

Opinion

# Complementarity in Practice: the ICC's Inconsistent Approach in the *Gaddafi* and *Al-Senussi* Admissibility Decisions

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## Abstract

Complementarity represents a seminal feature of the International Criminal Court (ICC), created as an instrument of last resort. It translates into the legal rules of Article 17 of the Rome Statute, which need to be developed through the Court's judicial activity. The challenges brought by Libya to the admissibility of the cases against Saif Gaddafi and Abdullah Al-Senussi offered the ICC a chance to clarify some aspects of complementarity. In particular, they touched upon two crucial elements of Article 17: the criterion of "otherwise" inability to carry out proceedings, and the extent to which fair trial breaches matter for the purpose of assessing unwillingness. The Pre-Trial Chamber I, while dismissing the challenge concerning Gaddafi, held the case against Al-Senussi inadmissible before the Court. The Appeals Chamber subsequently upheld both these holdings. This paper, carrying out a comparative analysis, points out the inconsistency affecting the two decisions, which is due to a conflicting assessment of the same element: Libya's failure to provide the accused with legal counsel. The author contends that, in the Al-Senussi case, the lack of legal representation resulted in Libya's inability and unwillingness to carry out the trial. Accordingly, the Chambers should have held the case admissible before the Court, as they did with Gaddafi. Also, the author suggests that incoherent approaches to similar situations expose the Court to a recurrent accusation: that of being heavily influenced by political factors.

Key words: admissibility; complementarity; International Criminal Court; Libya; fair trial standards

## I. Introduction

The Rome Statute defines the International Criminal Court ('ICC', or 'Court') as "complementary to national jurisdictions".<sup>1</sup> In order to respect States' primary duty to exercise criminal jurisdiction, the ICC has been envisaged as an instrument of last resort, meant to step in when justice cannot be achieved at the domestic level.<sup>2</sup> The complementarity principle shapes the relationship between the Court and national authorities. As such, it represents a cornerstone of the entire ICC machinery, as well as "one of [its] most contentious features".<sup>3</sup>

<sup>1</sup> Preamble - Art. 1, Rome Statute of the International Criminal Court (hereinafter, 'ICC Statute').

<sup>2</sup> Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 153.

<sup>3</sup> Marcus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck Yearbook on United Nations Law* 593.

The Statute implements complementarity through the legal rules laid down in Article 17, dealing with “Issues of admissibility”.<sup>4</sup> The criteria set forth in this provision leave several elements relatively undefined, allowing the Court a considerable degree of discretion in the assessment of admissibility. Thus, the ICC is called to develop a comprehensive regime through its judicial activity.<sup>5</sup>

The admissibility challenges brought by Libya regarding the cases against Saif Gaddafi and Abdullah Al-Senussi offered a chance to do so. In particular, they touched upon two crucial elements of Article 17: the criterion of “otherwise” inability to carry out proceedings, and the extent to which fair trial breaches matter for the purpose of assessing unwillingness. The ICC Pre-Trial Chamber I (‘PTC’), while dismissing the challenge concerning Gaddafi, held the case against Al-Senussi inadmissible before the Court. The Appeals Chamber (‘AC’) subsequently upheld both these holdings.

This paper, carrying out a comparative analysis, will point out the inconsistency affecting the PTC’s decisions, which is due to a conflicting assessment of the same element. Specifically, as already noted by a scholar,<sup>6</sup> the PTC considered Libya’s failure to provide the accused with legal counsel sufficient to dismiss the admissibility challenge in the *Gaddafi* case. However, it then contradicted this finding in the *Al-Senussi* case. The argument will be that, in the latter, the lack of legal representation resulted in Libya’s inability *and* unwillingness to carry out the trial. Accordingly, the Chambers should have held the case admissible before the Court, as they did with Gaddafi. Also, this paper will suggest that inconsistent approaches to similar situations expose the Court to a recurrent accusation - that of being heavily influenced by political factors.<sup>7</sup>

Part 1 will analyse the admissibility regime, so as to provide the legal background against which the Court operated. In particular, it will examine the concepts of genuineness, unwillingness and inability, encompassed in Article 17 of the Rome Statute. Parts 2 and 3 will offer a comparative analysis of the PTC’s decisions in the *Gaddafi* and *Al-Senussi* cases, pointing out the already mentioned inconsistency between the two. Part 4 will discuss the AC’s failure to eliminate said inconsistency. It will do so highlighting that, in the *Gaddafi* case, the AC left the question of unwillingness untouched, thus opening the way to a confirmation of the PTC’s holding in regarding Al-Senussi. Then, the focus will shift to the AC’s assessment of inability. Also, Part 4 will put forward an incidental consideration. Specifically, it will argue that, in the context of admissibility, the presumption in favour of domestic prosecutions clashes with the burden of proof, which the Court attributed to the challenging State. Therefore, such a presumption should not operate in admissibility challenges. Finally, Part 5 will point out a risk stemming from inconsistent holdings, namely that of exposing the Court to criticisms based on its alleged politicisation.

## II. Article 17 of the Rome Statute: the Admissibility Regime

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<sup>4</sup> Michael A Newton, ‘Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court’ (2001) 167 *Military Law Review* 52.

<sup>5</sup> John Holmes, ‘The Principle of Complementarity’ in Roy Lee (ed), *The International Criminal Court: the Making of the Rome Statute* (Kluwer Law International 1999) 75.

<sup>6</sup> Kevin Jon Heller, ‘PTC I’s Inconsistent Approach to Complementarity and the Right to Counsel’ *Opinio Juris* 12 October 2013 <<http://opiniojuris.org/2013/10/12/ptc-inconsistent-approach-right-counsel/>> (all the on-line sources referred to have been last accessed 26 August 2014).

<sup>7</sup> See, e.g., Pietro Gargiulo, ‘The Controversial Relationship between the International Criminal Court and the Security Council’, *Essays on the Rome Statute of the International Criminal Court*, vol 1 (II Sirente 1999) 85–90.

Both the preamble and Article 1 of the Rome Statute define the ICC as “complementary to national criminal jurisdictions”. This is a seminal feature of the Court, established as an institution of last resort. The main rationale underlying the complementarity regime is the deference paid to State sovereignty, of which criminal jurisdiction is an essential aspect.<sup>8</sup> National prosecution, therefore, represents the norm, while international proceedings should only be triggered under exceptional circumstances.<sup>9</sup> However, the principle is not just a “concession to realpolitik”:<sup>10</sup> two practical reasons well justify complementarity. First, as the Court’s resources are limited, so too is its scope for action. Secondly, national authorities are generally in a privileged position to efficiently carry out investigations, due to the immediate access to evidence and witnesses.<sup>11</sup>

The legal framework resulting from the complementarity principle is laid down in Article 17 of the Rome Statute, which regulates “Issues of admissibility”. The provision establishes that a case is inadmissible before the Court when it is being, or it has been, investigated or prosecuted at the domestic level. However, it admits an exception where “the State is unwilling or unable genuinely to carry out the investigation or prosecution”. The following paragraphs will examine the elements of genuineness, unwillingness and inability, which inform admissibility challenges.

### *A. Genuineness*

When discussing complementarity, the Rome Statute negotiators wanted to avoid the ICC becoming an international appeal body, able to revise every judgment delivered by national courts. Consequently, they sought to limit the Court’s discretion in assessing the quality of domestic proceedings.<sup>12</sup> While criteria such as “effectiveness” were rejected as too subjective, the choice finally made was to use the adverb “genuinely”, which had gained broad acceptance, although some delegations still opposed it because they considered it too vague.<sup>13</sup>

Objective as it may be, the term has been described as “not at all clear”.<sup>14</sup> Besides, neither the Statute nor the *travaux préparatoires* provide any guidance on its practical implications.<sup>15</sup> Some authors pointed out its affinity to the concept of good faith, which, however, was among the terms rejected due to its subjectivity. An investigation or prosecution, despite being conducted in good faith by a State, could lack genuineness because of other, more objective, factors.<sup>16</sup> The correct interpretation, then, appears to be that a trial is genuine when it is truly intended to bring the offender to justice, and it is not merely a farce put in place to shield the accused from an effective prosecution.<sup>17</sup> According to this view, the wording echoes paragraph 4 of the Preamble to the ICC Statute, which calls for the “effective prosecution” of serious international crimes. Even so, it has been

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<sup>8</sup> Benzing (n 3) 595.

<sup>9</sup> Okechukwu Oko, ‘The Challenges of International Criminal Prosecutions in Africa’ (2008) 31 *Fordham International Law Journal* 362.

<sup>10</sup> Benzing (n 3) 599.

<sup>11</sup> ICC Office of the Prosecutor, ‘Informal expert paper: The principle of complementarity in practice’ 2003, para. 1.

<sup>12</sup> Holmes, ‘The Principle of Complementarity’ (n 5) 49.

<sup>13</sup> John Holmes, ‘Complementarity: National Courts versus the ICC’ in Antonio Cassese et al. (eds), *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press 2002) 674.

<sup>14</sup> Paolo Benvenuti, ‘Complementarity of the International Criminal Court to National Criminal Jurisdiction’ in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the International Criminal Court*, vol I (II Sirente 1999) 42.

<sup>15</sup> Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law: Origins, Development and Practice* (Martinus Nijhoff 2008) 164.

<sup>16</sup> Holmes, ‘Complementarity: National Courts versus the ICC’ (n 13) 674.

<sup>17</sup> Andreas Zimmermann, ‘The Creation of a Permanent International Criminal Court’ (1998) 2 *Max Planck Yearbook on United Nations Law* 220, note 184.

doubted whether the formula really adds anything to the criteria set out in Article 17, paragraphs 2 and 3, meant to guide the Court in determining a State's unwillingness or inability.<sup>18</sup>

### ***B. Unwillingness***

Article 17(2) states that, “[i]n order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more” of the following situations occur:

- a) the proceedings are being undertaken “for the purpose of shielding the person concerned from criminal responsibility”;
- b) “[t]here has been an unjustified delay (...) which (...) is inconsistent with an intent to bring the person concerned to justice”;
- c) the proceedings “are not being conducted independently or impartially”, and they “are being conducted in a manner which (...) is inconsistent with an intent to bring the person concerned to justice”.

The reference to fair trial principles in the *chapeau* of Article 17(2) gave rise to controversies on its interpretation. At a first glance, one could deduce that, when domestic proceedings are not fully in line with the accused's right to a fair trial then unwillingness can be declared. Some commentators have adopted this view.<sup>19</sup> However, the very reason for adding a provision on unwillingness in Article 17 was to avoid sham trials being carried out for the sole purpose of shielding perpetrators from criminal responsibility.<sup>20</sup> Its introduction was intended to add objectivity to the admissibility regime. All Article 17(2) subparagraphs deal with circumstances benefiting the accused, and not prejudicing his/her rights. Explicit reference is made to (a) “the purpose of shielding the person concerned from criminal responsibility” and (b)(c) the inconsistency “with an intent to bring the person concerned to justice”. This is important especially as regards subparagraph (c): in the absence of its second part, the provision, together with the *chapeau* of Article 17(2), could suggest an interpretation in favour of the accused's rights. On the contrary, the correct view seems to be that practices inconsistent with fair trial standards – such as secret proceedings – can indicate unwillingness only when intended to shield the accused from investigation and prosecution.<sup>21</sup> The drafting history of Article 17 supports this conclusion. During the negotiations, most delegations maintained that the problem of overly harsh national proceedings was to be addressed by human rights bodies, and not by the ICC. Consequently, a proposal by Italy envisaging the lack of due process as a ground for admissibility<sup>22</sup> was rejected.<sup>23</sup> Therefore, unwillingness cannot be declared simply because domestic proceedings fail to ensure international fair trial standards. If it were the case, the ICC would be attributed the task to supervise national courts, which is inconsistent with its Statute.<sup>24</sup>

<sup>18</sup> Benzing (n 3) 603.

<sup>19</sup> William Schabas, *An Introduction to the International Criminal Court* (3rd edn, Cambridge University Press 2007) 184.

<sup>20</sup> Holmes, ‘The Principle of Complementarity’ (n 5) 50.

<sup>21</sup> Holmes, ‘Complementarity: National Courts versus the ICC’ (n 13) 676.

<sup>22</sup> Draft Proposal by Italy, UN Doc. A/AC.249/1997/WG.3/IP.4, 5 August 1997: “In deciding on issues of admissibility under this article, the Court shall consider whether... (ii) the (...) investigations or proceedings (...) were or are conducted with full respect for the fundamental rights of the accused”.

<sup>23</sup> Holmes, ‘The Principle of Complementarity’ (n 5) 50.

<sup>24</sup> Rolf Einar Fife, ‘The International Criminal Court – Whence It Came, Where It Goes’ (2000) 69 *Nordic Journal of*

Still, Mégret and Samson have expressed the view - shared by this writer - that *extreme* violations of the accused's rights can be considered indicators of unwillingness.<sup>25</sup> The argument is based on a careful analysis of Article 17. Indeed, one must bear in mind that (b) unjustified delays and (c) proceedings lacking impartiality/independence assume relevance when "inconsistent with an intent to bring the [accused] to justice". As the two authors have suggested, the word 'justice' cannot be considered to admit those proceedings which completely disregard the principles of the criminal process. The issue, then,

"is one of threshold. [T]he litmus test is not whether the right to a fair trial has been violated in itself, but whether the degree to which it has been violated is such that one cannot realistically say that there has been a trial at all, thus revealing (...) unwillingness".<sup>26</sup>

When proceedings are undertaken for the sole purpose of reaching a predetermined conviction, "the line between imperfect justice and absolute injustice is crossed".<sup>27</sup> In such cases, there is no intent to bring an individual to justice. Admittedly, drawing the line between a real trial and an illusory one is a hard task. It will be for the Court to operate a case-by-case determination. However, some elements could well reflect a State's unwillingness to carry out a proper criminal prosecution: for instance, the manifest partiality of the bench, the commission of violence against witnesses, or the use of torture to obtain evidence.<sup>28</sup>

### C. Inability

Article 17(3) of the Rome Statute identifies three circumstances potentially leading the Court to determine a State's inability to proceed:

- a) "the State is unable to obtain the accused";
- b) the State is unable to obtain "the necessary evidence and testimony"; or
- c) the State is "otherwise unable to carry out its proceedings".

The provision establishes that all these situations have to be "due to a total or substantial collapse or unavailability of [the concerned State's] national judicial system". This last clause was the object of discussions at the Rome Conference, and the wording "total or substantial collapse" was finally preferred to "partial collapse", which appeared in the Draft Statute of the Preparatory Committee.<sup>29</sup> Such a change allowed States to retain exclusive jurisdiction in situations where an armed conflict, while affecting some regions, does not extend to the whole country, so that prosecution at the national level is still possible in other venues.<sup>30</sup>

Some authors have maintained that, when domestic laws characterise the accused's conduct as ordinary crimes, instead of international ones, inability can be declared.<sup>31</sup> This position is based on the view, expressed by the International Criminal Tribunal for the former

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*International Law* 66–67.

<sup>25</sup> F Mégret and MG Samson, 'Holding the Line on Complementarity in Libya' (2013) 11 *Journal of International Criminal Justice* 585–586.

<sup>26</sup> *Ibid.* 584–585.

<sup>27</sup> *Ibid.* 586.

<sup>28</sup> *Ibid.*

<sup>29</sup> Holmes, 'The Principle of Complementarity' (n 5) 55.

<sup>30</sup> Holmes, 'Complementarity: National Courts versus the ICC' (n 13) 677.

<sup>31</sup> E.g. Jann Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 89.

Yugoslavia ('ICTY') in the *Tadić* case, that one of the aims of international criminal tribunals is averting the "trivialisation" of the most serious crimes against humanity.<sup>32</sup> However, this interpretation seems to go well beyond the aims of the ICC complementarity regime. As Benzing has pointed out, an interpretation consistent with the Statute is that inability could be declared when the national legislation does not penalise the conduct at all, or when the penalties imposed are manifestly inadequate in relation to the gravity of the crime.<sup>33</sup>

While options (a) and (b) designate situations that can be objectively acknowledged, option (c) deals with a range of residual circumstances, whose concrete determination is left to the Court on a case-by-case basis. On the one hand, the provision reveals the effort to delimit the scope for subjective decisions due to the concern of safeguarding sovereignty - which shaped complementarity discussions at the negotiations.<sup>34</sup> On the other hand, it reflects the concern not to excessively circumscribe the scope for inability, thus preventing the Court from intervening under unforeseen circumstances so requiring. As a result, the Court is allowed a certain degree of discretion in the assessment of a State's inability to carry out proceedings.<sup>35</sup>

Although negotiators of the Rome Statute attempted to subject admissibility to an objective regime, several aspects remain to be spelt out through the Court's judicial activity. Notably, it has been pointed out that the extent to which violations of fair trial standards matter for the purpose of assessing unwillingness is unclear. Also, the broad criterion of "otherwise" inability is susceptible of conferring relevance to unforeseen circumstances. These two elements require the ICC's jurisprudence to develop further: the *Gaddafi* and the *Al-Senussi* admissibility challenges touched, *inter alia*, upon them. However, given the inconsistency between the decisions, the Court missed the chance to spread clarity over crucial elements characterising admissibility. The PTC, in fact, after holding the case against Gaddafi to be admissible, ruled out inability and allowed Libya to proceed against Al-Senussi. The AC then upheld both these decisions. In the *Al-Senussi* case, for the first time the ICC held a case inadmissible applying the complementarity principle. Part 2 will carry out a comparative analysis of the PTC's decisions.

### III. The Admissibility of the Case against Gaddafi

On 26 February 2011 the Security Council, considering that the forcible response carried out by governmental forces against demonstrators from 15 February 2011 could have resulted in the commission of crimes against humanity, referred the situation in Libya to the ICC Prosecutor.<sup>36</sup> As a result of the Prosecutor's investigation, the PTC issued warrants of arrest for Saif Gaddafi - who was considered Libya's *de facto* prime minister - and the head of the Military Intelligence Abdullah Al-Senussi.<sup>37</sup> Consequently, a case against them commenced before the Court. On 1 May 2012, pursuant to article 19 ICC Statute, Libya filed a challenge to the admissibility of the case against Saif Gaddafi, based on the fact that its national judicial authorities were actively investigating the accused in order to bring him to justice.<sup>38</sup>

<sup>32</sup> See Benzing (n 3) 612, referring to ICTY Appeals Chamber, Prosecutor v. Tadić, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, para. 58.

<sup>33</sup> Ibid 615.

<sup>34</sup> Holmes, 'The Principle of Complementarity' (n 5) 74.

<sup>35</sup> Holmes, 'Complementarity: National Courts versus the ICC' (n 13) 678.

<sup>36</sup> United Nations Security Council Resolution 1970 (2011), para. 4.

<sup>37</sup> ICC Pre-Trial Chamber I, 'Warrant of Arrest for Saif Al-Islam Gaddafi' (hereinafter 'Gaddafi Arrest Warrant'), and 'Warrant of Arrest for Abdullah Al-Senussi', 27 June 2011.

<sup>38</sup> ICC Pre-Trial Chamber I, 'Application on behalf of the Government of Libya pursuant to Article 19 of the ICC

The PTC issued the *Gaddafi* Admissibility Decision on 31 May 2013.<sup>39</sup> It started by clarifying that, according to the AC's jurisprudence, the principle of complementarity – although expressing a preference for national proceedings – does not relieve the challenging State from bearing the burden of proof as regards the admissibility test. Nevertheless, the PTC maintained that an evidentiary debate will be meaningful only when doubts arise as to whether domestic investigations or prosecutions are genuine. Since this was the case with Gaddafi, Libya had to demonstrate that it was taking concrete steps towards ascertaining his criminal responsibility.<sup>40</sup> The PTC then turned to addressing the admissibility challenge, following the two-limb test set out in article 17(1)(a) ICC Statute.

### *A. The 'Same-conduct' Test*

The first limb of the test consists in assessing whether an investigation or prosecution of the *same* case before the Court is on-going at the national level. The PTC noted that the assessment of domestic proceedings should focus on the alleged conduct, and not on its legal characterisation. Therefore, when covering the same conduct, a domestic investigation or prosecution for ordinary crimes is sufficient. Accordingly, Libya's lack of legislation penalising crimes against humanity did not *per se* result in admissibility before the Court.<sup>41</sup> Furthermore, the national investigation does not need to cover *all the events* mentioned in the arrest warrant (in the case at issue, the murders committed by Libyan Security Forces “in Tripoli, Misrata and Benghazi as well as in (...) Al-Bayda, Derna, Tobruk and Ajdabiya”).<sup>42</sup> On the contrary, it must concern the same *general course of conduct* alleged, i.e. Gaddafi's control over the State apparatus and Security Forces to deter – even using lethal force – the demonstrations of civilians against the regime.<sup>43</sup>

The PTC found that, due to the scant specificity of the evidence produced by Libya, it was impossible to identify the precise scope of the domestic investigation. While progressive steps to bring Gaddafi to justice had been undertaken, Libya failed to prove that it was investigating the same case already before the Court.<sup>44</sup>

As the AC clarified in the *Katanga* case, unwillingness and inability should be addressed only when the ‘same-conduct’ test has been satisfied: “[t]o do otherwise would be to put the cart before the horse”.<sup>45</sup> Nevertheless, the PTC adopted a different approach, turning to address inability, which is part of the second limb of the admissibility test. Since Libya was found unable to proceed against Gaddafi, the admissibility challenge was eventually dismissed. The question arises as to whether the PTC would have reached the same conclusion even on the sole ground of the ‘same-conduct’ test. The just mentioned AC's jurisprudence would only allow a positive answer. However, it should be highlighted that, having found Libya unable to proceed against the accused, the PTC explicitly stated that addressing unwillingness was not necessary.<sup>46</sup> Thus, the question remains open.

At this point, an interim consideration on the ‘same-conduct’ test can be put forward. When assessing whether a domestic investigation existed, the PTC, in practice, also evaluated

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Statute’, 1 May 2012.

<sup>39</sup> ICC Pre-Trial Chamber I, “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”, 31 May 2013 (hereinafter ‘Gaddafi Admissibility Decision’).

<sup>40</sup> *Ibid.*, paras. 52-54.

<sup>41</sup> *Ibid.*, paras. 85-88.

<sup>42</sup> Gaddafi Arrest Warrant, para. 10.

<sup>43</sup> Gaddafi Admissibility Decision, para. 133.

<sup>44</sup> *Ibid.*, paras. 132-137.

<sup>45</sup> ICC Appeals Chamber, ‘Judgment 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’, 25 September 2009, para 78.

<sup>46</sup> Gaddafi Admissibility Decision, para. 138.

Libya's willingness to prosecute Gaddafi. In fact, the statement at paragraph 132 – “the evidence presented satisfactorily demonstrates that a number of progressive steps directed at ascertaining Mr Gaddafi's criminal responsibility have been undertaken by the Libyan authorities” – would hardly be compatible with a finding of unwillingness. Notably, in the decision concerning the admissibility of the case against Al-Senussi, the PTC explained how “the two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked”.<sup>47</sup>

### ***B. The Inability Test***

The second limb of the admissibility test consists in the assessment of whether the concerned State is “unwilling or unable genuinely to carry out the investigation or prosecution”.<sup>48</sup> The PTC stated that the ability of a State genuinely to carry out the proceedings must be assessed against “the relevant national system and procedures”. Therefore, it was to be ascertained whether Libyan authorities were able to investigate or prosecute the accused under the substantive and procedural law applicable in Libya.<sup>49</sup> The PTC listed the rights granted to the defendant by the Libyan Code of Criminal Procedure (‘LCCP’). Particularly relevant here is Article 106, envisaging the right to a lawyer from the investigation stage, both when the accused is interviewed by the Prosecutor-General and when he/she is confronted by witnesses.<sup>50</sup>

The PTC held that, despite the efforts made, Libya was still incapable of exercising its jurisdiction fully across the entire country, thus rendering its national system “unavailable” within the meaning of Article 17(3) ICC Statute. As a consequence, Libya was “unable to obtain the accused” and the necessary testimony, and was also “otherwise unable to carry out [the] proceedings” against Gaddafi in compliance with its national laws.<sup>51</sup>

As for the inability to obtain the accused, the PTC noted that Gaddafi was still under the custody of the Zintan militia - which had captured him on 19 November 2011 while he was trying to flee from Libya<sup>52</sup> - and that, despite the central Government's efforts to secure his transfer, no progress to this effect had been made since his capture in November 2011. As submitted by Libya, in absentia trials are not permitted under Libyan law when the accused is present on Libyan territory. Therefore, the trial could not take place without Gaddafi's participation.<sup>53</sup> Moreover, the lack of control over certain detention facilities, along with the uncertainties over the existence of witness protection programmes under Libyan law, was considered to have a direct bearing on the investigation.<sup>54</sup>

Finally, the PTC considered the fact that the accused was still lacking legal representation. Libya had indicated that Ministry of Justice officials had engaged in continuing high level contacts with the Libyan Law Society and the Popular Lawyer's Office in order to find a suitably qualified attorney. Nonetheless, according to the PTC, these submissions fell short of substantiating how the obstacles in securing a lawyer to the accused were going to be overcome. Furthermore, the PTC noted Libya's submission that the interrogation of Gaddafi without the presence of his counsel was not a breach of Libyan law, as the presence

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<sup>47</sup> ICC Pre-Trial Chamber I, ‘Decision on the admissibility of the case against Abdullah Al-Senussi, 31 May 2013 (hereinafter ‘Al-Senussi Admissibility Decision’), para. 210.

<sup>48</sup> Art. 17, Para. 3 ICC Statute.

<sup>49</sup> Gaddafi Admissibility Decision, para. 200.

<sup>50</sup> *Ibid.*, paras. 201-202.

<sup>51</sup> *Ibid.*, para. 205.

<sup>52</sup> ‘Gaddafi's Son Saif Al-Islam Captured in Libya’ *BBC* (19 November 2011) <<http://www.bbc.co.uk/news/world-middle-east-15804299>>.

<sup>53</sup> *Ibid.*, paras. 206-208.

<sup>54</sup> *Ibid.*, paras. 209-211.



of counsel during interrogations pursuant to Article 106 LCCP is only required where counsel has been appointed. However, the PTC considered the failure to nominate an attorney “an impediment to the progress of [the] proceedings”. The PTC’s conclusion leaves no doubt as to whether the lack of legal representation constitutes, *per se*, a ground on which to declare inability: “If this impediment is not removed, a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system”.<sup>55</sup>

### ***C. Overall Conclusion***

The PTC, having found Libya unable genuinely to carry out an investigation, did not consider necessary to address the alternative requirement of unwillingness,<sup>56</sup> holding the case admissible before the Court.<sup>57</sup> Also, it recalled that “a finding on admissibility is predicated on facts *as they exist at the time of the proceedings* concerning the admissibility challenge”.<sup>58</sup> As will be addressed below, in the *Al-Senussi* case, while formally restating this principle, the PTC substantially departed from it.

## **IV. The Inadmissibility of the Case against Al-Senussi**

The Libyan Government challenged the admissibility of the case against Al-Senussi on 2 April 2013. The PTC issued the *Al-Senussi* Admissibility Decision on 11 October 2013. Contrarily to what it decided in the *Gaddafi* case, the PTC held the case inadmissible before the Court, finding the ‘same-conduct’ requirement to be met, and Libya neither unable nor unwilling genuinely to carry out the proceedings. The PTC proceeded following the two-limb test already adopted in the *Gaddafi* case.

### ***A. The ‘Same-conduct’ Test***

In the Admissibility Challenge (filed before the PTC decided on the admissibility of the *Gaddafi* case), Libya underlined a lack of clarity, in the Court’s jurisprudence, on the precise criteria to be met in order to satisfy the ‘same-conduct’ test. In particular, the Court had never made clear whether the challenging State has to investigate precisely the same incidents under investigation by the Court. According to Libya, a flexible definition of “case” has to be adopted, in order to allow the domestic authorities a certain discretion and autonomy in the determination of the conduct to be prosecuted. Finally, Libya argued that its investigation into Al-Senussi covered, and was actually broader than, the case before the Court.<sup>59</sup>

The PTC started by considering that the incidents listed in the decision to issue an arrest warrant did not represent “unique manifestations” of the accused’s criminal conduct. Rather, they were illustrative and non-exhaustive examples, and were not in fact listed by the warrant itself, which instead focused only on the conduct for which Al-Senussi’s arrest had been sought. Therefore, it was not necessary to ascertain whether domestic proceedings covered all the incidents investigated by the Court. Rather, the fact that some of them were, or were not, investigated by national authorities could be taken into account as relevant indicators.<sup>60</sup>

The PTC considered the elements provided by Libya in its submissions - witness statements,

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<sup>55</sup> *Ibid.*, paras. 212-214, emphasis added.

<sup>56</sup> *Ibid.*, para. 216.

<sup>57</sup> *Ibid.*, para. 219.

<sup>58</sup> *Ibid.*, para. 220, emphasis added.

<sup>59</sup> *Al-Senussi* Admissibility Decision, paras. 31-37

<sup>60</sup> *Ibid.*, paras. 76-79.

documentary evidence and intercepts<sup>61</sup> - sufficient to conclude that progressive steps in the proceedings were being taken, and to identify the subject-matter of such proceedings.<sup>62</sup> The PTC recalled the object of the case against Al-Senussi before the Court, namely the killings of many civilian demonstrators and political dissidents committed in Benghazi from 15 February until at least 20 February 2011, as part of a policy of the Libyan State to deter the revolution against the regime. In light of the evidence provided by Libya, the Court held that the domestic investigation substantially covered the same conduct as alleged in the proceedings before the Court.<sup>63</sup>

It has been stated above, when considering the *Gaddafi* Admissibility Decision, that the two limbs of the admissibility test are strictly related. This appears even more evident in the case at stake. Not only, in fact, did the ‘same-conduct’ test reveal Libya’s willingness to proceed against Al-Senussi. Also, it provided elements which were relevant for the purpose of assessing ability. It should be remembered, in fact, that the impossibility of obtaining witness statements was considered a strong indicator of the Libyan judicial system’s “unavailability” to prosecute Gaddafi. In the *Al-Senussi* case, on the other hand, the PTC considered the same element as a ground on which to identify the scope of the proceeding, also assessing, to a certain extent, its effectiveness.

### ***B. The Inability Test***

Turning to the second limb of the test, the PTC stated that, while either unwillingness or inability is sufficient to hold a case admissible, “in practice, the same factual circumstances may often have a bearing on both aspects”. According to the PTC this interplay was reflected in the parties’ submissions, which did not clearly distinguish between the two elements. Therefore, instead of attempting a separate analysis, the PTC addressed in turn all the submissions in order to come to an overall determination of “unwillingness and/or inability”.<sup>64</sup> For the purposes of this paper, it is noteworthy that, as a result of this aggregate approach, the same reasoning allowed the PTC to conclude that neither unwillingness nor inability could be declared on the ground of Libya’s failure to provide the accused with legal counsel. Therefore, this reasoning will be examined below, in the paragraphs addressing inability. The PTC’s overall conclusion on unwillingness was that the investigation into Al-Senussi was not inconsistent with the intent to bring the accused to justice.<sup>65</sup> Regarding inability, the PTC considered whether, as in the *Gaddafi* case, at least one of the criteria set out in Article 17(3) ICC Statute were fulfilled.

#### *1. Inability to Obtain the Accused*

The “inability to obtain the accused” was excluded on the ground that Al-Senussi - unlike Gaddafi - was already in the custody of the Libyan authorities.<sup>66</sup> The PTC was not persuaded by the Defence proposition that the Government of Libya did not exercise control over the Al-Hadba prison, where the accused was being held. On the contrary, it was satisfied that Libya had demonstrated to exercise sufficient control over the facility.<sup>67</sup>

#### *2. Inability to Obtain the Necessary Evidence and Testimony*

As regards the second criterion, it has been clarified that the incapacity to obtain the

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<sup>61</sup> Ibid., paras. 83-157.

<sup>62</sup> Ibid., para. 160.

<sup>63</sup> Ibid., paras. 163-168.

<sup>64</sup> Ibid., paras. 170-171.

<sup>65</sup> Ibid., paras. 290-293.

<sup>66</sup> Ibid., para. 294.

<sup>67</sup> Ibid., para. 264.

necessary evidence and testimony can indicate inability to proceed only when resulting from “a total or substantial collapse or unavailability” of the concerned State’s judicial system. Since the judicial system in question was the same as in the *Gaddafi* case, and given that Libya provided “no new submissions intended to demonstrate the existence and effective functioning of a witness protection programme in the country”, the PTC had to consider the relevance of the persisting security challenges to the proceedings carried out against Al-Senussi by Libya.<sup>68</sup>

The PTC observed that Libya provided a considerable amount of evidence collected as part of its investigation, including witness and victims' statements as well as pieces of documentary evidence. In the PTC's view, in the case at issue there was no indication that collection of evidence and testimony was going to cease because of security concerns for witnesses, or due to the absence of governmental control over certain detention facilities. The PTC observed that the judicial proceedings against the accused were progressing and had reached the accusation stage. Therefore, while reiterating its concerns about the lack of appropriate witness protection programmes, the PTC did not consider this fact to result in Libya's inability genuinely to carry out its proceedings against Al-Senussi.<sup>69</sup>

The rationale of this finding is doubtful. The Defence brought to the Chamber’s attention several Non-Governmental Organisations’ reports and media articles, according to which governmental authorities, local prosecutors, and judges faced security threats and were targeted with violence. In particular, the Deputy Prosecutor assigned to the case of Al Senussi, Taha Bara, was abducted and abused by militia groups in May 2013. Libya submitted that, rather than abducted, Taha Bara was arrested in circumstances unrelated to the case. The PTC stated not to possess the elements to ascertain whether a correlation between the abduction and the case existed. Therefore, it was unable to draw any conclusion from the event.<sup>70</sup> The PTC also argued that “although Libya carries the burden of proof, any factual allegation raised by any party or participant must be sufficiently substantiated in order to be considered properly raised”.<sup>71</sup> However, the thoroughness of the Defence’s arguments appear sufficient to justify placing on Libya the duty to disprove a relation between the abduction and the trial. In this sense, the PTC’s evaluation of the matter resulted in subverting the burden of proof.

More generally, Judge Van den Wyngaert, in her declaration appended to the Decision, expressed concern about the abduction and release of the Libyan Prime Minister Ali Zeidan, which occurred on 10 October 2013. Highlighting the risk that a further deterioration of the security situation could affect the proceedings against Al-Senussi, Judge Van den Wyngaert stated that seeking further submissions from the parties on the matter would have been preferable.<sup>72</sup>

### 3. *Lack of Legal Representation*

The most notable inconsistency between the *Gaddafi* and the *Al-Senussi* Admissibility Decisions is the evaluation made of the accused’s lack of legal representation. As already pointed out, in the *Gaddafi* case the PTC made it clear that the circumstance would have been able, *per se*, to determine Libya’s inability to proceed.

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<sup>68</sup> Ibid., paras. 286-288.

<sup>69</sup> Ibid., paras. 298-301.

<sup>70</sup> Ibid., paras. 273-276.

<sup>71</sup> Ibid., para. 208.

<sup>72</sup> Ibid., ‘Declaration of Judge Christine Van den Wyngaert’. Heller has defined “unusual” Judge Van den Wyngaert’s step to append a declaration to the Decision (Kevin Jon Heller, ‘Libya’s Magic Security Situation and Al-Senussi’s Right to Counsel’ *Opinio Juris* 13 October 2013 <<http://opiniojuris.org/2013/10/13/libyas-magic-security-situation/>>).

In the *Al-Senussi* case, the PTC recalled the rights conferred upon the accused by the LCCP. Among them are the right of being granted legal representation from the investigation stage, and the right to view the investigating material relating to the case. If the accused does not nominate counsel the appointment has to be made by the Accusation Chamber. If a trial were to proceed without a lawyer to represent the accused, the resulting verdict would be quashed on appeal.<sup>73</sup>

Al-Senussi had, indeed, not been provided with any form of legal representation for the purposes of the national proceedings against him. By Libya's own admission, this was primarily due to security difficulties. The PTC recalled that “the admissibility of a case must be determined in light of the circumstances existing *at the time of the admissibility proceedings*”. However, following reasoning that seems illogical, it continued by arguing that its task was to “determine whether the (...) circumstances [were] such that a concrete impediment to the *future* appointment of counsel [could] be identified”.<sup>74</sup>

The PTC then observed that contrary to the situation of Gaddafi, who was not under the control of national authorities and for whom attempts to secure legal representation had repeatedly failed, Al-Senussi was instead imprisoned in Tripoli by the central Government. Libya submitted that several local lawyers had indicated their willingness to represent Al-Senussi, without having been given, yet, a formal power of attorney.<sup>75</sup> Thus, the hurdle to securing legal representation was going to be overcome at the order of the Accusation Chamber. The PTC stated not to see any reason to put into question the information provided by Libya, and to be unable to conclude that the case was going to be impeded from proceeding further on the grounds that Libya was unable to provide the accused with an attorney.<sup>76</sup>

The reasoning of the PTC is flawed in several ways. To begin with, it reflects an unreasonable application of the ‘at the time’ requirement. In light of the latter, the PTC should have concluded that, since at the time of the Admissibility Decision the defendant had not been provided with an attorney, the proceedings against him could not continue, as held in the *Gaddafi* case. The possibility that Libya might provide Al-Senussi with counsel prior to trial should have been deemed irrelevant.

Admittedly, one could argue that, since the LCCP only categorically requires a defendant to have counsel at trial,<sup>77</sup> and given that the proceedings had not yet reached the trial stage, Libya was not *yet* unable to prosecute Al-Senussi. However, such a stand would not eliminate the inconsistency with the *Gaddafi* case. At the time of the admissibility challenge, in fact, the proceedings against Gaddafi in Libya were still at the investigation stage as well. Furthermore, this view would have required the PTC to overlook Libya’s inability to gain custody of Gaddafi, given that this failure could have been overcome before the trial’s commencement.<sup>78</sup>

Nor is it adequate to distinguish the two cases on the ground that the attempts to provide Gaddafi with an attorney were less likely to succeed because he was being held by the Zintan militia. It has to be remembered that Libya as the party challenging admissibility bore the burden of proving its ability to carry out the proceedings. Therefore, when assessing inability, the PTC should assume that a state of affairs will continue, at least in the

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<sup>73</sup> Al-Senussi Admissibility Decision, paras. 204-206.

<sup>74</sup> Ibid., para. 307 (emphasis added).

<sup>75</sup> Ibid., para. 308.

<sup>76</sup> Ibid., paras. 304-309.

<sup>77</sup> Supra, 2.2.

<sup>78</sup> Heller, ‘PTC I’s Inconsistent Approach to Complementarity and the Right to Counsel’ (n 6).

absence of clear evidence to the contrary. Nevertheless, when comparing the two decisions, it is apparent that Libya's reassurances to provide Al-Senussi with counsel are not substantially different from those previously made about its efforts to provide Gaddafi with one. Accordingly, there was no reason to distinguish the two cases speculating on their potential developments. In the *Gaddafi* Admissibility Decision the PTC rejected Libya's assertions that it would have been able to provide the accused with counsel prior to trial. It should have done so in the *Al-Senussi* case as well.<sup>79</sup>

#### 4. Overall Conclusion

The PTC concluded that the same case against Al-Senussi that was before the Court was currently subject to domestic proceedings in Libya, and that Libya was neither unwilling nor unable genuinely to carry out the proceedings. Hence, the PTC held the case inadmissible before the Court pursuant to article 17(1)(a) of the ICC Statute.<sup>80</sup>

### V. The Appeal Judgments

The PTC's reasoning in the *Al-Senussi* Admissibility Decision cannot be considered consistent with its previous holding in the *Gaddafi* trial. The PTC correctly distinguished the two cases on the ground that Al-Senussi was in custody of the Libyan authorities, while Gaddafi was not. However, as explained above,<sup>81</sup> Article 17(3) ICC Statute identifies three circumstances reflecting the inability of a State to carry out proceedings. The "inability to obtain the accused", although significant, cannot alone dispose of the inability issue. As the PTC pointed out in the *Gaddafi* case, the failure to provide the accused with an attorney, when due to the security situation, reflects "otherwise" inability to carry out proceedings.<sup>82</sup> Such inability affected Libya in the domestic trial against Al-Senussi as well. Through a creative application of the 'at the time' requirement - based on a mere speculation rather than on concrete evidence - the PTC disregarded its previous jurisprudence and, ultimately, a criterion set out in the very Statute.

One would have expected the AC to adopt a corrective approach, conforming the decisions under a coherent rationale. The AC delivered the judgments on the *Gaddafi* and *Al-Senussi* cases, respectively, on 21 May and 24 July 2014. It upheld both the decisions given by the PTC, thus allowing the inconsistency to persist.

#### A. The *Gaddafi* Appeal

On 17 June 2013, Libya filed its appeal against the *Gaddafi* Admissibility Decision, requesting the AC to reverse the impugned Decision and to find the case against Gaddafi inadmissible before the Court.<sup>83</sup> As noted by Judge Ušacka in her Dissenting Opinion, out of the four grounds of appeal, the first three were "interlinked and deal[t] with alleged legal, factual and procedural errors in relation to the Pre-Trial Chamber's finding that Libya [was] not investigating the same case against Mr Gaddafi" that was before the Court.<sup>84</sup> The fourth ground related to the second limb of the admissibility test, i.e. the finding that Libya was

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<sup>79</sup> Ibid.

<sup>80</sup> Al-Senussi Admissibility Decision, para. 311.

<sup>81</sup> Supra, 1.3.

<sup>82</sup> Art. 17, Para. 3 ICC Statute.

<sup>83</sup> ICC Appeals Chamber, 'Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2012 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'', 21 May 2014 (hereinafter *Gaddafi* Appeal Judgment), para. 12.

<sup>84</sup> Ibid., 'Dissenting Opinion of Judge Anita Ušacka', para. 10.

unable to obtain the accused or the necessary evidence and testimony and otherwise unable to carry out its proceedings.<sup>85</sup> The AC's approach raises concerns: refraining from assessing unwillingness, the Judges seem in fact to have been careful not to prejudice the *Al-Senussi* appeal. Before turning to this point, however, the paper will put forward an incidental consideration on the burden of proof suggested by the judgment.

*1. An Incidental Consideration: the Clash between Burden of Proof and Presumption in Favour of Domestic Proceedings*

As discussed above, the PTC considered that, due to the lack of specificity affecting the evidence produced, it was impossible to identify the contours of the national proceedings against Gaddafi. Hence, Libya had not satisfactorily proved to be investigating the same case that was already before the Court.<sup>86</sup> Given that, in the context of admissibility challenges, the burden of proof has consistently been allocated to the State concerned both by the PTC and the AC,<sup>87</sup> such a conclusion seems entirely reasonable. The AC, in fact, confirmed its validity. Bearing in mind Libya's obligation to *demonstrate* its investigation of the same case, a mere finding that "discrete aspects"<sup>88</sup> of that case are under domestic scrutiny does not put a Chamber in the position to consider the test to be satisfied.<sup>89</sup> However, a point raised by Libya deserves to be addressed. According to Libya,

"the Pre-Trial Chamber made a general error as regards the requisite level of "sameness" of the case. (...) [T]he will of the drafters of the Statute [was] to give a "strong presumption in favour of national jurisdictions" (...) [and] the Court must, to the extent possible, "give effect to this strong presumption by interpreting article 17 reasonably and flexibly in order to enable, rather than defeat, domestic proceedings"<sup>90</sup>.

This argument cannot be easily dismissed. The existence of such a presumption, which indeed represents a cornerstone of the complementarity regime, is undeniable.<sup>91</sup> Were this principle to be taken into account in admissibility challenges, one could reasonably conclude that the ICC should not set too high a threshold in order for a State to demonstrate that the same case is being investigated at the national level. In other words, proving that a domestic investigation covers "discrete aspects" of a case before the Court - as Libya did in the case at issue - would seem sufficient to meet the 'same-conduct' test under the Statute.

The AC dismissed Libya's argument simply noting how complementarity "does not mean that all cases must be resolved in favour of domestic investigation".<sup>92</sup> Whilst arguably correct, this cursory response fails to account for the logical point made by Libya: if the presumption exists, then it has to entail some legal consequence. It is here suggested that, had it resorted to a slightly deeper analysis of the matter, the AC could have defeated Libya's argument, eliminating once and for all what appears an undeniable clash between burden of proof and presumption in favour of national jurisdiction.

<sup>85</sup> Gaddafi Appeal Judgment, para. 45.

<sup>86</sup> *supra*

<sup>87</sup> See Gaddafi Admissibility Decision, para. 54, and Al-Senussi Admissibility Decision, para. 208.

<sup>88</sup> Gaddafi Admissibility Decision, para. 121.

<sup>89</sup> Gaddafi Appeal Judgment, para. 77.

<sup>90</sup> *Ibid.*, para 76.

<sup>91</sup> Jann Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdiction* (Oxford University Press 2008) 101.

<sup>92</sup> Gaddafi Appeal Judgment, para. 78.

Libya's position is based on a blurring of the notions of complementarity and admissibility. While inextricably linked, the two are not synonymous. Complementarity characterises the Court as an instrument of last resort, intended to supplant national jurisdictions when the same are not available.<sup>93</sup> Admissibility identifies the regime through which complementarity operates.<sup>94</sup> In this sense, admissibility stems from complementarity, giving the latter a full implementation. As noted by Kleffner, "[t]he *principle* of complementarity translates into the more specific legal *rules*" of Article 17.<sup>95</sup> Nevertheless, complementarity also exists independently from admissibility, and it operates at every stage of the ICC's activity. For instance, it imposes a burden on the Prosecutor not to initiate an investigation, when a State is able and willing to do so.<sup>96</sup> Vice-versa, 'admissibility issues' arise only when a case has begun, as confirmed by the wording of Article 17 ("the Court shall determine that a case is inadmissible"). The primacy of national jurisdictions claimed by Libya was introduced by the drafters of the Rome Statute in order to safeguard State sovereignty, and represents a corollary of the complementarity principle. However, a similar presumption has nothing to do with admissibility proceedings. The mechanism triggering the ICC jurisdiction supports this view. As will be well known, under Article 13 of the Statute, the Prosecutor can begin an investigation:

1. following a referral by the Security Council (as occurred with Libya);
2. following a State's self-referral;
3. proprio motu, only with respect to situations affecting a State party to the ICC Statute.

As for the first option, it can be stated that, when the Security Council considers a situation worth being referred to the ICC Prosecutor, a preliminary assessment of the concerned State's inability or unwillingness to bring some individuals to justice has already been made at the highest United Nations level.<sup>97</sup> Admittedly, with regard to the Libyan situation, the referral was made when the unwillingness of the Gaddafi regime to prosecute its own leaders could have been easily presumed,<sup>98</sup> while the same cannot be stated for the new government. Still, the Security Council will intervene with an ICC when a State presents a particularly challenging security situation. Against such background, even if domestic authorities are willing to prosecute certain individuals, their ability to do so will presumably be undermined. Therefore, in light of a Security Council referral, it seems logical to set aside the presumption at the admissibility stage.

As concerns the second circumstance, it is enough to say that, when a State proceeds to a self-referral, it does so precisely acknowledging its incapacity to carry out some proceedings.<sup>99</sup> In similar cases, the State's own admission seems to be enough to reasonably eliminate the presumption in favour of domestic prosecution.

Finally, the Office of the Prosecutor can autonomously start an investigation only into States party to the ICC. Therefore, it cannot impinge upon the sovereignty of the non-States

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<sup>93</sup> Cryer and others (n 2) 153.

<sup>94</sup> Newton (n 4) 52.

<sup>95</sup> Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdiction* (n 89) 102.

<sup>96</sup> Benzing (n 3) 593.

<sup>97</sup> As noted by Holmes, this was the case also when the Security Council created the ad hoc Tribunals: "in the former Yugoslavia, there was an unwillingness to investigate and prosecute effectively those responsible for international crimes and in Rwanda there was an inability to do so" (Holmes, 'Complementarity: National Courts versus the ICC' (n 13) 668).

<sup>98</sup> In UNSC Resolution 1970 (2011), the Security Council recalled "Libyan authorities' responsibility to protect his population" and "the need to hold to account those responsible for attacks, including by forces under their control, on civilians" (preamble).

<sup>99</sup> Federica Gioia, 'State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *Leiden Journal of International Law* 1114.

parties unless the Security Council authorises it to do so. On the contrary, States party to the ICC relinquished a certain degree of their sovereignty when ratifying the Statute.<sup>100</sup> Such a renunciation can be considered to encompass the authorisation, for the Office of the Prosecutor itself, to make a preliminary evaluation of the willingness and ability of a State to prosecute its own nationals. Thus, it also allows contending that, when an investigation begins, the presumption in favour of domestic proceedings should cease to operate.

While attributing the burden of proof to the challenging State, the Court seemingly inverted it several times in the cases at issue. Such an attitude is capable of creating further confusion in admissibility challenges. A clear example is the PTC's evaluation of the abduction of Taha Bara in the *Al-Senussi* case, discussed above - which in fact resulted in a doubtful conclusion. Considering the primacy of national jurisdictions at the admissibility level amounts, as well, to inverting the burden of proof. As a consequence, it is submitted that the Court should disregard such a presumption when dealing with admissibility issues. Doing so, admissibility proceedings would consistently gain in clarity.

## 2. The AC's Failure to Assess Inability

Turning back to the *Gaddafi* Appeal Judgment, it has been stated that, according to the PTC, Libya had not proven to be investigating the same case that was before the Court. The AC confirmed the PTC's decision, dismissing the first three grounds of appeal brought by Libya. In light of such a finding, the AC chose not to proceed to consider the arguments raised in the fourth ground, concerning to inability. Recalling the *Katanga* Admissibility Judgment, the AC stated that

“in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability.”<sup>101</sup>

This reasoning appears flawless: under Article 17, inability and unwillingness assume relevance when assessing the genuineness of an investigation or prosecution concerning a case which is already before the Court. When, however, the sameness of a case has not been ascertained, it would not make sense for the ICC to consider its genuineness.

While theoretically irreprehensible, the AC's approach to the matter is unconvincing. As already discussed in Part 2.1, the PTC, although finding the 'same-conduct' test not to be met, went on to address inability.<sup>102</sup> Also, it has been noted that, absent an express indication by the PTC, doubts arise as to the potential consequences that such a failure would have had, if the PTC had found Libya able to proceed. Even more considering that, on the ground of Libya's inability, the PTC did not proceed to assess unwillingness.

Choosing not to engage in the evaluation of the fourth ground of appeal, the AC somewhat clarified the matter, restating that the failure to withstand the 'same-conduct' test results in a dismissal of the admissibility challenge. However, the AC avoided addressing the fourth ground of appeal without even referring to the different approach adopted by the PTC.

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<sup>100</sup> Benzing (n 3) 599.

<sup>101</sup> *Gaddafi* Appeal Judgment, para. 213.

<sup>102</sup> *Supra*, 2.2.



Given the strict connection existing between the *Gaddafi* and the *Al-Senussi* cases, one could reasonably suspect the Judges, when drafting the Gaddafi Appeal Judgment, to have already borne in mind the *Al-Senussi* appeal. This suspicion arises considering the bases on which the PTC ruled Libya unable to carry out its proceedings against Gaddafi. These were inability to obtain the accused, inability to obtain the necessary testimony and otherwise inability due to the incapacity of providing Gaddafi with an attorney. The existence of the first two circumstances is hardly deniable - as confirmed by Judge Song in his Separate Opinion<sup>103</sup> - and the AC would have most likely upheld the characterisation given by the PTC, if it had addressed the fourth ground of appeal. More controversial, though, would have been reconsidering the consequences of the lack of legal representation. Both in the *Gaddafi* and the *Al-Senussi* cases, Libya had failed to provide the accused with legal counsel, although claiming that it was going to do so. A general statement on the matter, if delivered by the AC in the *Gaddafi* case, could have influenced the outcome of the *Al-Senussi* Appeal Judgment, which was going to be handed down just two months later. Even though there is no proof supporting this interpretation, the AC might have taken the chance of averting a similar risk, being able to (rightly) dispose of the matter leaving the issue untouched. Notably, Judges Song and Ušacka, in their Opinions appended to the Judgment, argued that the PTC should have found the 'same-conduct' test to be satisfied, but they did not engage in a thorough evaluation inability either.<sup>104</sup> This could be another indicator of the bench's willingness not to prejudice the matter.

Such an attitude could also have been adopted considering the possibility of a second admissibility challenge being brought by Libya, an occurrence that the AC almost seemed to encourage. This impression emerges from the response provided to the Libyan request of being allowed to submit additional evidence. The AC rejected it explaining that, far from deciding anew on the admissibility of a case, "its function is corrective in nature and (...) the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber". Therefore, "it would not [have been] appropriate for the Appeals Chamber to consider this material when the Pre-Trial Chamber ha[d] not done so".<sup>105</sup> However, the Judges went on to indicate that,

"[s]hould Libya wish the above information to be considered by the Court, the correct avenue would rather be for it to make an application under article 19 (4) of the Statute, in which circumstances the Pre-Trial Chamber could decide whether to grant leave to Libya to bring a second challenge to the admissibility of the case ("In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.")".<sup>106</sup>

Again, although it cannot be proved, the trend of almost suggesting that Libya file a new application appears to find a confirmation in Judge Ušacka's Dissenting Opinion. There, seemingly incidentally, Judge Ušacka nevertheless recalled - in the context of some rather doctrinal remarks on complementarity - that "[w]here a case is declared admissible by the Court upon a State's challenge to its admissibility, the State depends on the Court to "grant

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<sup>103</sup> Gaddafi Appeal Judgment, 'Separate Opinion of Judge Sang-Hyun Song', paras. 27-36.

<sup>104</sup> Judge Song, notwithstanding a different understanding of the 'same-conduct' test, nevertheless agreed with the majority on the overall correctness of the PTC's decision in light of the inability to obtain the accused (Gaddafi Appeal Judgment, 'Separate Opinion of Judge Sang-Hyun Song', paras. 27-38). In Judge Ušacka's opinion the AC, not having addressed the second limb of the admissibility test, should have remanded the matter to the PTC for a new consideration (Gaddafi Appeal Judgment, 'Dissenting Opinion of Judge Anita Ušacka', paras. 63, 66).

<sup>105</sup> Gaddafi Appeal Judgment, para. 43.

<sup>106</sup> Ibid, para. 44.

leave" if it considers that "exceptional circumstances" justify allowing a second challenge".<sup>107</sup>

Were the presumption correct, it would have been at least short-sighted, for the AC, to engage in a thorough assessment of the inability test. If Libya were allowed to bring a new challenge, more consistently substantiating to be investigating (or prosecuting) the same case could prove sufficient for the trial before the ICC to be held inadmissible. Had the AC ruled on the whole inability test, then a significantly higher threshold would have been set for Libya, either to demonstrate the existence of "exceptional circumstances" justifying a second challenge, and to prove the case to be inadmissible before the Court.

Admittedly, the AC correctly upheld the PTC's decision on the admissibility of the case against Gaddafi. However, recalling the comparative nature of this paper and the similarity between the two cases forming its subject matter, a more determined approach to the core issues - pointing towards a harmonisation between the *Gaddafi* and the *Al-Senussi* Appeal Judgments - could have been expected. Leaving the second limb of the admissibility test untouched the AC opened the way to upholding the PTC's *Al-Senussi* Admissibility Decision.

## B. The *Al-Senussi* Appeal

On 17 October 2013, the Defence filed its appeal against the *Al-Senussi* Admissibility Decision.<sup>108</sup> Out of the three grounds of appeal, the AC started with the second ground, rejecting the request to consider new evidence which was previously unavailable.<sup>109</sup> It then turned to the third ground, relating to the 'same-conduct' test, which the Defence, contrary to the PTC, considered not to have been met by Libya. The AC rejected this argument. It did so, on the one hand, differentiating the case at stake from the *Gaddafi* case, on the ground that the latter concerned "crimes allegedly committed throughout Libya", while the former was "limited to alleged crimes committed in the city of Benghazi".<sup>110</sup> On the other hand, the AC took into account the fact that the PTC did not use the specific incidents alleged against Al-Senussi as part of the comparison in carrying out the 'same-conduct' test, thus departing from the AC's jurisprudence. Nevertheless, the AC noted that the PTC "proceeded to find 'that the fact that all or some' of the incidents [were] being investigated domestically '[might] still constitute a relevant indicator that the case' [was] the same".<sup>111</sup> Finally, the AC moved to the second ground of appeal, concerning Libya's willingness and ability to carry out its proceedings against Al-Senussi.

### 1. *The Lack of Legal Representation and Inability*

It has been repeatedly stated that the main inconsistency between the *Gaddafi* and the *Al-Senussi* Admissibility Decisions is the different evaluation made of the failure to provide the accused with legal counsel - considered a manifestation of "otherwise inability to carry out proceedings" in the former, but not in the latter. Also, it has been clarified that the submissions made by Libya on the matter did not substantially differ in the two cases. Anyhow, in the *Al-Senussi* case, the PTC should not have taken into account the argument that Libya was going to nominate an attorney, given that speculative consideration clash with the 'at the time' requirement informing the admissibility test. The AC, nevertheless,

<sup>107</sup> Ibid., 'Dissenting Opinion of Judge Anita Ušacka', para. 64.

<sup>108</sup> ICC Appeals Chamber, "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'", May 2014 (hereinafter '*Al-Senussi* Appeal Judgment'), para. 15.

<sup>109</sup> Ibid., paras. 55-61.

<sup>110</sup> Ibid., para. 95.

<sup>111</sup> Ibid., para. 102.

confirmed the PTC's decision, not considering its "element of prediction" to be unreasonable.<sup>112</sup> In addition, the AC further restated that, unlike Gaddafi, Al-Senussi was in the custody of Libyan authorities, thus the appointment of a lawyer becoming easier in the case at stake.<sup>113</sup> The AC seems to have considered this circumstance as the main reason justifying ruling the *Al-Senussi* case admissible, notwithstanding this important commonality with the *Gaddafi* trial. While a critique of this holding has been put forward above, a further consideration made by the AC itself reflects the illogicality of such an approach. The Judges, in fact, dismissed the Defence's argument on the Libyan judicial system being compromised by the security situation across the country stating that, *inter alia*, such a contention was "speculative".<sup>114</sup> Whether correct or not, as stated by Heller, speculative as well as accepting Libya's submission ensuring the future appointment of an attorney for the accused.<sup>115</sup>

## 2. *The Lack of Legal Representation and Unwillingness*

Unwillingness under the ICC Statute identifies those situations in which the State intends to shield an individual from criminal responsibility. A State's failure to respect the fair trial standards recognised under international law does not result in unwillingness. However, where such failure translates in violations so grave that a trial cannot be considered a trial at all, then unwillingness can be declared.<sup>116</sup> This will occur, for instance, when a State is "too willing"<sup>117</sup> to prosecute some individuals, so that the trial against them is a mere farce put in place to reach a foregone conclusion. The AC itself proved to share this view, clearly stating that

"the fact that admissibility is not an enquiry into the fairness of the national proceedings *per se* does not mean (...) that the Court must turn a blind eye to clear and conclusive evidence demonstrating that the national proceedings completely lack fairness[.]

At its most extreme, the Appeals Chamber would not envisage proceedings that are, in reality, little more than a predetermined prelude to an execution, and which are therefore contrary to even the most basic understanding of justice, as being sufficient to render a case inadmissible. Other less extreme instances may arise when the violations of the rights of the suspect are so egregious that it is clear that the international community would not accept that the accused was being brought to any genuine form of justice. In such circumstances, it is even arguable that a State is not genuinely investigating or prosecuting at all".<sup>118</sup>

The AC then proceeded to clarify that these kinds of violations, indicating inconsistency with the intent to bring a person to justice, would be relevant for the purpose of assessing unwillingness.<sup>119</sup>

It has to be questioned whether failing to provide an accused with any form of legal representation can be considered a violation "egregious" enough to impinge upon the

<sup>112</sup> Al-Senussi Appeal Judgment, para. 201.

<sup>113</sup> *Ibid.*, para. 203.

<sup>114</sup> *Ibid.*, para. 288.

<sup>115</sup> Heller, 'PTC I's Inconsistent Approach to Complementarity and the Right to Counsel' (n 6).

<sup>116</sup> See *supra*, 1.2.

<sup>117</sup> Mégrez and Samson (n 25) 572.

<sup>118</sup> Al-Senussi Appeal Judgment, paras. 229-230.

<sup>119</sup> *Ibid.*, para. 230(3).

genuineness of a trial, thereby preventing the Court from holding a case inadmissible. It is submitted that such a flaw should definitely represent too much of an impediment for a proper prosecution intended to deliver “justice”<sup>120</sup> to be undertaken. Mégret and Samson, indeed, included “the absence of access to any legal representation” in the list of telements potentially indicating that a trial is too flawed not to be considered a farce.<sup>121</sup> Hence, with regard to Al-Senussi, the AC could also have overturned the PTC’s decision on this ground, ruling the case admissible because of Libya’s unwillingness to prosecute. This is further supported by the fact that, as pointed out by Heller, “far from trying and failing to provide al-Senussi with an attorney, [Libya] has done everything in its power to prevent him from obtaining one”.<sup>122</sup>

The Defence, in fact, contended that the lack of legal representation should have resulted in a finding of unwillingness to carry out proceedings on behalf of Libya. However, the Defence’s strategy has been, as the AC itself noted, rather chaotic, inasmuch as it failed to “separate out those arguments which go to unwillingness from those which go to inability”.<sup>123</sup> Such confusion resulted in the failure to substantiate the relevance of the lack of legal representation for the purposes of unwillingness. Consequently, the AC did not engage in a proper evaluation of the matter, simply stating that “insofar as the Defence argue[d] that a State is unwilling genuinely to carry out the investigation or prosecution if it does not respect the fair trial rights of the suspect *per se*”, the argument relating to unwillingness had to be rejected.<sup>124</sup>

The PTC - or the AC - should have held the case admissible because of Libya’s “otherwise inability to carry out its proceedings” (the failure to provide Al-Senussi with counsel) due to the “unavailability of its national judicial system” (the security situation that, as acknowledged by the Chambers themselves,<sup>125</sup> represented the primary cause hindering the appointment of a lawyer). Nevertheless, had the Defence elaborated a more structured and theoretically accurate appeal, admissibility could have been declared on the basis of unwillingness due to the lack of legal representation for the accused.

## VI. A Risk Stemming from Inconsistent Holdings: Exposing the ICC to New Criticisms

The paper has proved that the PTC’s decision on the admissibility of the case against Al-Senussi departed from its previous finding in the *Gaddafi* case. A careful analysis of the judgments leads to believe that the main criterion on which the Chambers based their decisions was the difference in circumstances: Al-Senussi was directly detained by Libyan authorities, Gaddafi was not. However, other parameters should have been decisive. Notably, it has been repeatedly pointed out that there was inconsistent consideration of the lack of legal counsel for the accused. Judge Ušacka, in her Separate Opinion appended to the *Al-Senussi* Appeal Judgment, highlighted the excessive weight attributed to the custody element. In her view, the AC should have held both the *Gaddafi* and *Al-Senussi* cases inadmissible.<sup>126</sup> While such a stand radically differs from that supported by this paper, it recognises the similarity existing between the two cases, other than being, at least, more coherent than the PTC and AC’s conclusions.

<sup>120</sup> See supra, 1.2.

<sup>121</sup> See supra, 1.2.

<sup>122</sup> Heller, ‘PTC I’s Inconsistent Approach to Complementarity and the Right to Counsel’ (n 6).

<sup>123</sup> Al-Senussi Appeal Judgment, para. 183. As noted supra at 3.2, the same failure to clearly distinguish the arguments supporting inability from those supporting unwillingness characterised the Defence’s submissions before the PTC.

<sup>124</sup> Ibid., para. 231.

<sup>125</sup> Ibid., para. 193.

<sup>126</sup> Ibid., ‘Separate Opinion of Judge Anita Ušacka’, paras. 13-16.

It has been stated that the Court still has to spell out in practice many aspects of admissibility, left undefined by the Statute.<sup>127</sup> Such a task can only be performed through elaborating a coherent approach to similar issues. Failing to do so leaves several aspects of complementarity undefined, and undermines the predictability of admissibility challenges. Moreover, acting inconsistently against similar situations entails another risk for the Court, i.e. that of drawing new criticisms. The ICC is already being targeted by several accusations related to it being excessively politically influenced by bodies such as the Security Council. In particular, a growing dissatisfaction is emerging on behalf of African States, which started to perceive the Court as an instrument through which Western powers pursue a new form of colonialism.<sup>128</sup> Such diffidence is due to the ICC's intervention in some cases as that of Sudan<sup>129</sup> - which saw the Court issuing two arrest warrants against the serving president Al-Bashir - considered by African States an unacceptable interference with their internal affairs. Given this discontent, the African Union, during a meeting held in Addis Ababa in the days just preceding the delivery of the *Al-Senussi* Admissibility Decision, started to discuss the prospect of an *en bloc* withdrawal from the ICC.<sup>130</sup> It has to be borne in mind that the support of African States played a seminal role in the establishment of the Court.<sup>131</sup> All of the eight situations investigated by the Prosecutor thus far concern African States.<sup>132</sup> An international court already not supported by the United States, China and Russia, also bereft of African States' backing, would hardly be considerable legitimate. Against a similar background, one could suspect the Judges to have been influenced by the potential consequences of another decision displeasing to an African State. As stated by de Bertodano, issues of complementarity are "part of a process which is likely to push the judges into the forefront of the political arena".<sup>133</sup> Some scholars have already expressed the suspicion of international criminal courts taking into account political pressures and expediency when deciding controversial cases.<sup>134</sup> The same De Bertodano has emblematically contended that "[i]t is naive to imagine [that] there is no prospect of judges being influenced by political considerations regarding the state concerned (...). This problem is inherent in the principle of complementarity".<sup>135</sup>

As well as regarding other interpretations put forward in this paper, there is no concrete evidence suggesting that the PTC had in mind the potential repercussions of declaring the case admissible when deciding on *Al-Senussi*. It is submitted, however, that the Court can prevent such doubts from arising only by adopting a coherent approach to those issues left unclear by the Statute. Moreover, it must avoid unjustified departures from its previous jurisprudence when cases present similar circumstances - as occurred with the *Gaddafi* and *Al-Senussi* admissibility challenges. In the latter, the Court missed the chance to provide a meaningful clarification of how unwillingness and inability occur and assume relevance in practice, also exposing itself to new criticisms.

## VII. Conclusions

<sup>127</sup> Holmes, 'Complementarity: National Courts versus the ICC' (n 13) 672.

<sup>128</sup> Lutz Oette, 'Peace and Justice, or Neither?' (2010) 8 *Journal of International Criminal Justice* 359.

<sup>129</sup> Charles Jalloh, 'The African Union and the International Criminal Court: The Summer of Our Discontent(s)' *JURIST* 6 August 2010 <<http://jurist.org/forum/2010/08/the-african-union-and-the-international-criminal-court-the-summer-of-our-discontents.php>>.

<sup>130</sup> 'African States Must Reject Calls to Withdraw from the ICC' Amnesty International (10 October 2013) <<https://www.amnesty.org/en/news/african-states-must-reject-calls-withdraw-icc-2013-10-10>>.

<sup>131</sup> Olivia Swaak-Goldman, 'Africa and the International Criminal Court' (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 314.

<sup>132</sup> Democratic Republic of the Congo, Uganda, Central African Republic, Darfur, Kenya, Libya, Côte d'Ivoire, Mali (see the ICC's website, <[http://www.icc-cpi.int/EN\\_Menus/icc/Pages/default.aspx](http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx)>).

<sup>133</sup> Sylvia de Bertodano, 'Judicial Independence in the International Criminal Court' (2002) 15 *Leiden Journal of International Law* 314.

<sup>134</sup> See, e.g., de Bertodano (n 131) 415-417.

<sup>135</sup> *Ibid* 426.

Complementarity represents a cornerstone of the entire ICC machinery. It translates into the legal rules of Article 17 of the Rome Statute, which need to be implemented and clarified through the Court's judicial activity. As noted by Judge Ušacka, "future cases on admissibility will raise new issues that will require the jurisprudence of the Court to develop further".<sup>136</sup> Only adopting consistent approaches the ICC can provide a meaningful clarification of the admissibility regime. Given that the latter shapes the relationship between States and the Court,<sup>137</sup> the importance of such a task cannot be underestimated.

The highlighted inconsistency between the *Gaddafi* and the *Al-Senussi* holdings - both at the PTC and the AC stage - represents a step in the wrong direction. Moreover, the conflicting constructions given to the failure to provide the accused with legal counsel - resorting to a rather debatable application of the 'at the time' requirement in the *Al-Senussi* case - cast doubts over the real rationale underlying this discrepancy. The only way to reduce to a minimum suspicion of arbitrariness and political involvement is to elaborate, on the basis of the ICC Statute, consistent schemes to be indiscriminately applied to similar situations. Until, and unless, this happens, the Court will always be seen by many as an institution excessively yielding to realpolitik imperatives.

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<sup>136</sup> Gaddafi Appeal Judgment, 'Dissenting Opinion of Judge Ušacka', para. 59.

<sup>137</sup> Al-Senussi Appeal Judgment, para. 169.