 85–88.

³⁴⁴ *Id.* paras. 108–13, 201–03.

³⁴⁵ *See id.* para. 211.

³⁴⁶ *See id.*

³⁴⁷ Admissibility Decision, *supra* note 10, para. 208.

³⁴⁸ Libya’s Further Submissions, *supra* note 123, para. 99.

³⁴⁹ *See supra* Part III.B.

³⁵⁰ Admissibility Decision, *supra* note 10, para. 135.

the scope of the Libyan investigation.³⁵¹ Consequently, the Chamber never really went further than the first step of the analysis when it decided that Gaddafi's case was admissible to the ICC. The Chamber tried to make its discussion of Libya's ability irrelevant by relating it to the Chamber's issuance of a decision on the admissibility challenge.³⁵² However, this reason is tangential to the Chamber's primary reason for issuing the decision, namely that it believed Libya "had sufficient opportunities to submit evidence in support of its Admissibility Challenge."³⁵³ Thus, the Chamber's discussion on Libya's ability, or lack thereof, is wholly unnecessary to the disposition of the challenge.

B. How the Chamber Should Have Decided the Admissibility Challenge

In the final analysis, if it was necessary for the Chamber to discuss the issue, it should have found that Libya is genuinely able to investigate and prosecute Gaddafi. Although it may be questionable whether the Libyan government actually has effective control over Gaddafi in Zintan (unable to obtain the accused),³⁵⁴ Libya may not be able to try Gaddafi *in absentia* or appoint counsel for Gaddafi (unable to otherwise proceed),³⁵⁵ and Libyan officials may not be able to investigate Gaddafi's crime in some areas (unable to obtain evidence),³⁵⁶ this is not enough to prove inability. All of these things must be due to a total or substantial collapse or the unavailability of the judicial system.³⁵⁷ What constitutes a substantial collapse or unavailability of the judicial system? The change of the language from "partial collapse" to "substantial collapse" during the drafting of the Rome Statute³⁵⁸ suggests that there must be more than mere conflict or insurgency in a state for a judicial system to be considered "substantially collapsed."³⁵⁹ Rather, the conflict in the area or the general degradation of the state must be to the point that the state cannot shift resources or transfer venues to carry out the investigation or prosecution.³⁶⁰ The factors listed in the Informal Expert Paper can help

³⁵¹ *Id.* paras. 132–35.

³⁵² Admissibility Decision, *supra* note 10, para. 137.

³⁵³ *Id.* para. 137.

³⁵⁴ Defense's Admissibility Response, *supra* note 17, paras. 358–68.

³⁵⁵ *Id.* para. 358.

³⁵⁶ *Id.* para. 385.

³⁵⁷ Heller, *supra* note 238; OFFICE OF THE PROSECUTOR, *supra* note 242, para. 49.

³⁵⁸ *See, supra* notes 232–36 and accompanying text.

³⁵⁹ Holmes, *supra* note 210, at 677.

³⁶⁰ *Id.*

determine whether a state has the ability to shift resources or transfer venues.³⁶¹

In consideration of these factors, it appears, at the time of this writing, that Libya is neither suffering from a substantial collapse of its judicial system nor is the Libyan judicial system unavailable to Gaddafi. First, there is evidence that Libya has tried to maintain a sufficient number of prosecuting authorities and judges to sustain its judicial system “by reopening courts and recalling judges,” and in transferring “detainees to central government control.”³⁶² Libya has also started criminal proceedings against as many as forty-one persons accused of committing crimes during the Libyan Civil War.³⁶³ Moreover, it is perhaps possible to demonstrate that Libya has the resources to continue building its national judicial system by securing al-Senussi’s transfer to Libya.³⁶⁴ Libya also has the requisite “substantive or procedural penal legislation”³⁶⁵ to effectuate criminal investigations and proceedings.³⁶⁶ There are also instances of Libya’s judiciary not only working, but working independently, by declaring a law passed by the NTC as unconstitutional³⁶⁷ and even declaring the criminal procedures of the People’s Court unconstitutional.³⁶⁸

Additionally, there are significant key differences between the situation in Libya and the *Bemba* case. First, the discussion in the *Bemba* case was obiter dictum, having decided the case on the ground that there was not a “decision not to prosecute” under Article 17(1)(b).³⁶⁹ Second, even though both regions are afflicted with security concerns, Libya has initiated a program to help disarm illegal militias and, according to counsel for Libya at the admissibility hearings, this program is having some degree of success.³⁷⁰ Most importantly, however, the *Cour de Cassation* initially determined that the CAR was unable to prosecute Bemba.³⁷¹ The situation in Libya, on the other hand, was referred

³⁶¹ See OFFICE OF THE PROSECUTOR, *supra* note 242, at para. 50.

³⁶² Libya’s Admissibility Motion, *supra* note 9, para. 10.

³⁶³ *Id.*

³⁶⁴ See Grant, *supra* note 45.

³⁶⁵ OFFICE OF THE PROSECUTOR, *supra* note 242, at para. 50.

³⁶⁶ Libya’s Admissibility Motion, *supra* note 9, paras. 39–40.

³⁶⁷ Defense’s Admissibility Response, *supra* note 17, para. 316.

³⁶⁸ Libya’s Further Submissions, *supra* note 123, paras. 75–76.

³⁶⁹ See Bemba Admissibility Decision, *supra* note 96, paras. 242–247.

³⁷⁰ OTP’s Admissibility Response to Bemba, *supra* note 302, para. 62; Admissibility Hearing Day 1 Transcript, *supra* note 54, at 10.

³⁷¹ OTP’s Admissibility Response to Bemba, *supra* note 302, para. 62.

to the ICC by the Security Council³⁷² and Libya has since challenged admissibility.³⁷³ Thus, the *Bemba* case does not require a finding of Libya's inability to prosecute Gaddafi.

To say, however, that Libya is currently genuinely able to investigate and prosecute Gaddafi is not to say Libya will always be genuinely able to investigate and prosecute him. For instance, the OPCD argued at the admissibility hearing that Libya may be genuinely unable to prosecute Gaddafi because both the Libyan Constitutional Declaration and Criminal Procedure Code exclude intercept evidence, unless such evidence was first gathered upon authorization by a judge.³⁷⁴ The argument is that “the Libyan [prosecutors] would be unable to genuinely bring Mr. Gaddafi to justice if they were to base their case on inadmissible evidence.”³⁷⁵ However, this argument depends upon the evidence being declared inadmissible. Libya clarified during the admissibility hearing that the intercept evidence it possessed was from telephone conversations recorded, upon orders from Muammar Gaddafi, by the two major telephone companies in Libya.³⁷⁶ In the aftermath of Tripoli's liberation, these public documents and recordings were made widely available to the public.³⁷⁷ Thus, according to Libya, these facts and other events surrounding the Libyan Civil War raise practical and legal considerations that mean that such intercept evidence will not necessarily be ruled inadmissible.³⁷⁸ This situation demonstrates the importance of Article 19(10), which allows the Prosecutor to request a review of inadmissibility from the same Pre-Trial Chamber that made the original holding. This Article allows the Court to reconsider a case's admissibility when the ability or inability of a state is more certain than speculative. Thus, the OTP could have used its authority to request review under Article 19(10) if it became apparent that the intercept evidence would not be admissible under Libyan law because of the origin of the evidence, because Libya could not sufficiently authenticate the intercepts, or because of some other legal hindrance.

³⁷² S.C. Res. 1970, *supra* note 3, para. 4.

³⁷³ See generally Libya's Admissibility Motion, *supra* note 9.

³⁷⁴ Admissibility Hearing Day 1 Transcript, *supra* note 54, at 88.

³⁷⁵ *Id.*

³⁷⁶ Admissibility Hearing Day 2 Transcript, *supra* note 54, at 56.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 56–57.

CONCLUSION

Over the course of this discussion, a few observations can be made. First, the drafters of the Rome Statute were particularly concerned with the issue of state sovereignty, which is why they implemented a complementary jurisdictional scheme to the ICC rather than a primary jurisdictional scheme like the ones found in the ICTR and the ICTY.³⁷⁹ The drafters also intended that the inability exception found in Article 17(1)(a) only be applied in a limited set of circumstances, which is why Article 17(3)'s language was changed from a partial to a substantial collapse or unavailability of the national judicial system. This change necessitates the conclusion that the Statute allows for a national judicial system to suffer a partial collapse or be unavailable, and yet still be able to hold investigations and prosecutions in good faith. The collapse or unavailability in question should be due to something more than just armed conflict, especially if resources are available to dedicate to the proceedings. It is submitted here that the threshold question of whether a state is unable to adjust resources or transfer venue in order to carry out the investigation or prosecution must first be reached before the ICC can find that a state's judicial system has substantially collapsed. With regards to a judicial system's unavailability, there ought to be legal impediments that prevent the state from carrying the investigation or prosecution forward, such as statutes of limitations on crimes, amnesty laws, or as the OTP suggests, a lack of substantive or procedural legislation that render the state fully incapable of continuing the investigation or prosecution.³⁸⁰

This case provided a glimpse into how the ICC may view complementarity in the future. For the purposes of recognizing the importance that the drafters of the Statute placed on state sovereignty, and the limited circumstances that the drafters seemed to indicate as their intent with the strict language used in Article 17(3), the Chamber should have held that Libya is genuinely able to investigate and prosecute Gaddafi and work with the Libyan government in an effort to help it build its criminal justice system for future prosecutions. By finding the case inadmissible, the ICC could have taken a more positive approach to the situation in Libya, providing assistance to Libya to aid it in prosecuting international crimes, and only intervening if it became absolutely apparent that Libya could not genuinely prosecute Gaddafi.³⁸¹ Instead, it

³⁷⁹ Benzing, *supra* note 222, at 595.

³⁸⁰ OFFICE OF THE PROSECUTOR, *supra* note 242, para. 50.

³⁸¹ See *supra* Part II.C–D.

appears after this decision that the Court is taking a hard-lined approach toward complementarity, an approach more akin to the concurrent jurisdiction that was granted to the ICTR and ICTY,³⁸² rather than the complementary jurisdiction that the Rome Statute drafters intended. Moreover, the Chamber, through its muddled analysis of the inability issue, has tried to use “unavailability” as a means of bypassing the clear intent of the drafters of the Rome Statute to allow the ICC to take a case away from an actively investigating state only in a limited set of circumstances.

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³⁸² See Charles Chernor Jalloh, *Kenya vs. the ICC Prosecutor*, 53 HARV. INT’L L.J. 227, 236 (2012). Professor Jalloh argued the same proposition as in this article. In particular, Professor Jalloh analyzed the Appeals Chamber’s approach to Kenya’s admissibility challenge in *Prosecutor v. Ruto, Kosgey & Sang*. See *id.* at 227–28, n.2.

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