

# THE PRINCIPLE OF COMPLEMENTARITY IN THE JURISPRUDENCE OF THE ICC

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*This paper deals with the principle of complementarity as one of the most important principles governing the functioning of the International Criminal Court. The purpose of this principle is to delineate the jurisdiction of the Court from that of States. However, despite the relatively clear guidelines set in article 17 of the Rome Statute, the application of this principle has already proven to be difficult in practice. The authors analyze the development of the twofold test in the case law of the International Criminal Court, starting with the requirement of ongoing proceedings and then moving to the notions of unwillingness and inability. Special emphasis is given to the issue of due process and to the controversial claim that unfair proceedings at the national level should, in themselves, render the case admissible before the ICC.*

Keywords: complementarity, proceedings requirement, unwillingness, inability, due process

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## 1. INSTEAD OF AN INTRODUCTION: THE MEANING AND IMPORTANCE OF COMPLEMENTARITY

The International Criminal Court (hereinafter: the ICC, the Court) is a permanent court established by an international treaty with the power to prosecute perpetrators of the most serious international crimes. Its jurisdiction is complementary to national criminal jurisdictions.<sup>1</sup> This means that, unlike the *ad hoc* international criminal tribunals, the ICC does not have primacy over national courts nor does it have exclusive jurisdiction over international crimes. States are the ones that have not just the principal right but also the duty to prosecute international crimes.<sup>2</sup> Yet, the Court's existence would be meaningless if, under certain conditions, it could not step in and exercise its complementary

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<sup>1</sup> Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force on July 1 2002, art. 1.

<sup>2</sup> Yang, Lijun, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, Chinese Journal of International Law, 2005, Vol. 4, No. 1, p. 122.

jurisdiction. In order to fulfil its purpose, the Court must be able to intervene “when States do not or cannot investigate and, where necessary, prosecute”.<sup>3</sup>

The principle of complementarity underpins the Rome Statute of the International Criminal Court and is often highlighted as “the cornerstone of the functioning of the Court”.<sup>4</sup> It aims at “strik[ing] a balance between safeguarding the primacy of domestic proceedings *vis-à-vis* the International Criminal Court on the one hand, and the goal of the Rome Statute to ‘put an end to impunity’ on the other hand”.<sup>5</sup> The function of complementarity is not only to (strictly) monitor state action and establish whether it is for the Court or for a State to act in a specific case, but also to serve as a tool for managerial interaction between the Court and States.<sup>6</sup> Broadly speaking, it is a principle which regulates the relationship and the interplay between the Court and States Parties when dealing with international crimes. Hence, in a way, the principle of complementarity governs the functioning of the entire system established by the Rome Statute.

Questions about the legal nature and practical meaning of the principle of complementarity have been attracting the attention of scholars and practitioners alike for more than a decade now.<sup>7</sup> However, despite considerable academic attention, the debate is still ongoing. The first decisions on this matter unfortunately failed to provide a deeper theoretical understanding of the principle and to give clear guidelines for its application.<sup>8</sup> Some recent decisions offered a more comprehensive view,<sup>9</sup> yet many problems still need to be tackled, as was shown afresh in the new decision with respect to Libya.

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<sup>3</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (hereinafter *Prosecutor v. Katanga and Chui*), ICC-01/04-01/07-1497, 25 September 2009, § 85.

<sup>4</sup> *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (hereinafter *Prosecutor v. Kony et al.*), ICC-02/04-01/05-377, § 34.

<sup>5</sup> *Prosecutor v. Katanga and Chui*, § 85.

<sup>6</sup> Stahn, Carsten, *Complementarity: A Tale of Two Notions*, *Criminal Law Forum*, Vol. 19, No. 1, 2008, p. 88.

<sup>7</sup> Cf. El Zeidy, Mohamed M., *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 *Michigan Journal of International Law*, 869, 2001-2002; Burke-White, William W., *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, *Harvard International Law Journal*, Vol. 49, No. 1, 2008.

<sup>8</sup> *Prosecutor v. Kony et al.*, ICC-02/04-01/05-1-US-Exp, 8 July 2005, p. 2; *Prosecutor v. Thomas Lubanga Dyilo* (hereinafter: *Prosecutor v. Lubanga*), ICC-01/04-01/06-8-Corr., 09 March 2006, pp. 19-33; Situation in the Democratic Republic of the Congo, ICC-01/04-169, 23 September 2009 (pursuant to Decision ICC-01/04-538-PUB-Exp reclassified as public, decision under seal was rendered 13 July 2006) §§ 42-53 and 68-83. For a more detailed account of the earlier jurisprudence of the ICC, see: Batros, Ben, *The Evolution of the ICC Jurisprudence on Admissibility* in C. Stahn, M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2010.

<sup>9</sup> *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (hereinafter *Prosecutor v. Muthaura et al.*), ICC-01/09-02/11-274, 30 August 2011; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (hereinafter *Prosecutor v. Ruto et al.*), ICC-01/09-01/11-307, 30 August 2011. Some of the issues re-emerged in the case *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (hereinafter *Prosecutor v. Gaddafi*) ICC-01/11-01/11 with respect to Libya.

This paper will focus on substantive requirements which serve to delineate national jurisdictions from the jurisdiction of the Court, as set forth in article 17 (1) (a) and (b) of the Rome Statute. Although it does not exhaust the principle of complementarity, article 17 of the Rome Statute can be seen as its “centrepiece”.<sup>10</sup>

## 2. COMPLEMENTARITY IN THE JURISPRUDENCE AND CASE LAW OF THE ICC

### 2.1. Complementarity as part of the admissibility test: interpreting article 17

Complementarity is regulated by the Statute’s provisions on the admissibility of a case (articles 17 – 20 of the Rome Statute) and thus it belongs to the broader issue of admissibility rather than jurisdiction.<sup>11</sup> When analyzing the relationship between complementarity, admissibility and jurisdiction, the Court determined that: “complementarity is the principle reconciling the States’ persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed. Accordingly, admissibility can be regarded as the tool allowing the implementation of the principle of complementarity in respect of a specific scenario”.<sup>12</sup>

By regulating the substantive requirements for the inadmissibility of a case, article 17 gives effect to the principle of complementarity. The requirements set in article 17 apply to preliminary admissibility rulings (art. 18), to the challenges to the admissibility of a case before the Court (art. 19), and also to the Prosecutor’s decisions to initiate an investigation under article 53 (1) and (2).<sup>13</sup> Articles 18 and 19 provide the procedural framework for admissibility determinations, although, depending on the stage of proceedings and the specific issue, other articles may come into play as well.

The admissibility test, set down in article 17, consists of two main prongs – the first is complementarity, regulated by article 17 (1) (a) to (c),<sup>14</sup> and the second is gravity, governed by article 17 (1) (d).<sup>15</sup> Although part of the admissibility test, gravity itself is not

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<sup>10</sup> Robinson, Darryl, *Three Theories of Complementarity: Charge, Sentence, or Process?*, Harvard International Law Journal Online, Volume 53, April 2012, p. 177.

<sup>11</sup> Pichon, Jakob, *The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court*, International Criminal Law Review, Vol. 8, No.1-2, 2008, p. 188.

<sup>12</sup> *Prosecutor v. Kony et al.*, *supra* note 4, § 34.

<sup>13</sup> *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, 30 August 2011, § 38.

<sup>14</sup> The Appeals Chamber in the case *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, 14 December 2006, § 23, distinguished between complementarity, as encompassing article 17 (1) (a) to (b), and the *ne bis in idem* principle, contained in subparagraph (c). Therefore, although subparagraph (c) also serves as a substantive requirement delineating the jurisdictions, it can be seen as a distinct part of the admissibility test, separate from complementarity.

<sup>15</sup> *Prosecutor v. Ruto*, ICC-01/09-01/11-101, 30 May 2011, § 47.

relevant for the issue of complementarity and, therefore, will not be discussed further in this paper.

The first prong of the “admissibility test”, complementarity, encompasses three situations in which a case is inadmissible:

- a) it 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 (art. 17 (1) (a));
- b) it has been investigated by a State with jurisdiction which decided not to prosecute the person concerned, unless the “decision resulted from the unwillingness or inability ... genuinely to prosecute” (art. 17 (1) (b));
- c) the person concerned has already been tried for the conduct in question and a trial by the Court is not allowed under the Statute’s *ne bis in idem* rules (art. 17 (1) (c)).<sup>16</sup>

### 2.1.1. A twofold test for complementarity – the “proceedings requirement”

Complementarity itself contains a further test consisting of two “folds” or steps (the twofold test).<sup>17</sup> The Court must first determine:

- a) whether there is an ongoing investigation or prosecution in a State, or an investigation or prosecution existed in the past (the so-called “proceedings requirement”<sup>18</sup>);  
and only when the answer to this question is positive,
- b) whether the investigating or prosecuting state is willing and able genuinely to carry out the proceedings.

The twofold test, however, has not been accepted without significant controversy. Supporters of the so-called single-fold test on one side,<sup>19</sup> and those in favour of the twofold test, on the other,<sup>20</sup> have engaged in a long debate on the correct approach to determinations of inadmissibility on grounds of complementarity. The former suggest that a case should be admissible before the Court only when the State with jurisdiction is

<sup>16</sup> Article 17 stipulates the requirements under which the case is inadmissible before the Court, not the requirements for the case to be admissible before the Court. As Robinson states, this is a subtle point, but a noteworthy one nevertheless. Robinson, Darryl, *The Mysterious Mysteriousness of Complementarity*, Criminal Law Forum, Vol. 21, No. 1, 2010, p. 4. Available at SSRN: <http://ssrn.com/abstract=1559403>. Accessed on 23 October 2012. Regarding the *ne bis in idem* principle, see also footnote 14.

<sup>17</sup> *Prosecutor v. Ruto et al.*, *supra* note 15, § 47; *Prosecutor v. Katanga and Chui*, *supra* note 3, § 78.

<sup>18</sup> Robinson, 2010, p. 2.

<sup>19</sup> Arsanjani Mahnouch H., Weisman, W. Michael, *The Law-in-Action of the International Criminal Court*, 2005, Faculty Scholarship Series, Paper 1001. Available at [http://digitalcommons.law.yale.edu/fs\\_s\\_papers/1001](http://digitalcommons.law.yale.edu/fs_s_papers/1001) on 23 October 2010.

<sup>20</sup> Robinson, 2010, pp. 15-25. For a detailed analysis of article 17 and whether to accept the single or twofold test, see: El Zeidy, Mohamed M., *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC*, International Criminal Law Review, Vol. 5, No. 1, 2005, pp. 99-105.

unwilling or unable genuinely to carry out the proceedings.<sup>21</sup> Accordingly, even in cases of State inaction, the Court should take into consideration un/willingness or in/ability, so the case cannot be found admissible before the Court merely on the ground of State inactivity. A form of this single-fold test was highlighted by Katanga's defence in support of the appeal against the decision of the Trial Chamber on the admissibility challenge in the case of *Germain Katanga and Mathieu Ngudjolo Chui*.<sup>22</sup> The defence stated that it would discourage States from prosecuting domestically and would thereby endanger the correct application of the principle of complementarity if the Court was to accept the view that a State which is able to prosecute is fulfilling its duty to prosecute international crimes by transferring cases to the Court and by fully cooperating with it.<sup>23</sup> According to this argument, the Court should intercede only when a State is genuinely unwilling or unable to take action to support the prosecution of the crimes. Therefore, genuine willingness and ability to carry out proceedings would have to be taken into account even in cases of inaction.

The suggestion that a State not conducting any proceedings is in fact unwilling, and the view that inaction on the part of the State is a subset of unwillingness, has also arisen, and can even be detected in some Court decisions.<sup>24</sup> For instance, the Trial Chamber noted that DR Congo is "quite clearly unwilling to prosecute the case"<sup>25</sup> and hence dismissed the admissibility challenge. It also mentioned the importance of determining the "intentions of the State to institute proceedings against the persons in question".<sup>26</sup> However, the implicit hint in favour of the single-fold test by the Trial Chamber in this decision was clearly rejected later, first by the Appeals Chamber in the same case and then by the Pre-Trial Chamber in its decisions on the admissibility challenge in the two Kenyan cases.<sup>27</sup> The debate has, thus, seemingly found closure in confirmation of the twofold test by the Court.

The Court established that "in case of inaction, the question of unwillingness or inability does not arise".<sup>28</sup> It has underscored that States' unwillingness or inability genuinely to carry out proceedings, contained in subparagraphs (a) and (b) of article 17, cannot be the

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<sup>21</sup> Arsanjani et al., 2005, pp. 385-387.

<sup>22</sup> Mr. Katanga's defence elaborated the argument in the document submitted in support of the appeal against the Trial Chambers' decision on admissibility: *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-1279, 8 July 2009, §§ 62 -72. It was later rejected by the Appeals Chamber. See *supra* note 3.

<sup>23</sup> *Ibid.* See also *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-T-67-ENG, 12 June 2009, p. 8. For a more detailed discussion on applying complementarity through waiver, see: El Zeidy, 2005, pp. 83-120.

<sup>24</sup> See, e.g., the oral decision of the Court's Trial Chamber in the case *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-T-67-ENG, 12 June 2009, p. 10.

<sup>25</sup> *Ibid.* Further, for a more detailed critique of the Decision, see: Robinson, 2010, p. 13.

<sup>26</sup> *Ibid.*

<sup>27</sup> Pre-Trial Chamber II found: "Thus, while the Chamber welcomes the express will of the Government of Kenya to investigate the case *sub judice*, as well as its prior and proposed undertakings, the Chamber's determination on the subject-matter of the present challenge is ultimately dictated by the facts presented and the legal parameters embodied in the Court's statutory provisions". *Prosecutor v. Ruto et al.*, *supra* note 15, § 45.

<sup>28</sup> *Prosecutor v. Katanga and Chui*, *supra* note 3, § 78. The Pre-Trial Chamber accepted the twofold test early in the Court's practice. See *Prosecutor v. Lubanga*, ICC-01/04-01/06-8-US-Corr, 10 February 2006, § 29.

starting point when determining whether the case is inadmissible because complementarity concerns, first and foremost, “the existence or absence of national proceedings”.<sup>29</sup> The Court can turn to the willingness and ability of the State genuinely to carry out the proceedings only when it determines that national proceedings of a certain quality exist. In other words, even when a State is willing and able genuinely to carry out the proceedings, if the “proceedings requirement” is not fulfilled, the case is admissible and the ICC can take over.<sup>30</sup> This conclusion clearly follows from the text of article 17, subparagraphs (a) and (b), which states: “[t]he case *is being investigated or prosecuted, unless...*” and “[t]he case *has been investigated, unless...*”.<sup>31</sup> The same conclusion is also supported by teleological interpretation and the overall goal of the Rome Statute – putting an end to impunity – which cannot be achieved if the State is inactive, regardless of whether it is willing or able to prosecute. As the Appeals Chamber pointed out, if the opposite interpretation were accepted, “[t]he Court would be unable to exercise its jurisdiction as long as the State is theoretically willing and able to investigate and prosecute the case, even though the State has no intention of doing so”. This would lead to “thousands of victims.... denied justice”.<sup>32</sup>

Yet, although the twofold test is clearly supported by the text of article 17, it can be legitimately criticized for the fact that it separates States’ inaction from unwillingness or inability in a way that can create tensions with the duty of every State to prosecute international crimes and the role of the ICC as the Court of “last resort”.<sup>33</sup> States may (temporarily) refrain from prosecuting core crimes for various reasons that go beyond “inability” or “unwillingness”, such as various political, financial, logistical, local, or even external reasons. In addition, by failing to prosecute, States can purposely render cases admissible before the ICC. This can defeat the whole purpose of the complementarity mechanism,<sup>34</sup> especially if we bear in mind the possibility of self-referrals, and the ability of governments to selectively externalize difficult cases, thus relieving themselves of the pressure to prosecute the crimes enumerated in the Statute.<sup>35</sup> Notwithstanding this undesirable corollary of the prevailing interpretation of article 17, the only reasonable approach to this article is that the case can be found admissible before the ICC whenever national proceedings are not ongoing,<sup>36</sup> without the need to discuss the willingness or ability of the relevant State and without having to consider the reasons behind the State’s

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<sup>29</sup> *Prosecutor v. Katanga and Chui*, *supra* note 3, § 78, confirmed in: *Prosecutor v. Ruto et al.*, *supra* note 17, § 48; *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-96, 30 May 2011, § 44.

<sup>30</sup> *Prosecutor v. Katanga and Chui*, *supra* note 3, §§ 74 – 79.

<sup>31</sup> See Robinson, 2010, pp. 3-4.

<sup>32</sup> *Prosecutor v. Katanga and Chui*, *supra* note 3, § 79.

<sup>33</sup> Jurdi, Nidal Nabil, *Some Lessons on Complementarity for the International Criminal Court Review Conference*, The South African Yearbook of International Law, Vol. 34, 2009, pp. 28-56, p. 31.

<sup>34</sup> *Ibid.*, p. 31.

<sup>35</sup> Arsanjani et al., 2005, p. 390.

<sup>36</sup> And have not been conducted in the past.

decision not to prosecute. To scrutinize “willingness” or “ability” in the absence of ongoing or past proceedings would indeed mean “to put the cart before the horse”.<sup>37</sup>

However, this conclusion has recently been called into question by the Pre-Trial Chamber’s Decision on Libya’s challenge<sup>38</sup> which reopened a number of different issues and again muddied the waters surrounding the practical application of complementarity. The Court declaratively upheld the twofold test and clearly stated that it must first establish the existence of proceedings and only then may it proceed to the second prong of the test;<sup>39</sup> yet, it went on to discuss Libya’s ability to carry out proceedings despite its findings that Libya has not demonstrated that it is investigating the same case as the Court.<sup>40</sup> It remains to be seen whether the Pre-Trial Chamber’s decision will be upheld or overturned on appeal.

#### 2.1.1.1. The “same person/same conduct” test

According to the text of subparagraphs (a) and (b) of article 17, national proceedings encompass both investigation and prosecution conducted at the national level. The Statute, however, does not provide clear and detailed guidelines about actual conditions that national proceedings must satisfy in order to comply with the “proceedings requirement” under article 17 of the Statute.

These guidelines have been developed through the ICC’s case law. Today, it is uncontested that the “proceedings requirement” will be met only if the national proceedings concern the same person and the same conduct (the so-called “same person/same conduct test”). According to this test, relevant national proceedings must “cover the same individual and substantially the same conduct as alleged in the proceedings before the Court”.<sup>41</sup> The “same person/same conduct” test can be discerned from the outset; already in *Prosecutor v. Thomas Lubanga Dyilo*, the Pre-Trial Chamber stated that it considers a “*conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court”.<sup>42</sup> Since then, the matter has been discussed by several different chambers. In *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* the Appeals Chamber briefly discussed the test, but declined to rule on the correctness of the “same

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<sup>37</sup> *Prosecutor v. Katanga and Chui*, *supra* note 3, § 78.

<sup>38</sup> *Prosecutor v. Gaddafi*, ICC-01/11-01/11-344-Red, 31 May 2013.

<sup>39</sup> *Ibid.*, § 89.

<sup>40</sup> *Ibid.*, § 134.

<sup>41</sup> *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-274, 30 August 2011, § 39. Also, *Prosecutor v. Gaddafi*, ICC-01/11-01/11-344-Red, 31 May 2013, § 61. Additionally, the same person/same conduct test applies to the investigative phase as well, since “the issue is not merely one of ‘investigation’ in the abstract, but is whether the same case is being investigated by both the Court and a national jurisdiction”. *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-307, 30 August 2011, § 37.

<sup>42</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-8-US-Corr., 9 March 2006, § 31.

conduct” part because it was not relevant for the appeal decision in the case before it.<sup>43</sup> In that case, the Court did not have to decide “whether the *case* must always concern the same person”, since the national proceedings in DR Congo did concern Mr. Katanga.<sup>44</sup>

A more comprehensive analysis of the complementarity principle in general, and particularly of the same person/same conduct test, was undertaken fairly recently by the Appeals Chamber in two Kenyan cases – *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* and *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, following the appeal against the decision of Pre-Trial Chamber II on the admissibility challenge of the Government of Kenya pursuant to article 19 (2) (b) of the Statute.

The Appeals Chamber firstly raised a significant point endorsing a distinction in the application of article 17 based on the stage of the ICC proceedings.<sup>45</sup> It emphasised that the “same person/same conduct” test must be applied in the correct context. The phrases “case is being investigated or prosecuted” and “case has been investigated” in article 17 (1) (a) and (b) must be interpreted bearing in mind the different stages of the proceedings before the Court (specifically, the differences in the nature of proceedings pursuant to articles 15, 18, 19 or 53).<sup>46</sup> At the stage of preliminary admissibility proceedings under article 18, there will often be no suspects identified and the exact conduct and legal classification will be unclear,<sup>47</sup> while challenges under article 19 relate to the admissibility of a concrete case, as “defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61”.<sup>48</sup>

In the two Kenyan cases the admissibility challenge “was brought under article 19 (2) (b) concerning a case in which a summons to appear has been issued against specific suspects for specific conduct”.<sup>49</sup> In such circumstances, as the Appeals Chamber further explained, “the words ‘is being investigated’ ... signify the taking of steps directed at ascertaining whether *those suspects* are responsible for *that conduct*, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.<sup>50</sup> The argument put forth by Kenya that it is sufficient for the national investigation into the conduct in question to encompass “persons at the same level in the hierarchy being investigated by the ICC” was rejected.<sup>51</sup>

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<sup>43</sup> *Prosecutor v. Katanga and Chui*, *supra* note 3, § 81. The Appeal Chambers decided that at the relevant time there were no indications of any investigation or prosecution of any crimes allegedly committed in the DRC, § 80.

<sup>44</sup> *Prosecutor v. Muthaura et al.*, *supra* note 41, § 34.

<sup>45</sup> *Prosecutor v. Muthaura et al.*, *supra* note 41, §§ 37 -41; *Prosecutor v. Ruto et al.*, *supra* note 13, §§ 37-42.

<sup>46</sup> *Prosecutor v. Ruto et al.*, *ibid.*, § 39.

<sup>47</sup> *Ibid.*; *Prosecutor v. Muthaura et al.*, *supra* note 41, § 38.

<sup>48</sup> *Prosecutor v. Ruto et al.*, *supra* note 13, § 40; *Prosecutor v. Muthaura et al.*, *ibid.*, § 39.

<sup>49</sup> *Prosecutor v. Muthaura et al.*, *ibid.*, § 40.

<sup>50</sup> *Ibid.*; see also *Prosecutor v. Ruto et al.*, *supra* note 13, § 41.

<sup>51</sup> *Ibid.*, § 32.



The Appeals Chamber further upheld the view expressed by Pre-Trial Chamber II that in order for a case to be inadmissible before the ICC, concrete investigative steps must be undertaken at the national level.<sup>52</sup> In other words, an admissibility challenge based on judicial reforms and promises of future actions cannot succeed.<sup>53</sup> In addition, the Appeals Chambers clearly pointed out that in line with the general principle *onus probandi actori incumbit*, when a State challenges the admissibility of a case, it bears the burden of proof to demonstrate that the case is inadmissible. In the words of the Appeals Chamber: “[t]o discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing”.<sup>54</sup> This approach has recently been approved by the PTC in the Decision on Libya’s challenge to admissibility.<sup>55</sup>

One of the issues raised is the fact that, due to the “same conduct” requirement, national prosecutors “cannot charge crimes—including serious ones—that involve conduct the ICC is not investigating, even if prosecuting different conduct would be far more likely to result in a conviction”.<sup>56</sup> In such a case, when a State wishes to prosecute the same person, but for different conduct, as some argue, the State should rely on part 9 of the Statute which concerns international cooperation and judicial assistance.<sup>57</sup> This places the issue of a State wishing to prosecute what is essentially a different case in the context of the entirety of the Statute. In other words, “under the existing Rome Statute regime, competing claims concerning different cases are resolved through the consultation mechanism, and thus the issue is one of *sequencing*, i.e., which jurisdiction tries its case”.<sup>58</sup> Part 9 does not offer a perfect solution; some of its provisions are in fact quite ambiguous and confusing, but it presents an appropriate framework for the resolution of such problems.

Another question that has been discussed in the literature is whether a prosecution for an ordinary crime (e.g. murder) as opposed to prosecution for an international crime would satisfy the requirements of the same case? Stahn believes that admissibility should be assessed on the basis of a factual determination which then allows the States flexibility “since it does not per se require identity in the legal qualification of the criminal

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<sup>52</sup> *Ibid.*, §§ 62-70.

<sup>53</sup> Hansen believes that Kenya’s reliance on judicial reform as an argument could have resulted from the statements of the Pre-Trial Chamber in the case *Prosecutor v. Kony et al.* referring to an agreement between the Ugandan Government and the LRA and the fact it that was not turned into law. See Hansen, Thomas Obel, *A Critical Review of the ICC’s Recent Practice Concerning Admissibility Challenges and Complementarity*, Melbourne Journal of International Law, Vol. 13, No. 1, 2012, p. 219.

<sup>54</sup> *Prosecutor v. Muthaura et al.*, *supra* note 41, § 61.

<sup>55</sup> *Prosecutor v. Gaddafi*, *supra* note 38, §§ 52, 54.

<sup>56</sup> Heller Kevin John, *A Sentence Based Theory of Complementarity*, Harvard International Law Journal, Vo. 52, No. 1, 2012, p. 239.

<sup>57</sup> Robinson, 2012, pp. 177-180.

<sup>58</sup> *Ibid.*, p. 179.

conduct”.<sup>59</sup> This approach has been recently approved by the Court in the case of *Prosecutor v. Saif al-Islam Gaddafi*.<sup>60</sup> In that case, the Pre-Trial Chamber very clearly articulated its view that the assessment of domestic proceedings “should focus on the alleged conduct and not its legal characterization”.<sup>61</sup> As the PTC further explained, “the question of whether domestic investigations are carried out with a view to prosecuting ‘international crimes’ is not determinative of an admissibility challenge”.<sup>62</sup> It follows that a domestic investigation or prosecution for “ordinary crimes”, to the extent that the case covers the same conduct, should be considered sufficient, and the mere fact that the national criminal justice system lacks legislation criminalizing international crimes does not *per se* render the case admissible before the Court.<sup>63</sup>

A significant, related problem also arises in the context of international crimes, which normally encompass a number of different specific incidents or events, as well as a huge number of victims. Therefore, and especially when it comes to political and military leaders responsible for a wide range of events, it is very likely that different prosecutorial authorities will refer to different instances as non-exhaustive examples of individual acts constituting international crimes. According to the Pre-Trial Chamber in Libya, this, however, does not constitute different conduct.<sup>64</sup> The ICC held that it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution mentioned in the article 58 Decision as constituting instances of Mr. Gaddafi's alleged course of conduct.<sup>65</sup> However, a national investigation needs to encompass “the same conduct underlying the Warrant of Arrest and Article 58 Decision”.<sup>66</sup> This is probably the only possible reasonable approach in line with the purpose of the complementarity principle, since interpreting “same conduct” restrictively would in practice render almost all or at least most of the cases admissible before the ICC.

Having in mind all of the above, it may be concluded that in order for the case to be inadmissible, proceedings must be ongoing and must concern the same case, i.e. the same person and the same conduct. This, however, is not sufficient. In addition, the State must be able and willing to carry out the proceedings. This, second prong of the complementarity test will be analyzed further below.

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<sup>59</sup> Stahn, Carsten, *One Step Forward, Two Steps Back? Second Thoughts on a “Sentence-Based” Theory of Complementarity*, Harvard International Law Journal Online, Vol. 53, No. 1, 2012, pp. 183 -196, p. 189.

<sup>60</sup> *Prosecutor v. Gaddafi*, *supra* note 38.

<sup>61</sup> *Ibid.*, § 85.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, § 88.

<sup>64</sup> *Ibid.*, § 83.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, § 83. That conduct, according to the Chamber, is Mr Gaddafi's use of control over relevant parts of the Libyan State apparatus and Security Forces to deter and quell, by any means, including by the use of lethal force, the demonstrations of civilians against Muammar Gaddafi's regime.

### 2.1.2. Unwillingness and inability to carry out proceedings

The second “fold” of the complementarity test, the unwillingness or inability of a State with jurisdiction to carry out proceedings, opens a whole new set of issues. At first glance, paragraphs (2) and (3) of article 17 give relatively clear guidelines on how they should be understood. Practice has, however, shown that the application of the “unwilling or unable” test is difficult and complex.

As mentioned above, unwillingness and inability will only be considered if the “proceedings requirement” has been met.<sup>67</sup> This has been settled practice of the Court so far, although the latest decision of the Pre-Trial Chamber, which rejected the Libyan inadmissibility claim, seems to have endorsed a more flexible approach to this question. This decision also made it unclear which of the two, unwillingness or inability, should be discussed first.<sup>68</sup> A possible answer might be that an established order of discussion is not even relevant and that it can and should be ascertained on the basis of the specific circumstances of a concrete case. An argument in favour of discussing inability first, as was done in this case, is obviously the political sensitivity of the issue of unwillingness. However, this paper will follow the text of the Rome statute and analyze unwillingness first.

#### 2.1.2.1. “Unwillingness” in light of the due process thesis

The Statute outlines unwillingness in paragraph (2) of article 17; it is to be determined “having regard to the principles of due process recognized by international law”. When establishing the existence of unwillingness, the Court must take into account three situations delineated in paragraph (2), namely the purpose of shielding the person from criminal responsibility, unjustified delays inconsistent with the intent to bring the person to justice, and, finally, the dependence or partiality of the proceedings which had the same effect.

The Statute uses the phrase “the Court shall consider”, but it does not provide a general clause at the end of the list, nor does it use phrases such as *inter alia*. Thus, although the matter is open to different interpretation,<sup>69</sup> it seems that the list should be considered exhaustive, since unwillingness presents an exception that should be interpreted narrowly.<sup>70</sup> In any case, the notion of unwillingness refers to the purpose with which national proceedings are conducted, i.e. subjective motives underlying the proceedings.<sup>71</sup>

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<sup>67</sup> *Supra*, part 2.1.1. of this Article.

<sup>68</sup> Since the Pre-Trial Chamber left the notion of unwillingness out of the discussion and dealt only with the inability of Libya to carry out the proceedings. See *Prosecutor v. Gaddafi*, *supra* note 41, § 138.

<sup>69</sup> For an overview, see Pichon, 2008, p. 191.

<sup>70</sup> Benzinger, Markus, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity*, Max Planck Yearbook of United Nations Law, Volume 7 (2003), p. 606.

<sup>71</sup> Kleffner, Jann K., *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, Journal of International Criminal Justice, Vol. 1, No 1, 2003, p. 87.

The Informal Expert Paper provides a list of factors that may be relevant for determining unwillingness.<sup>72</sup> At the outset, it points to the relevant background context issues, such as: separation of powers, including the powers attributed to institutions of the criminal justice system; degree of *de jure* and *de facto* independence of the judiciary, prosecutors, investigating agencies; privileges and immunities of State authorities; the legal regime of access to evidence, of extradition, of asylum, of due process standards, the rights of the accused, procedures; security conditions for witnesses and investigators, access to the scene of crime.<sup>73</sup> It further points to examples of relevant facts and evidence that may be gathered, such as: delays in various stages of the proceedings compared with normal delays in that national system for cases of similar complexity, or patterns of political interference in investigation and prosecution and of trials reaching preordained outcomes.<sup>74</sup>

While there are various interesting issues regarding unwillingness, one deserves special attention – the issue of due process rights and “all too willingness”. It is questionable whether a case can be admissible before the Court if there is a danger that national proceedings are being conducted in violation of due process, defence rights or other rights of the accused. Could a State admissibility challenge be dismissed on these grounds, and, if so, would the grounds fall under unwillingness or inability?

The “due process thesis” advances the view that a State can be declared “unwilling or unable” on grounds of due process violations disadvantageous for the defendant.<sup>75</sup> It is most frequently justified on the basis of the *chapeau* phrase “having regard to the principles of due process recognized by international law”, but some scholars also rely on subparagraphs (b) and (c) of article 17(2) of the Rome Statute.<sup>76</sup> To consider whether this theory can be accepted, we must first focus on the principles of due process contained in the *chapeau* of paragraph (2) and then on the expressly enumerated situations, the third of which includes the need for independent and impartial proceedings.

The *chapeau* phrasing of article 17(2), that the Court *shall consider* the three situations *having regard* to due process, would suggest that due process considerations may come into play in the context of specifically enumerated situations.<sup>77</sup> In light of this, it would

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<sup>72</sup> Informal Expert Paper: The Principle of Complementarity in Practice, ICC-01/04-01/07-1008-AnxA, 30 March 2009, pp. 28 -31.

<sup>73</sup> *Ibid.*, p. 28.

<sup>74</sup> *Ibid.*, p. 29.

<sup>75</sup> Heller, Kevin John, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, Criminal Law Forum, Vol. 17, 2006, p. 2 et seq. Available at <http://ssrn.com/abstract=907404>. Accessed on 26 October 2012.

<sup>76</sup> For an overview, although she comes to the opposite conclusion, see Trahan, Jennifer, *Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression*, pp. 15-18. Available at: [http://works.bepress.com/jennifer\\_trahan/2](http://works.bepress.com/jennifer_trahan/2). Accessed on 10 September 2013.

<sup>77</sup> For a textual analysis of arguments favouring the due process thesis, see Heller, 2006, pp. 8-9.

seem that “violations of fair trial rights other than the independence and impartiality of the judiciary cannot lead to the admissibility of a case before the ICC”.<sup>78</sup>

Turning to the enumerated situations, it is obvious that the provisions on unwillingness were construed primarily to prevent sham proceedings designed to protect persons responsible for international crimes. This was logical and necessary to ensure that States do not attempt to conduct false proceedings against responsible persons with the consequence of a case being inadmissible before the ICC, as evident from the words “inconsistent with an intent to bring the person concerned to justice”. Hence, it is uncontroversial that both textual and teleological interpretations of relevant statutory provisions support the conclusion that such sham proceedings cannot form a basis for the inadmissibility of a case before the ICC.<sup>79</sup> On the other hand, when it comes to violations disadvantageous to the defendant, such as denial of the right to legal representation, of equality of arms, of the right to examine witnesses and of the right to an impartial and independent tribunal, both textual and teleological interpretations of article 17 (2) (b) and (c) suggest a different conclusion: such violations should not be considered a reason for a case to be admissible before the Court. Even the text of subparagraph (c), which stresses independence and impartiality, requires in addition that the proceedings were conducted or are being conducted in a manner which is inconsistent with the intent to bring the person concerned to justice. Both requirements need to be fulfilled.<sup>80</sup> Rojo notes that the “expression ‘intent to bring the person concerned to justice’ must be referring to the ‘intent to hold somebody accountable’ (result)”.<sup>81</sup> He further argues that it is only where such intent is missing on the part of the relevant State that the Court must intervene in order to hold the person accountable and put an end to impunity.<sup>82</sup> From this it would follow that violations of fair trial rights at the domestic level disadvantageous to the defendant would not lead to a case being admissible before the Court under the heading of unwillingness.

The same conclusion is supported by a number of scholars, who seem to hold that violations of due process may never affect admissibility, not even on grounds of State inability. For example, Pichon argues that the “complementarity principle does not apply to violations of the right to independent and impartial proceedings which are disadvantageous to the accused”.<sup>83</sup> Heller agrees, summarizing his findings in the following manner: “[P]roperly understood, article 17 permits the Court to find a State ‘unwilling or unable’ only if its legal proceedings are designed to make a defendant *more difficult* to convict. If its legal proceedings are designed to make the defendant *easier* to convict, the provision requires the Court to defer to the State no matter how unfair those

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<sup>78</sup> Pichon, 2008, p. 192.

<sup>79</sup> Heller, 2006, p. 3; Pichon, 2008, p. 193.

<sup>80</sup> Heller 2006, pp. 6-7; Rojo, Enrique Carnero, *The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From “No Peace without Justice” to “No Peace with Victor’s Justice”?* Leiden Journal of International Law, Vol. 18, Issue 4, 2005, pp. 835-837.

<sup>81</sup> Rojo, 2005, p. 839.

<sup>82</sup> *Ibid.*

<sup>83</sup> Pichon, 2008, p. 194.

proceedings may be”.<sup>84</sup> Rojo concludes “if the object and purpose of the Statute is the establishment of an international criminal court that complements national efforts to put an end to impunity for international crimes, only domestic proceedings which are delayed or are not impartial or independent in order to shield the person concerned from criminal responsibility are relevant to the ICC”.<sup>85</sup>

However, it seems that the Court is currently leaning towards the acceptance of the due process thesis or is at least sympathetic to it. In the case of *Thomas Lubanga Dyilo*, the Appeals Chamber emphasized that article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognized human rights.<sup>86</sup> The Appeals Chamber, further, importantly recognized that “[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its *provisions* must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.”<sup>87</sup> Notwithstanding the fact that this decision is not directly connected to the issue of complementarity, it provides an insight into the direction the Court might take in the future.

In fact, in its most recent decision in the Libyan case, the Court explicitly took into account fair trial considerations precisely in the context of admissibility and complementarity. Yet, the Court analyzed the issue of fair trial for Mr. Gaddafi in Libya not within the notion of “unwillingness”, which was not addressed at all, but within the assessment of Libyan ability to carry out proceedings in accordance with Libyan law.<sup>88</sup>

#### **2.1.2.2. “Inability” to genuinely carry out the proceedings**

In order to determine inability in a particular case, the Court is instructed to consider whether a State is unable to obtain the accused or evidence or is otherwise unable to carry out its proceedings (article 17 (3) of the Rome statute). Pursuant to article 17(3) of the Statute, such inability of a State must stem from a “total or substantial collapse or unavailability of its national judicial system”. Some argue that the wording of the provision implies that “only one kind of collapse or unavailability would satisfy article 17(3): namely, the kind that prevents a State from effectively investigating or prosecuting the accused”.<sup>89</sup> The Informal Expert Paper seems to endorse this view by proposing the following factors for the assessment that a national judicial system has collapsed or has become unavailable: lack of necessary personnel, judges, investigators, prosecutor or of judicial infrastructure; lack of substantive or procedural penal legislation rendering the

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<sup>84</sup> Heller, 2006, p. 3. Similarly, Rojo, 2005, pp. 835-837.

<sup>85</sup> Rojo, 2005, p. 868.

<sup>86</sup> *Prosecutor v. Lubanga*, *supra* note 14, § 36.

<sup>87</sup> *Ibid.*, § 37.

<sup>88</sup> *Prosecutor v. Gaddafi*, *supra* note 38, §§ 216-217.

<sup>89</sup> Heller, 2006, p. 10.

system “unavailable”; lack of access rendering the system “unavailable”; obstruction by uncontrolled elements rendering the system “unavailable”; and amnesties or immunities rendering the system “unavailable”.<sup>90</sup>

It has been argued, and it could be concluded from the list above, that inability may result from the absence or inadequacy of substantive legislation, especially when a State’s criminal legislation does not correspond to the substantive provisions of the Rome Statute, so an international crime can only be prosecuted as an ordinary one.<sup>91</sup> However, this is highly controversial. As has been explained above, the absence of specific provisions on international crimes in national legislation has not been seen as determinative when trying to establish whether the same case is being investigated at the national level.<sup>92</sup> In other words, to the extent that it covered the same conduct, a domestic investigation or prosecution for “ordinary crimes” has been deemed sufficient, and the lack of incriminations, such as crimes against humanity in national legislation, has not rendered the case automatically admissible before the Court.<sup>93</sup> Hence, it would be inconsistent to conclude the opposite when establishing the second prong of complementarity, i.e. inability to carry out the proceedings.

The determination of inability, as that of unwillingness, also raises a number of questions. One of the most interesting ones is again to what extent due process considerations should impact on the assessment of inability. For sure, the acceptance of the due process thesis requires an extensive interpretation, one prone to most of the already expressed objections. The statement that “fair trial concerns are both a symptom of a substantially collapsed justice system and, particularly when systematic, can cause the substantial collapse of the justice system”<sup>94</sup> is perhaps going too far. Claiming that every national judicial system that does not provide certain due process or fair trial rights has collapsed or is unavailable seems too harsh.<sup>95</sup> Even the most developed western states often breach some fair trial rights and that fact alone would certainly not *per se* render a case admissible before the ICC. The European Court of Human Rights has found a number of violations of some of the fair trial rights in most European states, and in some even on a regular basis (repeated/systematic violations or cases revealing structural problems);<sup>96</sup>

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<sup>90</sup> Informal Expert Paper 2009, p. 31.

<sup>91</sup> Kleffner, 2006, p. 89.

<sup>92</sup> *Prosecutor v. Gaddafi*, *supra* note 38, § 88.

<sup>93</sup> *Ibid.*

<sup>94</sup> O’Donohue, Jonathan, Rigney, Sophie, *The ICC Must Consider Fair Trial Concerns in Determining Libya’s Application to Prosecute Saif al-Islam Gaddafi Nationally*, at EJIL:Talk!, <http://www.ejiltalk.org/the-icc-must-consider-fair-trial-concerns-in-determining-libyas-application-to-prosecute-saif-al-islam-gaddafi-nationally/>. Accessed on 26 October 2012.

<sup>95</sup> Similarly, Heller, 2006, p. 10.

<sup>96</sup> For an overview, see e.g., States with Major Structural/Systemic Problems before the European Court of Human Rights: Statistics. Information document compiled by the Secretariat upon the instructions of the Chairperson, AS/Jur/Inf (2011) 05 rev 2, 18 April 2011. Turkey, for example, is dealing with a number of cases where unfairness of criminal proceedings has been established on account of applicants being convicted based on statements taken under duress and/or without the assistance of a lawyer. For example, see *Salduz v. Turkey* (GC), 27 November 2008, no. 36391/02; *Güveç v. Turkey*, 20 January 2009, no. 70337/01.

yet the proposition that those judicial systems should be found collapsed or unavailable is implausible.

Still, this seems to be the path implicitly taken by the Court in the recent decision in the Libyan admissibility challenge. Libya has been found to be unable genuinely to carry out the investigation or prosecution against Mr. Gaddafi, so the Court did not address the alternative requirement of “willingness” and, within it, the issues raised by the Defence about the impossibility of a fair trial for Mr. Gaddafi in Libya. To begin with, the Defence argued that Mr. Gaddafi would be denied the right to a trial within reasonable time before an independent and impartial tribunal established by law.<sup>97</sup> The Defence indicated that the actions and statements of Libyan officials not only violated the presumption of his innocence, but created a “presumption of guilt” and “reveal[ed] the extent of inappropriate executive influence over the case”.<sup>98</sup> Further, the Defence argued that Mr. Gaddafi’s minimum defence rights would not be guaranteed in Libya. It was specified that he was not notified about the nature of the charges against him,<sup>99</sup> that he was not given adequate time and facilities for the preparation of his defence (manifested in the refusal to ensure privileged communication with the Defence and the seizure of privileged defence documents),<sup>100</sup> and was not ensured legal assistance of his own choosing.<sup>101</sup> Finally, the Defence submitted that Libya had failed to ensure Mr. Gaddafi access to investigative materials and the right to confront witnesses against him.<sup>102</sup>

The Pre-Trial Chamber has discussed some of these fair trial considerations, particularly the right to have a defence counsel appointed, in the context of determining Libya's ability genuinely to investigate or prosecute the case.<sup>103</sup> The Pre-Trial Chamber attached significant weight to the existing difficulties in securing a lawyer for the suspect. It also questioned Libya’s capacity to obtain necessary testimonies and provide adequate protection for witnesses in favour of Mr. Gaddafi.<sup>104</sup>

The Pre-Trial Chamber has assessed Libya's capacity to investigate in accordance with the Libyan Code of Criminal Procedure, Libya's Constitutional Declaration and various human rights instruments that have been ratified by Libya. As the Pre-Trial Chamber has explicitly stated, “[t]his assessment has been pertinent because those issues impact on Libya's ability to carry out its proceedings in accordance with Libyan law”.<sup>105</sup> What seems to flow from this assertion is that the ability of a State genuinely to carry out an investigation or prosecution depends on the degree of development of its criminal justice system. The Court itself emphasized that a state’s ability “must be assessed in the context

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<sup>97</sup> *Prosecutor v. Gaddafi*, *supra* note 38, § 161, 163.

<sup>98</sup> *Ibid.*, § 165.

<sup>99</sup> *Ibid.*, § 161, 163.

<sup>100</sup> *Ibid.*, § 163, 164.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.*, § 217.

<sup>104</sup> *Ibid.*, § 211, 215.

<sup>105</sup> *Ibid.*, § 217.



of the relevant national system and procedures”.<sup>106</sup> This would seem to mean that for the assessment of ability it is not decisive whether a State respects international standards of human rights protection, but whether it adheres to its own substantive and procedural norms. Such interpretation of ability that could, perhaps, be deduced from the wording “collapse or unavailability of its national judicial system”, may have serious consequences. In the case of Libya, which has implemented international standards of fair trial in its own legislation, the Court’s approach to the issue of ability did not seem to cause problems, as Libya’s difficulties lie in the implementation of its substantive and procedural law, including human rights instruments. However, one may question the aptness of this approach in general, when it comes to States that have not ratified relevant human rights instruments, or whose substantive or procedural norms are otherwise substandard to western ideals. Whether those States could be seen as able to genuinely carry out the proceedings, although the rights available to the accused would be limited and would not reach the threshold necessary to qualify the proceedings as fair, is not clear.

Finally, one may also wonder about the role of the term “genuine” in the text of article 17 (1) (a) and (b), which specify the second “fold” of the complementarity test “unless the State is unwilling or unable *genuinely* to carry out the investigation or prosecution” and “unless the decision resulted from the unwillingness or inability of the State *genuinely* to prosecute”. The importance of genuineness as a factor in the discussion on the role of fair trial rights in the complementarity regime is even less clear than the answer to whether those rights are contained within unwillingness and inability. In any case, acceptance of the view that a violation of the accused person’s fair trial rights might lead to a case being investigated and prosecuted by the ICC, as opposed to being declared inadmissible, requires an extensive interpretation of the Statute and cannot easily find support in the current provisions on complementarity.

### 3. CONCLUSION

Complementarity, as a principle that regulates the relationship between the Court and the States, has far reaching consequences. Despite the fact that many issues important for determining whether a concrete case is admissible before the Court on the basis of complementarity are still only vaguely defined, there is no doubt that national proceedings concerning the same case must be ongoing. The existence of such proceedings is seen as a prerequisite for the discussion about unwillingness and/or inability. This seems logical and fully supported by the text of the Statute, regardless of the problems surrounding the interpretation of the “case” and the same person/same conduct test. What still presents a great challenge for the Court, and due to sensitive political implications will most likely continue to do so in the future, is the meaning of the notions of “unwillingness” and “inability”.

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<sup>106</sup> *Ibid.*, § 200.

The current statutory framework does not unequivocally support the interpretation that violations of due process disadvantageous for the accused can constitute a ground for a finding of unwillingness and thus for the admissibility of a case. The inability clause leaves more leeway, but such an interpretation of admissibility provisions seems rather extensive. The ICC is not a human rights court nor does it have a mandate to oversee fairness of procedure in its Member States. Still, to completely ignore fair trial rights and other basic human rights of the accused would substantially invalidate the purpose of the Court and undermine the fundamental values which led to its constitution. It seems that the ICC took that into account when delivering the latest decision in the Libya case. However, a more comprehensive approach should be developed, having in mind the didactic role of international criminal judiciary,<sup>107</sup> as well as the fact that the application of the principle of complementarity will shape future prosecution of international crimes.

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<sup>107</sup> Damaška, Mirjan, *What is the Point of International Criminal Justice?* Chicago-Kent Law Review, Vol. 83, 2008, pp. 343-347.

Sažetak

**NAČELO KOMPLEMENTARNOSTI U PRAKSI  
MEĐUNARODNOG KAZNENOG SUDA**

Načelo komplementarnosti jedno je od najvažnijih načela koja uređuju djelovanje Međunarodnog kaznenog suda. Svrha je tog načela razgraničiti jurisdikciju Suda od jurisdikcije država. Međutim, unatoč relativno jasnim smjernicama iz članka 17. Rimskog statuta, primjena načela u praksi se pokazala problematičnom. Autorice analiziraju razvoj dvostrukog testa u praksi Međunarodnog kaznenog suda počevši od zahtjeva 'postupka u tijeku' i nastavljajući do pojmova nevoljkosti i nesposobnosti. Poseban naglasak stavljen je na pitanje pravičnog suđenja i kontroverznu tvrdnju da bi nepravični postupci na nacionalnoj razini trebali, sami po sebi, učiniti predmet dopuštenim pred MKS-om.

*Ključne riječi: komplementarnost, zahtjev postupka u tijeku, nevoljkost, nesposobnost, pravično suđenje*

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