The ICC rulings in the Libyan cases and related due process implications of the Complementarity relationship with domestic prosecutions

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I. Introduction

The "complementarity relationship" between the jurisdiction of the International Criminal Court and the jurisdiction of States (to include States not party to the Statute) has been discussed in depth in the aftermath of the adoption of the Rome Statute. By defining its attitude towards domestic jurisdictions, the "complementarity" principle allows the Court, to concentrate on those situations in which there is a pressing need to prevent *de iure* or *de facto* impunity, due to the lack of effective investigation or prosecution by domestic jurisdictions, of those individuals responsible of crimes of international concern within to the *ratione materiae* jurisdiction of the Court. The principle, from a different perspective, represents a safeguard for State sovereignty and domestic jurisdiction which remain, due to the limited judicial resources of the Court, pivotal for the repression of the said crimes.

Nevertheless, despite its original *rationale* the complementarity principle may ultimately have impact on human rights obligations of the Court itself.

As an international institution provided with legal personality (Article 4 of the Statute), the Court is bound by any obligation upon it under general rules of international law[2], and in respect of the most fundamental human rights, also

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[1] This paper has been written under the auspices of the principle of non-attribution and reflects exclusively the personal understanding and the opinion of the author.

[2] ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, 37.

peremptory norms of international law [3] . Discrepancies between the interpretation of such obligations and their reach and interpretation of human rights obligations by treaty based human rights bodies an example of "fragmentation" of international law and a consequence of the existence of different self-contained legal systems.

The question if by holding a case to be inadmissible and therefore to be dealt with by the domestic jurisdiction of a State, despite the fact that the domestic proceeding entails violations of human rights, the Court may incur in responsibility, is to be answered based the relationship of the Court's jurisdiction *vis a vis* States. This in order to establish what is directly within and what is beyond the powers of the Court. Principles established in respect of State responsibility for extraterritorial violations of human rights may help in shaping the eventual contours of the Court's responsibility.

Conflicting obligations for States parties cooperating with the Court, between human rights conventions on one side and the Statute of the ICC on the other, are to be resolved under Article 18 of the 1968 Vienna Convention on the Law of Treaties (VCLT) in a way which is reminiscent of the debate about conflicting obligations between the Statute itself and subsequent "exemption agreements" under Article 98 of the Statute.

The Libyan ICC cases are of great interest because they highlight a very narrow interpretation by the Chambers of the meaning of the complementarity principle, and at the same time highlight a reductive interpretation of generally accepted human rights principles in an unconvincing attempt to save the credibility of the Libyan experiment with post-conflict justice and to deny the definitive collapse of Libyan institutions.

In the second section we will focus on the admissibility challenges in the cases of Mr. *Gaddafi* and Mr. *Al-Senussi*, whilst the third section will consider the "due process" requirement in respect of the admissibility of a case. The fourth section will focus on certain specific aspects of due process emerging from the Chamber decisions, and the subsequent fifth section will address the issue of possible responsibilities of the Court in respect of decisions on the inadmissibility of a case.

II. The admissibility decisions in the cases of Mr. *Gaddafi* and Mr. *Al-Senussi*

The Pre-Trial Chamber I of the International Criminal Court in two separate decisions disposed of the challenges to the admissibility under Article 19 of the

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[3] Human rights obligations of international organizations and institutions are currently a hot topic. An oversight can be found in the Report to the Parliamentary Assembly of the Council of Europe by Mr. J.M. BENYTO, on *Accountability of international organizations for human rights violations*, 17 December 2013, Doc. 13370, p. 6ff.. We would further refer to the *Draft articles on the responsibility of international organizations, with commentaries*, Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10), *sub* art. 41, 66.

Statute in the case of the *Prosecutor v. Saif Al-Islam Gaddafi* and *Abdullah Al-Senussi*[4]. Both decisions raise serious human rights questions[5].

In the first case, the Chamber held the case against Mr. *Gaddafi* to be admissible as the challenging State had not provided a sufficient degree of specific evidence to demonstrate that the Libyan and ICC investigations covered the same conduct, and that Libya is genuinely able to carry out an investigation[6]. The later finding was based on the fact that Libya has shown to be unable to secure the transfer of Mr. *Gaddafi* from his place of detention under authority of the *Zintan militia* – a non State actor - to the custody of the Libyan authorities. The Pre-Trial Chamber was also not persuaded that the Libyan authorities had the capacity to obtain the necessary testimony and found that Libya had not shown whether and how it would overcome the difficulties in securing a lawyer for the suspect[7].

The Appeals Chamber on the 21st of May 2014 rejected the Libyan appeal and confirmed the admissibility of the case of Mr. Gaddafi[8]. The Appeals Chamber further asserted, disposing of the allegations by Libya about the commencement in the meantime of the trial, that "*the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge*" and that "*facts which postdate the Impugned Decision fall beyond the possible scope of the proceedings before the Pre-Trial Chamber and therefore beyond the scope of the proceedings on appeal.*"[9] In addition, the Chamber further stated it was not

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[4] On the referral of the situation in Libya to the ICC, C. STAHN, *R2P, the ICC and the Libyan arrests, Hague Justice Portal*, www.haguejusticeportal.net/index.php?id=12998, retrieved June 19th 2014.

[5] On the topic Admissibility and Human Rights, *See* J. ALMQVIST, *Complementarity and Human Rights: A Litmus Test for the International Criminal Court*, *Loyola of Los Angeles International and Comparative Law Review*, Rev. 335 (2008).

[6] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* case n ICC-01/11-01/11-344-Red, Decision on the admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013, Pre Trial Chamber I § 234.

[7] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013, Pre Trial Chamber I § 234.

[8] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment 21 May 2014, Appeals Chamber, §§ 219, 215.

[9] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment 21 May 2014, Appeals Chamber, §§ 41ff. The Appeals Chamber relied on its decision of the 28th of July 2011, in the *The Prosecutor v. William Samoei Ruto, Hendry Kiprono Kosgey and Joshua Arap Sang*, case ICC-01/09-01/11-234, Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility" 28 July 2011 § 9, Appeals Chamber, in which the request by Kenya to submit an updated investigation report which post-dated the admissibility decision was rejected.

the function of the Appeals Chamber to decide anew the admissibility of the case.

This approach, developed for admissibility decisions, would later show to be particularly detrimental to the challenge of Mr. *Al Senussi*[10] against the ruling of inadmissibility.

The transfer of Mr. *Gaddafi* to the Court by the Libyan authorities, which was initially postponed under Article 95 of the Statute pending the decision on the admissibility challenge, was subsequently ordered since the 31st of May 2013. Nevertheless the issue of the transfer is still pending. On the 15th of May 2014, the Pre-Trial Chamber I invited Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate by the 28th of May 2014[11]. In response, Libya made an application for extension of time seeking an additional 12 weeks to make submissions[12], further attempting to avoid incurring a finding of non-compliance with its obligations. On the 11th of July 2014, the Single Judge carrying out the functions of Pre Trial Chamber I issued a decision on matters related to Libya's duties to cooperate with the Court, concluding that the requested extension was not appropriate. The Judge also noted Libya's failure to provide information on the transfer of Mr. *Gaddafi.* Together with the passage of time, this suggests that no steps have been taken to proceed to the immediate surrender to the Court[13] and that the Court may at any time take appropriate steps, including making a formal finding of non-cooperation.

The defence of Mr. *Gaddafi* also moved to seek leave to appeal under Article 82(1) of the Statute, the "failure to issue a decision in a reasonable time frame" as a "constructive refusal"[14]. The request for leave has been rejected because, according to the Chamber, "*no constructive refusal may be deduced from the mere passage of time*" and also because "*a finding of non-cooperation is neither a mandatory action, nor necessarily the most effective one*" and the fair and expeditious conduct of the proceeding is not directly affected by the

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[10] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* , Case n. ICC-01/11-01/11-565, Judgment 24 July 2014, Appeals Chamber, §§ 57ff.

[11] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* case n. ICC-01/11-01/11-545, Decision requesting Libya to provide submissions on the status of the implementation of its outstanding obligations to cooperate with the Court 15 May 2014, Pre Trial Chamber I §§ 7ff..

[12] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* case n.ICC-01/11-01/11-548, Libyan Application for extension of time related to the PreTrial Chamber I's "Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court"28 May 2014.

[13] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* case n.*,* 11 July 2014, ICC-01/11-01/11-563, Decision on matters related to Libya's duties to cooperate with the Court 11 July 2014, Pre Trial Chamber I, § 12ff..

[14] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* case n. ICC-01/11-01/11-522-Red, Defence, Public redacted version of "Request for leave to appeal the Pre-Trial Chamber's failure to issue a decision" 10 March 2014.

lack of such a finding[15]. A decision on the non-compliance by Libya with the requests for cooperation by the Court was finally made the 10th of December 2014[16].

In the case against Mr. *Al Senussi*, the Pre Trial Chamber decided that the case investigated by the Libyan authorities was substantially the same case that was being investigated by the Prosecutor, and that Libya had jurisdiction over the case. Despite the problem of legal representation - which had not yet become a barring impediment under Libyan criminal procedure – Libya was neither unwilling nor unable genuinely to carry out its proceedings in relation to the case[17].

Mr. Gaddafi's brother *Saadi* was traded over to Libya by the authorities of Mali in mid-March 2014. A joint trial with *Saif Gaddafi* "attending" by video teleconference while still in *Zintan* custody started on 14th April 2014[18]. The accused was apparently still not assisted by a counsel. Some of the United Nations observers were detained on suspicion of sorcery and Libya had subsequently to apologize for it.

In its seventh *Report* to the Security Council, dated 13th May 2014, the Prosecutor, Ms. *Bensouda*, expressed her appreciation for the cooperation by States party and State not party, and provided information of meetings with the Libyan authorities about burden-sharing in further investigations, prosecutions, and arrest strategy. The Prosecutor also reported that Libya had acted in compliance with the process set out in the Rome Statute in challenging the admissibility of cases in front of the Court. The *Report* neglects that the defence counsel appointed by the Court was denied access to the accused in respect of the admissibility challenge.

The Prosecutor further reported that Libya should immediately surrender *Saif Gaddafi* and noted that the since the previous *Report* - asserting that the majority of the 8.000 conflict related detainees were being held without due

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[15] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* case n.ICC-01/11-01/11-556, Decision on the "Request for Leave to Appeal the Pre-Trial Chamber's Failure to Issue a Decision" 10 June 2014, Pre Trial Chamber I.

[16] *The Prosecutor v. Saif Al-Islam Gaddafi,* case n., 11 July 2014, ICC-01/11-01/11-577, Decision on the non-compliance by Libya with the requests for cooperation by the Court and referring the matter to the United Nations Security Council, 10 december 2014, Pre Trial Chamber I.

[17] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* case n ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi 11 October 2013, Pre Trial Chamber I § 215.

[18] At this purpose, *See, The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment 21 May 2014, Appeals Chamber, Separate opinion of Judge Sang Hyun Song, considering evidence and fact postdating the appealed decision and observing that "*even assuming that there was a degree of cooperation in certain respects between the central Government and the Zintan Brigade, this apparently had not been sufficient to transfer Mr Gaddafi into the control of the central authorities so that his trial could take place. In this regard, I note that Libya does not point to any evidence that the Pre-Trial Chamber overlooked in coming to that specific conclusion*".

process - the number has dropped below to 7.000 people who have not yet been transferred to State authority.

The *Report* was interpreted as anticipating the willingness of the Court to go after alleged criminals residing outside Libya[19]. Amidst intensifying violence, the Libyan government has apparently decided on the 18th of July 2014 to seek external help in trying persuade the ICC Prosecutor to prosecute Misratan and Zintan forces threatening Tripoli[20] even if the situation is probably not the same referred by the Security Council with the Resolution 1970 adopted the 26th of February 2011.

Mr. *Al Senussi*'s appeal was in the end rejected by the Appeals Chamber the 24th of July 2014[21] while the situation in Libya were already decisively degrading.

III. Due process and fundamental rights in the decision on the admissibility of a case.

As observed above, the Court is bound, as an international institution and a subject under international law, to respect human rights as a matter of general principles or customary law and in respect of most fundamental human rights as a matter of peremptory norms of international law. Nevertheless the number, the quality and the purpose of references to Human Rights Conventions in the two decisions are highly illustrative of the approach followed by the Chamber in order to substantiate the meaning and extent of the "internationally recognized principle of due process" provision in Article 17(2) of the Statute.

The 1966 International Covenant on Civil and Political Rights *(ICCPR)* is quoted only once, in a generic footnote about features of the Libyan legal system in the case of Mr. *Al Senussi*. Instead there are five quotations of the

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[19] M. KERSTEN, The ICC in Libya: Not Done Just Yet, http://justiceinconflict.org/2014/06/26/the-icc-in-libya-not-done-just-yet/, access the 25th of July 2014. On the 2013 MOU between the Office of the Prosecutor and the Libyan Government whereby the Libyan authorities would have responsibility for investigating offences committed by Libyans who remained in Libya and the ICC would focus on prosecuting accused outside Libyan authority and control, See *The International Criminal Court and Libya: Complementarity in Conflict*, Chatham House Meeting, 22 September 2014, p. 6.

[20] M. KERSTEN *Back Against the Wall: Libya Wants the ICC to Prosecute Wanton Militias*, in http://justiceinconflict.org/2014/07/21/back-against-the-wall-libya-wants-the-icc-to-prosecute-wanton-militias/, access the 25th of July 2014. Subsequently the 25th of July 2014 the Prosecutor issued a statement about the situation in Libya, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-25-07-2014.aspx, retrieved the 26th of July 2014.

[21] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, case n. ICC-01/11-01/11-565, 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'" 24 July 2014, Appeals Chamber, §§ 57ff.

Covenant in the Pre Trial Chamber decision on the case of Mr. *Gaddafi*, including two quotations by the defence, one remark about compliance of the Libyan death penalty system with Article 6 of the *ICCPR*, and two generic references to the human rights obligations of Libya. In the almost 250 pages of the latter decision there is one reference to the European Court of Human Rights (ECtHR) jurisprudence in a quotation of a submission by Libya about the interpretation of "unjustified delay" and "undue delay".

In the appeal decision in the case of Mr. *Al Senussi*, the Appeals Chamber held "*the references to the jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights as well as that of the UN Human Rights Committee to be of only very limited relevance*" as … the case at hand concerned the question of the admissibility of the case and was therefore primarily a question of forum[22].

The reference of the "internationally recognized principle of due process" in Article 17(2) is perhaps one of the most controversial provisions in the Statute and leaves much room for different interpretations as to the meaning of the reference[23]. The reference to the principle of due process is rather generic; it does not extend to certain principles and guarantees one would expect to pertain to the principle[24] as corollaries, like specific procedural rights as well as the principle *in dubio pro reo* and its implications (Article 16(2) of the *ICCPR*).

As pointed out in legal doctrine, "*though Articles 17 and 20 are meant to govern the actions of the* [Prosecutor], *to some extent, they indicate the existence of limitations on the range of judicial actions that a state may pursue in fulfilling its investigatory and prosecutorial duties under the Statute*"[25].

A literary interpretation shows that there is not much room for the so called "due process thesis," according to which the Court should take into account the ability and willingness of a State to comply with due process standards[26]. This with regards to the drafting history of Article 17.

The Prosecutor in the *Gaddafi* case explicitly recalled the rejection of a proposal from Italy to rely on lack of due process as a ground for "admissibility since according to the Coordinator of the Working Group many delegations

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[22] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment 21 May 2014, Appeals Chamber, §§ 169ff.f

[23] C. DE FRANCIA, *Due process in international criminal courts: why procedure matters, Virginia Law Review*, vol. 87, n. 7, (2001), 1381ff..

[24] On the interpretation to be given to the principle of procedural fair trial and equality of arms in front of the ICTY, *See* recently *The Prosecutor v. Šainovic and others,* case n., IT-05-87-A, Judgment 23 January 2014, Appeals Chamber, § 87.

[25] J. ALMQVIST, *Complementarity and Human Rights: A Litmus Test for the International Criminal Court*, 339.

[26] K.J. HELLER, *The Shadow Side of Complementarity: The effect of article 17 of the Rome Statute on National Due Process, Criminal Law Forum,* 2006.

believed that procedural fairness should not be a ground for defining complementarity" [27].

In contrast, *Gaddafi's* defence[28] stressed the need to give a substantial meaning to the due process clause. The exclusion of fair trial considerations from the determination of an admissibility challenge would, according to the defence of Mr. *Gaddafi*, also violate the rights of the person enshrined in Article 67 of the Statute (Rights of the accused)[29].

Further emphasis was placed by the defence upon Rule 51 establishing that "the Court may consider, *inter alia*, information that the State referred to in Article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct". The Rule allows a State having jurisdiction (but not the accused person) to submit to the Court information for the purpose of the decision on the non admissibility of the case in front of the Court. The Rule does not state that the concerned State meet such standards and recognized norms. The standards are a requirement for a non admissibility decision.

Nevertheless, the Rule logically extends the cognizance of the Court to international standards and, in our view, it seem acceptable that national courts not meeting internationally recognized norms and standards should be regarded as unable rather than unwilling to prosecute cases.

The Rule, without prejudice of the hierarchical structure of the sources of law under Article 21of the Statute and its necessarily subordinate rank in respect of the Statute, seemed to support an interpretation of Article 17(2)(a) to (c) which clarifies that references to the "principle of due process recognized by international law" and "justice" were not to be interpreted "one way". Violations of due process would accordingly be relevant not only when preventing or delaying prosecution but also when the concerned State is willing and able to set up fast track judicial lynching procedures.

Such a widening of the meaning of the due process reference would also be beneficial to the aim of preventing impunity and to uncover, eventually in front of other Courts, further crimes or even support provided by other States to a long lasting criminal dictatorship and widespread human rights abuses. On the other side, the ideals of justice may not necessarily be confined to the very narrow timeframe investigated by the International Court and subject to the admissibility requirement. The latter aspect, which is ultimately close to the core question of the purpose of international criminal justice and the need to re-

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[27] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013, Pre Trial Chamber I § 140.

[28] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* Case n. ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi 11 October 2013, Pre Trial Chamber I, §§ 33.

[29] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* Case n., ICC-01/11-01/11-T-3-Red-ENG, Transcipts 10 October 2012, § 3.

evaluate retributionist approaches, has been recently abandoned in favor of rhetoric considerations based on the exceptionality of situations and imperative requirements to punish violations in order to dissuade and prevent further violations.

Perhaps this aspect is not sufficiently reflected in the debate surrounding the "sentence based complementarity" as opposed to a "conduct based" complementarity[30].

The Appeals Chamber, in the case of Mr. *Al Senussi*, observed that the "text of Article 17 (2) (c) and the *chapeau* of Article 17(2) could potentially be read to support the position argued for by the defence, namely 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"[31], but in the end concluded that the question underlying complementarity is whether the Court or the State is the proper forum to exercise jurisdiction. The Appeals Chamber further held that the fact that two subparagraphs of Article 17(2) do not expressively refer to shielding or protecting the person "cannot detract from the fact that they are sub-paragraphs of a provision defining unwillingness" [32].

Nevertheless, Rule 51 seems to provide an argument that the meaning of the "due process" reference in Article 17 was not so distorted, despite its drafting. Also the safeguard clause contained in Article 21(3) of the Statute, establishing that "*application and interpretation of law* [*pursuant* to art. 21 (of the Statute]*, must be consistent with internationally recognized human rights"* would have mandated a more human rights oriented interpretation of Article 17. There is no reason to restrict the reach of Article 21(3), which covers the entire spectrum of sources of law applicable by the Court, to exclude the subject matter of admissibility challenges from the safeguard clause. Interestingly, in the two decisions, Article 21(3) is quoted only twice, once in a reference to the submissions of the defence of Mr. *Gaddafi* and once in a reference to a submission of the Prosecutor in the Pre-Trial Chamber decision on the [in]admissibility of the case of *Al Senussi*. The Appeals Chamber quotes Article 21(3) without going in depth.

Under other circumstances the Trial Chamber has shown to interpret Article 21(3) in a very persuasive way in the case of witnesses claiming asylum whose immediate return was held to interfere with the Netherlands' ability to

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[30] Reference is to K.J. HELLER, *A Sentence-Based Theory of Complementarity*, 53 *Harvard International Law Journal* (2012, 85ff., C. STAHN, One Step Forward, Two Steps Back?: Second Thoughts on a "Sentence-Based" Theory of Complementarity, 53 *Harvard International Law Journal* (2012), p. 185ff and also D. ROBINSON, *Three Theories of Complementarity: Is it About the Charge, the Sentence, or the Process?*, 53 *Harvard International Law Journal* (2012), p. 165ff..

[31] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 24 July 2014, Appeals Chamber, § 213.

[32] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 24 July 2014, Appeals Chamber, § 218. *See* also §§ 219 and 220.

properly deal with the claim in respect of the so-called "asylum cases"[33]. If the outcome of the said cases may be not perceived as satisfactory to all, at least the purpose of the references to Article 21(3) must be praised. In the instant case the provision may support the definition of the exterior limits beyond which the lack of procedural rights and fundamental guarantees become relevant for complementarity.

The Prosecutor has taken the position that procedural guarantees in the proceeding State are relevant for complementarity at the moment at which such guarantees (or lack of guarantees) "*can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3)*". The Appeals Chamber in the case of Mr. *Al Senussi* adopted a similar approach asserting that in the context of Article 17, the question is if the violation of the accused's right is "so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the accused so that they should be deemed [...] to be 'inconsistent with an intent to bring [the person] to justice'" [34].

This position is reminiscent of the so-called *Radbruch Formel*[35] and may imply that there may be "a margin of tolerable injustice of inadmissibility decisions". Or, in other terms, that there must be a limit beyond which the strict application of certain provisions of the Statute become intolerable and antithetical to the purpose of the Statute.

The defence of Mr. *Gaddafi* referred to the *ad hoc* Tribunal (ICTY) practice of assessing, in order to refer a case to State and outsource its different "primary jurisdiction", the ability of the concerned State to adhere to the standards of the human rights instruments it has ratified (*ICCPR*, *ACHR*), as relevant to its ability to investigate and prosecute if referred the case.

International standards are apparently not in the forefront in the evaluation of the inadmissibility of a case already investigated by a State. According to the Pre-Trial Chamber in the case of Mr. *Gaddafi,* "*the ability of a State genuinely to carry out an investigation or prosecution must be assessed in the context of the relevant national system and procedures"*[36]. Similarly, in the case of *Al Senussi*, the Pre Trial Chamber held that "*Libya's willingness and ability to carry out its*

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[33] *The Prosecutor v. Germaine Katanga*, case n. ICC-01/04-01/07-3003, Decision on the admissibility of the appeal against the "Decision on the application for the interim release of detained Witnesses" 9 June, 2011.

[34] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 24 July 2014, Appeals Chamber, §§ 190 and 230ff.

[35] Reference is to G. Radbruch's essay *Gesetzliches Unrecht und übergesetzliches Recht*, *Süddeutsche Juristenzeitung* , 1946, p. 107ff..

[36] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the admissibility of the case against Saif Al-Islam Gaddafi 31 May 2013, Pre Trial Chamber I § 200.

proceedings ... must be assessed in the light of the relevant law and procedure applicable to domestic proceedings Libya" [37].

In the latter case, the Chamber further held that violations of procedural rights are not *per se* grounds for a finding of unwillingness or inability under Article 17 [38]. The Chamber held nevertheless that certain violations of the procedural rights of the accused may be relevant for the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make. However, Article 17 identifies two cumulative requirements, "*providing for a finding of unwillingness only when the manner the proceeding are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice*"[39]. In other words, the lack of independence is not relevant and condoned for the purpose of admissibility, if it does not reflect a lack of intent to bring the person to justice and the later term is not an expression of an abstract ideal of justice.

Before the Pre-Trial Chamber decision in the case of Mr. *Gaddafi,* the issue of remedies to human rights violations under the law of the State proceeding was discussed in very interesting posts on internet legal blogs[40]. One apparent paradox which emerged from the debate was related to the possibility that remedies like the "stay" of the proceeding due to human rights violations affecting the proceeding, may determine the concerned State's inability to proceed for purposes of the admissibility decision.

Without any intention to argue that procedural impediments are or should be "transferred" as such to the ICC in a subsequent trial, nor upholding the idea that "absolute" impediments may exist as such, there is some substance in the fact that a State setting up lynch-justice is less likely to determine an inadmissibility decision of the ICC.

From a different perspective, also certain substantial provisions defining specific crimes in the case of an armed conflict of not an international character, and serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949", are relevant to the admissibility of a case. Reference is to Article 8(2)(c)(iv) and the "*passing of sentences and the carrying out of executions without previous judgments pronounced by a regularly constituted*

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[37] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* , 11 October 2013, Pre Trial Chamber I § 203.

[38] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* , 11 October 2013, Pre Trial Chamber I § 235.

[39] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* , 11 October 2013, Pre Trial Chamber I § 235.

[40] *See* K.J. Heller, *Why the Failure to Provide Saif with Due Process is Relevant to Libya's Admissibility Challenge*, dated 2 August 2012, and related responses and trackbacks, http://opiniojuris.org/2012/08/02/why-the-failure-to-provide-saif-with-due-process-is-relevant-to-libyas-admissibility-challenge/, retrieved June 18th 2014.

court, affording all judicial guarantees which are generally recognized as indispensable".

Standards are in this case set out in Article 75, paragraphs 3 and 4, of the 1977 first Additional Protocol to the Geneva Conventions. The provision is at the crossroads between human rights law and the law of armed conflict. When interpreting Article 17, such substantive provisions should be taken into consideration at least as the "outer limit" of the acceptability of "domestic standards" and the Court while assessing the admissibility or inadmissibility of the case, cannot acknowledge national investigations which are by themselves incompatible with such standards, and criminal in essence.

It is worth observing that practices by domestic Courts in the repression of crimes of international concern (falling beyond the *ragione temporis* jurisdiction of the ICC) in a State party to the Rome Statute has recently been considered in a communication on under Article 15(2) as a crime under the Statute[41].

IV Specific aspects related to the due process principle emerging from the decisions of the Chambers.

The approach followed by the Court when shaping of the relationship between the ""internationally recognized principle of due process" as such and the admissibility or inadmissibility of a case, seems to miss the point and certain specific findings about due process and substantive human rights in the decision are disappointing or misleading.

The incapacity by Libya to provide adequate legal representation to the accused was considered both in the *Gaddafi* and in the *Al Senussi* case. Lack of legal representation was deemed fatal only in the case of Mr.*Gaddafi,* who was not under the control of the authorities of Libya. Also Mr. *Al Senussi* was not afforded with his right to access to a lawyer upon his transfer to Libya in 2012 and has since then been held in detention. The Pre Trial Chamber noted[42] Libya's responses about the fact that no lawyer was willing to take up the case and ongoing efforts and finally, in a colorless paragraph, considers the "lack of legal representation" to be eventually relevant for the admissibility of the case as, if Mr. *Al Senussi* will not be represented, the trial cannot proceed. The finding was deemed[43] to be conflicting with the one in the case of Mr. *Gaddafi* as the sole difference is represented by the fact that the proceeding of Mr. *Gaddafi* could not proceed in any case.

On her own, the Prosecutor, quoted in the Pre Trial Chamber's decision in the case of *Al Senussi*, provided an explanation of her understanding of pattern for prognostics, asserting that the *Chamber should resist engaging in*

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[41] 9 Bedford Row International, *Communication to the ICC Prosecutor pursuance to article 15 of the Rome Statute of the international Criminal Court to open a preliminary inquiry into the situation of Bangladesh,* February 4, 2014, n. 14.

[42] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* 11 October 2013, Pre Trial Chamber I § 231.

[43] K.J. HELLER, *PTC I's inconsistent Approach to Complementarity and the Right to Counsel, Opinio Juris,* Oct. 13, 2013.

speculative assessment as to the outcome of future events at the national level ... remaining vigilante to obvious obstacles, established on the basis of concrete evidence that establish a foreseeable risk that national proceeding cannot in fact be carried out". Lack of representation as such was not considered a violation of due process in the Chamber decisions.

In the appeal proceeding in the issue of the [in]admissibility of the case of Mr. *Al Senussi*, the Appeals Chamber observed that the arguments of the defence as to the lack of counsel in domestic Libyan proceedings were somewhat unclear … because the defence did not separate those arguments going with the unwillingness from those going with the inability of the Libyan State[44]. The defence argued *inter alia* that the Pre Trial Chamber failed to apply and consider international human rights law in respect of the requirement for legal representation in the criminal proceeding, that the lack of legal representation may not be justified with reference to the security situation in Libya and that the Pre Trial Chamber "reversed the burden of proof and failed to require Libya to establish that the lack of legal representation was not an impediment to it being willing and able genuinely to carry out the proceedings", contradicting the finding in the case of Mr. *Gaddafi*.

The Appeals Chamber held that Pre Trial Chamber did not err when it found that the lack of legal representation in the domestic proceeding against Mr. *Al Senussi* did not reach the threshold necessary to establish the unwillingness of Libya under Article 17(2) and further held that the Pre Trial Chamber's conclusion that the lack of representation was primarily due to the security situation in Libya was not unreasonable[45]. Clearly the exclusion of evidence about the security situation in Libya postdating the decision had, in the said context, a more substantial impact on the outcome of the appeal than in the case of Mr. *Gaddafi*[46].

Denial of access of the accused to lawyer for purpose of the admissibility challenge in front of the ICC, despite non-compliance with an order of the

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[44] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 24 July 2014, Appeals Chamber, § 183 and also § 199.

[45] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 24 July 2014, Appeals Chamber, §§ 189ff..

[46] On the subject matter of the review of the factual situation due to change in circumstances, *See* K.J. Heller, *It's Time to Reconsider the Al Senussi Case (But How?)*, http://opiniojuris.org/2014/09/02/time-reconsider-al-senussi-case/ accessed November 18th 2014. The Author concludes that under article 19(4), upon the commencement of the Trial in Libya a subsequent challenge would be based on *ne bis in idem* and that accordingly Mr. *Al Senussi* would not be entitled to challenge the inadmissibility finding. As explained in a Comment posted thereof, we consider that the reasoning of the Appeals Chamber in the case of Mr. *Gaddafi* and then in the case of Mr. *Al Senussi* derives from the AC decision on admissibility of the 28 July 2011 since the case of Mr. *Ruto*. Such a posture does not appear to be supported in the Statute of in the RPE. Article 83(2)(a), which applies to appeals against other decisions than an acquittal or a sentence, provide the Appeals CChamber with the power to reverse or amend the decision (idem Rule 158.1). Excluding evidence postdating the impugned seems to be justified exclusively when there is the need to order a new trial and the new evidence has to be assessed in first instance (art. 83(2)(b)).

Chamber, was not adequately considered in the case[47] of *Al Senussi*. Perhaps the right to consult freely with counsel under Article 67(1)(b) of the Statute is constituted too strictly and applies solely when a charge has to be determined (Article 67(1)) and not to proceedings under Article 19, and this is clearly a loophole in the guarantees of the Statute and in the rules of procedure and evidence. In its appeal the defence of Mr. *Al Senussi* argued that the Appeals Chamber should not dispose the matter without the suspect being able to provide his instructions and information to his counsel. The argument was rejected by the Appeals Chamber which asserted that participatory rights of the suspect proceedings are limited to the right to trigger an admissibility proceeding (art. 19(2)(a)) and the right of a suspect surrendered or voluntarily appearing to the Court, to make written submissions in proceedings triggered by others, including States (rule 58(3))[48]. Accordingly, broader participatory rights, as those claimed by the defence of Mr. *Al Senussi* to consult and receive instruction from the suspect in the admissibility proceeding may be granted under rule 58(2) … at the discretion of the Pre Trial Chamber when deciding on the procedure[49] and the exercise of such discretion may be subject on appeal to review exclusively when standard for review are met (e.g. when the decision is based upon an erroneous interpretation of law, a patently incorrect or unfair or unreasonable conclusion on facts as to constitute an abuse of discretion) and such standards were apparently not met even if the Pre Trial Chamber had previously decided on a privileged visit to the suspect by his defence. The possibility for the defence to visit Mr. *Al Senussi* was also considered by the Single judge exercising the functions of the Pre Trial Chamber I, in her decision of the 11th of July 2014[50].

From a due process viewpoint it can probable be left open, if it is more egregious to deny the right to access to the lawyer appointed for purpose of the

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[47] The "obligation ... to return to the defense of Mr. *Gaddafi* the originals of the material that were seized from the former counsel for Mr. *Gaddafi* by the Libyan authorities during her visit ... in Zintan, and destroy any copies thereof", in compliance previous Court order dated March 1, 2013, is considered in the Decision requesting Libya to provide submissions on the status of the implementation of its outstanding duties to cooperate with the Court 15 May 2014, Pre Trial Chamber I, § 9.

[48] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 24 July 2014, Appeals Chamber, § 146. The Appeals Chamber relied on the decision of the 16th of September 2009 on the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, case n. ICC-02/04-01/05-408, § 24, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, in which the argument was rejected that the discretionary appointment of a counsel to represent fugitive suspects arose out of article 67(1) and rule 121.

[49] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 24 July 2014, Appeals Chamber, § 149.

[50] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* case n. ICC-01/11-01/11-563, Decision Decision on matters related to Libya's duties to cooperate with the Court, 11 July 2014, Pre Trial Chamber I, § 22ff..

admissibility proceeding before the ICC or the detention of the lawyer appointed for the proceeding in front of the ICC as in the case of Mr. *Gaddafi*.

The necessary independence and impartiality of the Libyan judiciary has been highlighted and ultimately affirmed by the Pre Trial Chamber in the *Al Senussi* case with a really disappointing "quote, note and observe technique" lacking of legal analysis. Facts the Pre Trial Chamber noted include: a single request for adjournment of trial which has apparently been granted in Libya and a Libyan courtroom left open to public[51]. It remains with the reader to guess what weight the Chamber attributed to each of the facts tediously noted in favor or against the finding that Libyan Courts fulfill the necessary independence requirements and what the balancing criteria, if any, was adopted.

The apex is perhaps reached in one paragraph of the *Al Senussi* Pre Trial Chamber's decision where it reads that "*indeed, the Chamber noted that the acquittal of the two individuals, although for charges related to the "1988 Lockerbie bombing", has reportedly "seem as important because it shows the impartiality and independence of the Libya at the time when many voices outside the country claim that a fair trial is impossible in Libya*»[52]. The fact that the notation is preceded by the word "indeed" supports the understanding that the Chambers consider this fact to be really relevant for assertion of the independence of the Libyan judiciary. The reference was to a case of embezzlement of funds related to reparations awarded in the *Lockerbie bombing* by aids of Mr. *Gaddafi* senior, still detained for other heinous crimes. If ultimately the case of Mr. *Gaddafi* was affirmed to be admissible in front of the Court also due to the lack of control by Libya over the place the accused is detained[53], it worth mentioning an acrobatic interpretation by the Prosecutor about the possibility that Libyan authorities could prosecute Mr. *Gaddafi in absentia* under Article 348 of the Libyan criminal procedure, while detained by the *Zintan militia* and that Libya was consequently able to conduct the proceeding[54]. The position was later retracted by the Prosecutor[55] stressing the fact that under art. 17(3), the case would be admissibility if Libya due to the total or partial collapse of its judicial system is Libya would be unable to obtain the

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[51] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* , 11 October 2013, Pre Trial Chamber I § 254.

[52] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* 11 October 2013, Pre Trial Chamber I § 255.

[53] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 24 July 2014, Appeals Chamber, § 204, distinguishing the rationale of the Pre Trial Chambers in the cases of Mr. *Gaddafi* and Mr. *Al Senussi*.

[54] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* , case n. ICC-01/11-01/11-276 Red., Prosecution's Response to "Libyan Government's further submisions on isues related to the admisibility of the case against Saif Al-Islam Gaddafi", 12 February 2013, 19.

[55] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* , case n. ICC-01/11-01/11-282, undated.

presence of Mr. *Gaddafi*. *In absentia* trials are permitted under the Special Tribunal for Lebanon (*STL*) Statute[56] which contains a very questionable provision on *in absentia* proceedings, with the guarantee of a re-trial (in need of transitional regulations as the tribunal is not a permanent body)[57] in situations in which the accused is non present due to lack of cooperation by the requested State. The said provision is suitable of being interpreted in two ways, as to apply in situations in which the State is not cooperating in the capture of the accused of the person, but also in situations, similar to those of Mr. *Gaddafi*, in which the individual is not fugitive, but held in custody[58]. The later interpretation is in blatant violation of the basic rights of the accused. Probably, the *Prosecutor* had in mind something similar in its stand later retrieved.

Undue delay of the proceeding has been considered upon allegations of the defence in the case of *Al Senussi*. The Chamber maintained to be mandated, under art. 17(2) of the Statute, to examine also factual circumstances with the view of ultimately discerning what the State's intent is in respect of the ongoing domestic proceedings against the individual. Accordingly delay is to be considered relevant not as a violation of the principle of due process, but solely as a matter of intentional avoidance of prosecution. The determination as to whether a delay is unjustified must be made not against an abstract ideal of "justice", but against the specific circumstances surrounding the investigations concerned[59].

Also issues related with the principle of legality surfaced in the Gaddafi case. It is an established principle that prosecution must not necessarily be for “international crimes”. In the decision of the Appeals Chamber of May 21, 2014 the Court applied the so called *Ruto test* developed first in the case of the admissibility challenge of the vice President of Kenya and named consequently. According to the test, domestic investigation must cover the “same conduct”, discrete aspect of the case in front of the Court are investigated domestically and the State challenging the jurisdiction is required to establish the actual

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[56] Specifically about the *SLT* practice, *See* M. GARDNER, *Reconsidering Trials In Absentia at the Special Tribunal for Lebanon: an application of the tribunal's early jurisprudence*, 43, *The George Washington International Law Review* (2011)p. 91ff. On the attempt to the credibility of the Court due to lack of cooperation by States and possible alternatives, *See*, H.P. KAUL, *Construction Site for More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT law (2005).

[57] On the question of re-trial and in the sense that *in absentia* trial fits better with the ICC than with a non permanent tribunal, G.J. SHAW, *Convicting Inhumanity in absentia: holding trials in absentia at the International Criminal Court*, 44, *The George Washington International Law Review* (2012), 116ff..

[58] For the interpretation of the Statute of the *SLT*, W.A. SCHABAS, *In Absentia Proceedings Before International Criminal Courts*, in G. SLUITER – S. VASILIEV (edited by) *International Criminal Procedure*: *towards a Coherent Body of Law*, London, Cameron May, 2009, p. 379ff.

[59] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* 11 October 2013, Pre Trial Chamber I § 223.

contour and precise scope of domestic investigation[60]. Some of the charges against Mr. *Gaddafi* explicitly apply to "public officers" or to “acts against State safety or to conduct defined as "insulting constitutional authorities" (...). The possibility to satisfy the first requirements with the exercise of "*de facto* authority" was considered by the Pre-Trial Chamber solely under the perspective of the existence of criminal provisions repressing such conduct, not also for purpose of evaluate if *nulla poena sine lege* requirements are fulfilled, eventually resorting to "international law".

Under well settled Human rights law the *nulla poena sine lege* principle is not violated if the conduct was criminal under international law even if the principle is recently undergoing a development in the jurisprudence of the *ECtHR* in the shift from the *Simsic* case[61] to the cases of *Maktouf* and *Damjanovic*[62] . But it is doubtful that the "international law" exception allows for the "over-stretching" of ordinary criminal provisions far beyond predictability and without relying on international law.

This raises the question if predictability and foreseeability of punishment under ordinary provisions should be an outer limit to the condescend approach since now followed by the ICC - based on the sufficiency of domestic incriminating provisions not necessarily coinciding with those established under the Statute - and mandate the admissibility of the case.

It is no surprise that the decisions in the cases of *Gaddafi* al *Al Senussi* do not address the issue of under a Human rights perspective

Death penalty, which was highly critical issue during the negotiations of the Rome Statute, is very shortly addressed in both decisions. The Pre Trial Chamber in the case of Mr. *Gaddafi* observed *en passant* that "*where the death penalty has been imposed, the sentence cannot be carried out until the case has been considered by the Supreme Court*" and further that "*commutation of death sentence to life imprisonment is possible where the family members of victims forgive the convicted person*".

In the case of *Al Senussi* the wording is slightly more reassuring as "*a more stringent procedure is followed when the death penalty has been imposed ... as the Supreme Court may consider not only error of law, but re views all factual, legal and procedural matters leading to the verdict and sentence*".

The Appeals Chamber while entertaining the 22nd of November 2013, the "request for suspensive effect of the appeal" addressed by the defence of Mr. *Al*

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[60] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Judgment*,* 21 May 2013, Appeals Chamber, §§ 56ff.

[61] ECtHR, Fourth Section, *Simsic v. Bosnia and Herzegovina*, decision, 10th of April 2012. In its decision the Court considered that retrospective criminal legislation adopted in 2003 in order to allow State prosecutions of crimes against humanity did not violate article 7 of the Convention as the conduct constituted a crime under international law.

[62] ECtHR, Grand Chamber, *Maktouf and Damjanovic v. Bosnia and Herzegovina,* judgement, 18th of July 2013, held article 7 of the Convention to be violated by the retrospective sharpening of penalties for war crimes which were already punishable when committed and that the *lex mitior* principle was supposed to apply.

Senussi, alleging that the enforcement of the impugned Chamber decision would inevitably result in the imposition of death penalty and such situation would be irreversible and there would be no remedy for the violations of fair trail which would continue[63]. Both Libya and the Prosecutor argued that the suspension of the impugned decision would not entail suspensive effect on the domestic proceeding and also that the obligation to surrender would not be directly reinstated as a consequence of an appeal decision reversing the Chamber decision. The Appeals Chamber also held that the request exceeded the scope of an order for suspensive effect, as the impugned decision even in the case of a reversal, would not impede or stay the Libyan domestic proceeding. Nevertheless, according to the Appeals Chamber, Libya was under an obligation to abstain from any initiative which would frustrate "the Court's legitimate expectations" that, should the decision on the admissibility be reversed, it would be for the case possible to be resumed in front of the Court.

The Appeals Chamber addressed subsequently in its decision on the appeal of the [in]admissibility decision in the case of Mr. *Al Senussi*, the argument of the defence that the Pre Trial Chamber that should have used a higher level of scrutiny because it could result in the imposition of death penalty, observing that the Pre Trial Chamber showed to be aware of the circumstance[64].

The legitimacy of death penalty for core crimes remains, even after (or despite) the 1998 Rome Conference, a hot topic

Looking at post World War II jurisprudence, death penalty for war crimes and crimes against humanity seems to be not less rooted in international criminal law than the concept of *joint criminal enterprise*; at least employing the same interpretative approach followed the *Ad Hoc* tribunals in relying on decisions like the "*Essen lynching case*"[65]. Even death penalty for juvenile perpetrators was not a taboo. Nevertheless things were already slowly moving since the review and commutation and early release practice subsequent to *Nuremberg* descending trials and the Rome Conference, does not seem to correctly reflect international debate as "like minded" States were too much "compromise ready" in order to reach their goals.

Apart from Regional Human rights agreements, death penalty as such does not represent a violation of international law for those States which have not ratified the Protocol to the *ICCPR.* Perhaps aspects like the death penalty moratorium under the United Nations General Assembly Resolution (A/RES/62/149), ordinary advocacy of United Nations Offices and agencies for the abolition of death penalty under the reference to common values and views

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[63] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, case n. ICC-01/11-01/11-480, Decision on the request for suspensive effect and the request to file a consolidated reply, 22 November 2013, Appeals Chamber.

[64] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Judgment, 24 July 2014, Appeals Chamber § 254.

[65] Case n. 8, *The Essen Lynching Case*. Trial of Erich Heyer and six Others British Military Court for the Trial of War Criminals, Essen, 18th -19th and 21st – 22nd December 1945, UNWCC, vol. 1, 1949, p. 88ff..

under the United Nations Relationship Agreement with the Court could have been addressed by the Chamber.

Nevertheless States which have not ratified the Protocol additional to the *ICCPR*, shall apply the principles set out in the *ECOSOC* resolution 1984/50 and its annex and specifically n. 5, which calls into play Article 14 of the *ICCPR*. Accordingly without "full size" fair trail guarantees - not the cropped due process surrogate which emerges from the wording of Article 17 of the Statute - death penalty is contrary to international law.

This brings us back to Article 21(3) which was not relied sufficiently considered in the decisions and in more generally the obligation of international organizations or "institutions" to respect internationally recognized human rights.

This said, the two decisions of the Pre Trial Chamber on the admissibility challenges in the Libyan cases and also the Appeals Chamber decision in the case of Mr. *Al Senussi* are probably in absolute the most algid decisions incidentally dealing with fundamental rights, and make commercial arbitrations and WTO dispute panels look warm hearted.

Finally, it is worth questioning, having noted the excess of post conflict rhetoric in the decisions, if relevance (or lack of relevance) of due process considerations for purposes of complementarity and admissibility of the case, should not be addressed under the perspective of times of emergency using accepted patterns for non suspendible rights and criteria setting limits to the suspension of fair trial guarantees. The same rhetoric is to be found in respect of state of transition and transitional justice in the Appeals Chamber dissenting opinion of Judge Anita Ušacka*,* advocating for not too high standards for States in a transition process[66]*.*

Perhaps another missed opportunity to discuss such standards in respect of derogation mechanisms under human rights instruments.

V. **What is within and what is beyond the jurisdiction of the ICC in respect of foundamental rights**.

The Statute of the International Criminal Court establishes generally a fair legal framework, granting fundamental rights to the accused with certain weaknesses to include the lack of a proper sentencing framework.

The Statute and Rules of procedure and evidence are insufficient and capable of triggering Responsibility under Human Rights Conventions of States Parties or not cooperating with the Court in those situations in which the Court eventually engages with the domestic jurisdiction of other States.

Requests to States to prosecute offenses against the Court under Article 70(4)(b) of the Statute and rule 162 are similar, in their effects to referrals of proceedings to States by the *ICTY* under *Rule* 11-*bis* which are nonetheless

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[66] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment 21 May 2014, Appeals Chamber, quoting at p. 24, D. LUBAN, *After the Honeymoon: Reflections on the Current State of International Criminal Justice*, 11 Journal of International Criminal Justice (2013), p. 505, at p. 512, words: "*It seems plainly more important that Libyans have the experience of transitional justice than that the ICC works its mandate*".

conditioned, besides the absence of death penalty, by the requirement of fair trial guarantees[67].

As to the responsibility of the Court to respect internationally recognized human rights it is relevant to establish if ordinary criteria developed for "extraterritorial jurisdiction" of States in Human rights issues may provide some additional value in defining the boundaries of the international responsibility of the international court ... which is by itself without a territory and extraterritorial in essence (even if jurisdiction conferred primarily, having regarded to the so called pre-conditions under art. 11 of the Statute, based upon territoriality and the personality principle).

The ICTR Appeals Chamber held in the *Prosecutor v. Kajelijeli* case that once the accused is arrested or detained by a State at the request or under the authority of the Tribunal has a responsibility to provide whatever relief is available to it to reduce any human rights violation in the State of detention[68]. Nevertheless, it is worth mentioning that the ICC trial Chamber, in the decision on the sentencing in the case of Mr. *Katanga,* seems to have taken a different stand and excluded that the alleged omission by the Prosecutor to require the detaining State to respect accepted standards could determine a reduction of the sentence[69].

The defence of Mr. Gaddafi sought, based on an explicit admission by Libya that the ICC arrest warrant had been carried out within the meaning of *rule* 123, to assert the responsibility of the ICC in a broader sense[70]. This raises the question if the claim by Libya, probably made with the purpose of avoiding non-cooperation with the Court, suffices to extend the responsibility for the detention under the *Zintan* militia to the Court.

Those provisions which are "shaped" on and inspired by the "specialty rule" in extradition and cooperation based upon transfer of sentenced persons, contained in the Statute and establishing approval for prosecution in the State of enforcement, even if subject to a consultation mechanism with the state which has surrendered the person (Article 106 of the Statute and Rule 214(4)), are clearly insufficient to safeguard human rights commitments of States cooperating with the Court and should mandate the setting of clear condition having in mind the boundaries for State responsibility defined by the *ECtHR* in its decision in the *Djokaba Lambi Longa v. The Netherlands*[71].

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[67] At this purpose, *See*, W. SCHABAS, *Anti-Complementarity: Referrals to National Jurisdictions by the UN International Criminal Tribunal for Rwanda,* in *Max Planck Yearbook of United Nations Law,* 13, 2009, p. 29ff..

[68] *The Prosecutor v. Kajelijeli*, case n. ICTR-98-44A, Judgment, 23 May 2005, Appeals Chamber.

[69] *The Prosecutor v. Germaine* Katangacase n. ICC-01/04-01/07-3484, Decision, 23 May 2014, Pre Trial Chamber II, § 136.

[70] Respectively, motion by the defense, ICC-01/11-01/11-522-Red 10-03-2014 and submissions by Libya, ICC-01/11-01/11-128-Conf 02-01-2014.

[71] ECtHR, Third section, *Djokaba Lambi Longa v. The Netherlands*, decision, 9 October 2012.

Since the *Galic*[72] and *Blagojevic*[73] cases the *ECtHR* has held, with an apparent excessive reliance on situations under Article VII of the *NATO Sofa* (...) that it was not axiomatic that a criminal trial would engage the responsibility under public international law of the State on whose territory it was conducted. The *ECtHR* further led in the *Djokaba* case "*the Convention does not impose on a State that has agreed to host an international criminal tribunal on its territory the burden of reviewing the lawfulness of deprivation of liberty under arrangements lawfully entered into between that tribunal and States not party to it*"[74]. The *ECtHR*'s assessment which does recall previous assessments in respect of State obligations under the Convention and adhesion to international agreements, appear to be more prone to acceptance when such Organization entail the creation of an international jurisdiction, perhaps as a matter of comity.

Nevertheless, the transfer of the prosecution of an offenses against the Court to a State, as well as the removal of a legal obstacle to prosecution in or extradition from or by the State of enforcement, reasonably fall within the jurisdiction *ratione personae* of the Court and, in our view also of the State which has previously surrendered the individual to the Court; even if the latter is responsible under its treaty obligations and the Court solely as a matter of general principles and customary law.

Responsibility is based upon a "consequentiality principle" which was correctly pointed out in the *Soering v. The UK* decision[75]. The rationale was later partially obfuscated by the *ECtHR* in its *Bankovic* decision (in which the *Soering* rationale was re-thought as based upon presence of the individual in the respondent State). The "direct consequence" approach has been followed by the *ECtHR* in the *Al Saadoon and Mufdhi v. The United Kingdom* decision, in which the *Grand Chamber* defined the liability of States having taken an action which has as a direct consequence the exposure of the individual to a risk of proscribed ill treatment [76]. It is worth to mention that the *ECtHR* didn't consider the referral of the case of *Al Saadoon* and *Mufdhi* to Iraqi authorities for prosecution (which ultimately triggered the issue of their transfer) as an action having direct consequences on a an proscribed ill treatment but rather as a missed opportunity to seek guarantees and assurances.

The position taken by the *ECtHR* was perhaps influenced by the fact that the handover of the individuals was in a more direct relationship with the feared ill treatment than the previous referral of their case.

The "consequentiality" of an action which results in an internationally wrongful act is, under a different perspective, taken into consideration as acts

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[72] ECtHR, Third section, *Galic v. The Netherlands*, decision, 9 June 2009.

[73] ECtHR, Third section, *Blagojevic v. The Netherlands*, decision, 9 June 2009.

[74] ECtHR, *Djokaba Lambi Longa v. The Netherlands*.

[75] ECtHR, *Soering v. The United Kingdom*, decision, 7 July 1989.

[76] ECtHR, Fourth Section, *Al Saadoon and Mufdhi v. The United Kingdom*, Judgment, 2 March 2010, § 120.

and omissions which are defined wrongful as an aggregate and trigger responsibility of State under art. 15 of the 2001 *Draft Articles on Responsibility of States for Internationally Wrongful Acts* and the responsibility of International Organizations under the corresponding Article 13 of the *Draft Articles on Responsibility of International Organizations for Internationally Wrongful Acts* of 2011 which extends the purpose of “aggregate acts”.

The reach of procedural guarantees established under the Statute, reference is to Article 67 and the rights of the accused, is necessarily limited to proceedings in front of the Court. Such procedural guarantees, according to the reasoning of the Chambers do not represent a reference for the assessment of the ability of a State to prosecute in accordance with the “principles of due process recognized by international law” (art. 17).

With regard to the criteria for extraterritorial jurisdiction of States in human rights matters developed by human rights bodies, the determination of the Court as to the inadmissibility of the case under Article 17 of the Statute as such case is being investigated or prosecuted by a domestic court , in a situations in which the individual has not been surrendered to the seat of the Court and the cooperation by the request State may not be directly compelled, represents a situation in which there is a merely virtual jurisdiction *ratione personae* over the individual the Court failed to obtain the surrender of.

The essence of the scrutiny by the *ICC* over the admissibility of a case and the finding that such a case is inadmissible due to ongoing investigation and/or prosecution violating the internationally recognized due process principle falls short of the requirements of "assisting" the State in the commission of an internationally wrongful act (Article 14 of the *Draft Articles*). If and to what extent the Court could be affirmed to have a positive obligation, when assessing the admissibility of a case to prevent violations of human rights by the proceeding State is a question to be resolved based upon the Statute and, as seen above, the drafting doesn't support directly the assertion of such an obligation.

If a parallel were to be driven with State responsibility for extraterritorial violations of fundamental rights, the situation seems to a certain extent similar to those in which an individual detained abroad tries to compel a State he has a link to, to engage in a diplomatic row in order to be released or transferred. Situation in which the individual does not make a strong case unless perhaps, aggrieved State expressively renounced to any further effort, nullifying any reasonable expectation of successful intervention.

Perhaps one could question if the further keeping watch and continuing seeking of information on the progress in Libyan prosecutions and the possibility for the Prosecutor to seize again the Chambers in the *Al Senussi* case (art. 19(10) of the Statute) is for purpose of being sure the proceeding moved towards death penalty. If such "monitoring" encompasses the "commutation" process and further if monitoring may itself be considered an active commitment of the Court in death penalty cases remains open. We may only suppose that after the sentencing commutation of death penalty would no longer be an issue of complementarity.

Further it is worth observing that death penalty and the risk for an international Organization to get "involved" into a troubling situation has been recently addressed in a valuable and frank *position paper* by the UNODC[77].

VI. **Conclusions**

The shortfalls of the ICC Statute and Rules in matters related to the fundamental rights of the accused in proximity of domestic jurisdiction of States Party are significant, strategic and compromise-oriented in order to gain consent by the widest possible number of States, to include those with a less than immaculate human rights curricula.

The decisions of the Chambers in the issue of the admissibility challenges by Libya appear to be even more oriented towards a total absence of scrutiny of domestic practice and human rights records of concerned States, than the arguable drafting history of the Rome Statute.

The complementarity of the Court's jurisdiction does not seem a core value in itself to balance against human rights. Unfortunately the Chamber decisions seem to be reflect a “Court marketing” approach aimed at preserving the palatability of the Court itself and that future "selective" self-referrals by States, which should accordingly have nothing to fear in terms of scrutiny in their human rights records for those cases they don’t want to refer the Court, and more generally to reassure States about the fact that the Court is not willing to exercise its scrutiny over domestic proceedings.

Further thoughts about the decision are unfortunately closer to conspiracy novels than to legal literature, perhaps due to the fact that Wikileaks has disclosed some cable highlighting an unexpected political role of the Court[78].

The Pre Trial Chamber’s decisions and the Appeal Chamber’s judgment in the case of Mr. *Al Senussi* as well as the approach of the Court to Libyan situation may suggest an active engagement in the efforts to preserve the impression of a Libyan progress towards a political stability which does not exist or does no longer exist.

One could also wonder if implied powers, invoked by international criminal courts and tribunals to include of *Kompetenz - Kompetenz* - which has lastly become a questionable "non objected" principle of international law as asserted

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[77] *UNODC AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, POSITION PAPER*, 2012. The position in respect of death penalty is ultimately expressed at p. 10, where it reads: “*Whether support technically amounts to aid or assistance to the human rights violation will depend upon the nature of technical assistance provided and the exact role of the counterpart in arrest, prosecutions and convictions that result in application of the death penalty. Even training of border guards who are responsible for arrest of drug traffickers ultimately sentenced to death may be considered sufficiently proximate to the violation to engage international Responsibility. At the very least, continued support in such circumstances can be perceived as legitimizing government actions. If, following requests for guarantees and high-level political intervention, executions for drug related offences continue, UNODC may have no choice but to employ a temporary freeze or withdrawal of support*.”

[78] About alleged assurances to China in the situation of Sudan, *See* W. SCHABAS, *International Criminal Court and Wikileaks*, PhD studies in human rights, December 18th 2010, http://humanrightsdoctrorate.blogspot.it, retrieved the 24th of July 2014.

in decision by the *SLT*[79] a *status symbol* - contempt jurisdiction were not established under the respective statute, corporate criminal (contempt) jurisdiction[80] over legal persons, information of failure to cooperate to the Security Council by States in situations referred by the S.C.[81] and recent the resurgence of *subpoenas* beyond statutory provisions[82], could not be better used in order to scrutinize adherence of death penalty provisions to international law and international obligations of international organizations and institutions; at least in situations in which respect for domestic legislation and complementarity is not treaty based.

What is really unfortunate is that the two decisions has not been sufficiently considered by legal doctrine, if compared to other issues like, for example, the attendance at trial in the Kenyan cases and rule 134-*bis,* which are relevant, but certainly raise much less fundamental issue.

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[79] Special Tribunal for Lebanon, Special Tribunal for Lebanon, (SLT), Appeals Chamber, decision of 10 November 2010, Case n. CH/AC/2010/02.

[80] Special Tribunal for Lebanon, (SLT), Order SLT-14-06/I/CJ dated January 31, 2014, asserting that whilst the Tribunal does not have jurisdiction over legal persona in respect of core crimes, nevertheless it does as a matter of contempt jurisdiction. The 24th of July 2014, the Contempt Judge upon motion by the defense, hold, decision STL-14-05/PT/CJ, its jurisdiction to be limited to natural persons and certified the issue for appeal. In the subsequent appeal the Appeals Panel, *Decision on interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings*, 2 October 2014, para 55ff., reversed the decision and held inherent jurisdiction to apply to personal jurisdiction as well.

[81] *The Prosecutor v. Ahmad Muhammad Harun*, case n. ICC-02/05-01/07-57, Decision Public Document informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, 25 May 2010, Pre Trial Chamber I.

[82] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, case n. ICC-01/09-01/11-1274, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014.