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## Predictive Due Process and the International Criminal Court

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## Predictive Due Process and the International Criminal Court

*Samuel C. Birnbaum\**

### ABSTRACT

*The International Criminal Court (ICC) operates under a regime of complementarity: a domestic state prosecution of a defendant charged before the ICC bars the Court from hearing the case unless the state is unable or unwilling to prosecute the accused. For years, scholars have debated the role of due process considerations in complementarity. Can a state that has failed to provide the accused with adequate due process protections nonetheless bar a parallel ICC prosecution? One popular view, first expressed by Professor Kevin Jon Heller, holds that due process considerations do not factor into complementarity and the ICC could be forced to cede a case even to a state intent on subjecting the accused to a show trial. Drawing on recent ICC precedents, this Article argues that the Pre-Trial Chamber has begun to resolve this open question. The Court is now developing a system of "predictive due process." Under this new model of due process, the Court considers to a limited extent whether domestic criminal proceedings abide by international norms and, as part of the analysis, the Court tries to predict how the state in question would treat the accused if given control of the*

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case. Taking a rational actor view of judicial behavior, this Article concludes that the rise of predictive due process is inevitable. From the perspective of ICC judges entrusted with the Court's institutional legitimacy, some consideration of due process factors is the optimal risk-averse strategy. Finally, proceeding from the conclusion that the ICC inevitably will use predictive due process, the Article argues that the ICC should learn from other courts that engage in similar inquiries. Specifically, the Court should seek guidance from the International Criminal Tribunal for the Former Yugoslavia's decision making under Article 11 bis, international economic law jurisprudence on standards of review, and the proportionality jurisprudence of international human rights tribunals. Although reliance on human rights law conflicts with stated ICC doctrine, this standard may give way in practice, if not in form.

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## I. INTRODUCTION

Imagine that the International Criminal Court (ICC) has indicted a defendant from a small, developing country for war crimes and crimes against humanity. After the accused is transferred to The Hague, the state in which he committed his crimes nonetheless indicts him. Now controlled by the defendant's rival ethnic group, the state is intent on convicting and imprisoning the defendant. Indications are that the state has no intention of providing the accused with even minimal due process rights at his trial. Does the ICC have to transfer the defendant back to his home state?

Though this situation may seem far-fetched, it is entirely plausible through the doctrine of complementarity. In many situations, complementarity requires the ICC to abandon a case once a domestic prosecution has commenced. Whether the doctrine applies when the would-be domestic prosecution appears to violate the defendant's due process rights has remained an open question—or at least it has until recently. Drawing on new precedents, this Article identifies a new trend that may resolve such problems. Through the emerging doctrine of “predictive due process,” the ICC has signaled its openness to account for certain, limited due process concerns when evaluating complementarity-based challenges to its jurisdiction. It is doing so by making predictive judgments about how the state would treat the accused if allowed to proceed. The advent of this new model of due process is one of the most significant recent developments in the ICC's evolving relationship with the states parties of the Rome Statute.

Complementarity is one of the cornerstones of the International Criminal Court. Under the Rome Statute, which established and regulates the functions of the ICC, a case is admissible only when the state party of which the accused is a national is unable or unwilling to prosecute.<sup>1</sup> The result is that the ICC is a court of last resort that is complementary to the jurisdiction of national courts.<sup>2</sup> This innovation was critical in securing state support for the Rome Statute,<sup>3</sup> and today, in an era where many accuse the ICC of political

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1. See Rome Statute of the International Criminal Court July 17, 1998, 2187 U.N.T.S. 3, pmb., art. 17 [hereinafter Rome Statute].

2. See generally Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?*, 12 WASH. U. GLOBAL STUD. L. REV. 451, 452–54 (2013) (providing an overview of the Rome Statute's complementarity principle).

3. See ROY S. K. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 41–78 (1999) (explaining that a system based on national procedures complemented by an international court was clearly viewed by states as the most effective and viable system).

motivated prosecution,<sup>4</sup> it is an important tool for bolstering the Court's legitimacy.<sup>5</sup> Complementarity is also more than a legal principle. Over the past ten years, state primacy has become one of the guiding lights for the Office of the Prosecutor of the ICC. Former Prosecutor Luis Moreno-Ocampo himself has often emphasized that a sign of the ICC's ultimate success would be that the Court has no cases because all possible cases are being prosecuted in domestic courts.<sup>6</sup>

The Rome Statute does little to define complementarity's contours. Article 17 of the Statute, which lays out complementarity, provides only a few paragraphs of information. Among the questions the Rome Statute leaves open are, whom and what exactly must the domestic state be investigating in order to render the corresponding ICC case inadmissible? And when, legally, is a state "unwilling" or "unable" to prosecute? Over the past ten years, these questions and others have emerged as flashpoints, as litigants have challenged the permissibility of cases brought in the ICC on complementarity grounds, arguing that state efforts to investigate and prosecute should abrogate ICC investigations and indictments. The result has been a series of decisions that have resolved many of the outstanding questions about complementarity. For example, it is now clear that a state investigation may only render an ICC case inadmissible if the state is investigating the same person for "substantially the same conduct as" is the Prosecutor of the ICC.<sup>7</sup>

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4. See, e.g., Michael Birnbaum, *African Leaders Complain of Bias at the ICC as Kenya Trials Get Underway*, WASH. POST (Dec. 5, 2013), [http://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b\\_story.html](http://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b_story.html) [<http://perma.cc/6AX4-GBXS>] (archived Jan. 19, 2015) ("There are eight cases and 21 defendants in front of the International Criminal Court, and every last one of them is from Africa. . . . [The ICC's] choice of cases has frustrated African leaders, who say that comparable crimes elsewhere in the world are being ignored and that race is a factor in the decision-making."); Mwangi S. Kimenyi, *Can the International Criminal Court Play Fair in Africa?*, BROOKINGS: AFRICA IN FOCUS (Oct. 17, 2013, 11:15 AM), <http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimenyi> [<http://perma.cc/6V4T-VU4E>] (archived Jan. 19, 2015) (discussing criticisms of the ICC expressed by African nations and concluding that "claims of unfair adjudication of justice may not be far-fetched").

5. See Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115, 119–23 (2010) ("The long term viability of the International Criminal Court . . . depends upon an implementation of the complementarity principle that preserves cooperative synergy between the Court and domestic jurisdictions.").

6. See OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 4 (2003) [hereinafter OTP PAPER], [http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf) [<http://perma.cc/JF7P-HQ7Z>] (archived Jan. 19, 2015).

7. Prosecutor v. Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/11-274, Judgment on Appeal, ¶ 39 (Aug. 30, 2011) [hereinafter Muthaura Judgment on Appeal], <http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf> [<http://perma.cc/GM8H-C8VR>] (archived Jan. 19, 2015); see also Charles Chernor Jalloh, *International*

Today, one of the last remaining areas of ambiguity regarding complementarity is the role of due process considerations in the Court's legal analysis. Article 17 of the Rome Statute was written primarily to ensure that the ICC would retain the ability to hear a case when a domestic state was intent on protecting the accused by engaging in a sham investigation or prosecution.<sup>8</sup> But what about the inverse problem? What if a state is overzealous and wants to or cannot help but to subject the accused to an investigation and prosecution that is unconstrained by international norms of due process? In the worst-case scenario, what if the state intends to subject the accused to a show trial? Would the ICC retain the ability to hear a case in such circumstances?<sup>9</sup> In the early years of the ICC, most scholars subscribed to the so-called due process thesis, which contends that under Article 17 a state prosecution that does not abide by international due process norms cannot trigger complementarity.<sup>10</sup> However, in an influential 2006 article, Professor Kevin Jon Heller made a compelling case for the opposite conclusion—that Article 17 does not allow for due process considerations and that a show trial actually could render an ICC case inadmissible.<sup>11</sup> Since that time, academics have debated without resolution whether and how much of a role due process norms should have in complementarity analysis.<sup>12</sup>

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*Decisions: Situation in the Republic of Kenya*, 106 AM. J. INT'L L. 118, 120 (2012) (quoting Muthaura Judgment on Appeal, *supra*) (“[F]or a judicial determination of inadmissibility . . . the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.”).

8 See Beth Van Schaack, *ICC Case Against Spy Chief Senussi Deemed Inadmissible*, JUST SECURITY (Oct. 14, 2013, 2:48 PM), <http://justsecurity.org/2013/10/14/icc-case-spy-chief-senussi-deemed-inadmissible/> [<http://perma.cc/Y8CK-CLTX>] (archived Jan. 19, 2015).

9 This question is closely related to whether due process considerations can factor into whether a state is “unable” to prosecute a case, a consideration accounted for by Article 17. See Rome Statute, *supra* note 1, art. 17.

10 See, e.g., Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 226 (2002) (“[F]or states who become party to the Statute and who have not embraced these standards [of due process recognized by international law], the ICC will require them to ensure the basic rights for the accused.”); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86, 112 (2003) (assessing the “significant impact of complementarity on the implementation of substantive international criminal law” and arguing that pursuant to the principle of complementarity, states must “pay due consideration to . . . the rights of due process”).

11. See Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 257 (2006). It is worth noting that Heller later modified his position on Article 17. He now contends that the proper interpretation of the second limb of complementarity is that due process concerns are relevant only insofar as they are tied to the challenging state's norms of due process. See *infra* note 43.

12. See generally Gregory S. McNeal, *Lessons from the Saddam Trial: ICC Inability Determinations In Light of the Dujail Case*, 39 CASE. W. RES. J. INT'L L. 325 (2006) (discussing the “due process thesis” and textualist approaches to inability

In the last two years, the ICC has issued several decisions on complementarity that have the potential to advance the debate over due process. Each of the decisions stemmed from the ICC's involvement in Libya. In 2011, pursuant to a UN Security Council referral, the Prosecutor of the ICC sought warrants for the arrest of Saif Al-Islam Gaddafi, the son of Muammar Gaddafi, and Abdullah Al-Senussi, Libya's widely-feared former chief of intelligence.<sup>13</sup> Both stand accused of crimes against humanity stemming from their participation in the atrocities perpetrated by the Gaddafi regime.<sup>14</sup> But after Libyan rebels, assisted by an international air campaign, overthrew the Gaddafi regime, the new Libyan government insisted that Libya would itself prosecute Gaddafi and Senussi. Litigation over complementarity at the ICC ensued. Ultimately, the ICC issued decisions addressing Libya's complementarity challenges in each of the case. The Pre Trial Chamber, and later the Appeals Chamber, held that the international case against Gaddafi remained admissible but found the ICC case against Senussi was inadmissible under Article 17. In the process, the Court discussed extensively the role of due process concerns in complementarity.

Drawing on these decisions and others, this Article concludes that the ICC is beginning to move toward a new model of due process jurisprudence. In contrast with many of the recent examinations of complementarity, this Article concludes that the ICC remains open to considering the due process implications of granting a complementarity challenge. However, increasingly, the ICC Pre-Trial Chamber is engaging in "predictive" due process analysis—it examines the behavior of the state challenging complementarity and, based on the evidence before it, makes predictions about whether the state will be willing and able to abide by certain due process norms in its future investigation and prosecution of the accused. As part of this predictive jurisprudence, the Court is open to conducting a reasonably invasive look at the behavior of the state in question. Though the Court's analysis is not explicitly guided by international due process norms, the Court's discussion in both Libya cases shows that it will consider those norms in numerous circumstances.

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determinations); Jennifer Trahan, *Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression? Considering the Problem of "Overzealous" National Court Prosecutions*, 45 CORNELL INT'L L.J. 569 (2012) (assessing "whether there are ways to interpret the current complementarity provision broadly enough to cover the problem of 'all too willing' domestic court prosecutions that fail to adhere to due process"); Anna Bishop, Note, *Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge*, 22 MINN. J. INT'L L. 388 (2013).

13. See Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Prosecutor's Application Pursuant to Article 57 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi (May 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf> [<http://perma.cc/V5UB-9NPJ>] (archived Jan. 19, 2015).

14. See *id.* ¶ 3.

Although this style of complementarity jurisprudence conflicts with established ICC doctrine on the first “limb” of the Article 17 admissibility test, the Court’s turn to predictive analysis in addressing whether a state is unwilling or unable to prosecute is likely inevitable. Taking a rational actor view of judicial behavior, which treats ICC judges as autonomous actors with their own preferences and goals, this Article argues that when assessing whether a state is “unable or unwilling” to prosecute the accused, ICC judges will engage in predictive analysis guided by due process standards because doing so offers the best chance at maintaining the ICC’s legitimacy among key states parties. In so doing, this Article goes beyond the doctrinal question about the meaning of Article 17 that has defined the due process debate in the academic literature. Instead of merely asking what the meaning of complementarity is, this Article defines the core question as, what meaning are ICC judges likely to ascribe to complementarity, given both legal and extra-legal factors?

Accepting that the ICC is adopting a predictive complementarity analysis that incorporates limited due process norms, this Article proceeds to show that the ICC can learn lessons from other international and domestic courts that have addressed similar issues. A variety of courts regularly assess the motives and capacities of other court systems, and many perform predictive analysis of how other court systems will perform in the future. These courts have developed techniques and heuristics to increase the accuracy of their determinations. In particular, the ICC should look to 11 *bis* determinations made by the ICTY, determinations related to exhaustion and the Convention Against Torture made by domestic courts, and to the jurisprudence of the European Court of Human Rights and other international human rights tribunals. The aim of this Article is not to offer a full account of what the ICC can learn from such institutions but rather to show demonstratively how the ICC stands to benefit from drawing on the experience of other national and international courts in the complementarity realm.

The remainder of the Article proceeds in four parts. Part II provides a brief history of complementarity, focusing on the development of the due process thesis. Part III, the heart of the Article, charts the recent development of predictive due process. After summarizing the content of the Libya decisions, Part III shows how the decisions portend the adoption of predictive due process. It then demonstrates how this development is inevitable. Part IV offers lessons from other legal systems that the ICC can apply to its complementarity jurisprudence. In particular, the ICC should consider establishing a special panel to hear complementarity challenges and incorporating the concepts of variable standards of

review and proportionality into its Article 17 jurisprudence. Part V concludes.

## II. HISTORY AND DOCTRINE OF COMPLEMENTARITY

The way in which the ICC gains jurisdiction and admits cases is the product of a long and contentious negotiating process. The result of that process is a series of procedures that seek to balance the Rome Statute's core goal of ending impunity with respect for the sovereignty of states parties.<sup>15</sup> The ICC may only exercise jurisdiction over crimes specified in the Rome Statute<sup>16</sup> in three situations: (1) when a state party to the Rome Statute refers a situation to the ICC Prosecutor, (2) when the Security Council refers a case to the Prosecutor under Chapter VII of the UN Charter, and (3) when the Prosecutor initiates an investigation of a situation *proprio motu* under Article 15 of the Rome Statute.<sup>17</sup> However, even if the ICC has established jurisdiction over a particular situation, a case arising from that situation must be "admissible" in order for it to proceed. It is at this admissibility stage where the Rome Statute's drafters made perhaps their most significant concession to state sovereignty.

Previous international tribunals enjoyed "primacy" over domestic courts, meaning that if the ICTY and a domestic court both indicted the same individual, the ICTY retained the power to hear the case and the domestic court was obligated to defer to the ICTY.<sup>18</sup> The drafters of the Rome Statute took a different approach. Several

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15. See generally LEE, *supra* note 3 (discussing the principle of complementarity); Philippe Kirsch & John T. Holmes, *Developments in International Criminal Law: The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2 (1999) (discussing the primary issues under consideration and the "evolution of negotiations" at the Rome Conference).

16. See Rome Statute, *supra* note 1, art. 5.

17. See *id.* arts. 13, 15; see also Bishop, *supra* note 12, at 391-92.

18. See S.C. Res. 827, Annex, art. 9(2), U.N. Doc. S/RES/827 (May 25, 1993) ("The International Tribunal shall have primacy over national courts."); see also Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 49-64 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (confirming the legitimacy of the primacy principle). Around the time the ICTY was created, many commentators agreed that a primacy system was critical for the success of international criminal tribunals, as it vindicated international criminal law as truly "transnational," and made sense given the extraordinary gravity of the crimes being prosecuted. See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 394-95 (1998) ("This extraordinary jurisdictional priority is justified by the compelling international humanitarian interests involved and by the Security Council's determination that the situation in the former Yugoslavia, as well as that in Rwanda, constituted a threat to international peace and security."); Kerry R. Wortzel, *The Jurisdiction of An International Criminal Tribunal in Kosovo*, 11 PACE INT'L L. REV. 379, 390-91 (1999) (justifying primacy through reference to principles of universal jurisdiction).

factors pushed the drafting parties away from primacy. Most notably, there was a fear among some states parties that a court with the potentially massive jurisdictional reach of the ICC would be too powerful if given primacy over domestic courts.<sup>19</sup> Rome Conference delegates feared creating an “international appellate court” that could second-guess the outcomes of domestic criminal proceedings.<sup>20</sup> There was also a sense among delegates that it was normatively preferable for prosecutions to take place in domestic courts, where possible. The result of these and other concerns was that the Rome Statute adopted a regime of complementarity. As explained in the preamble of the Statute, the ICC is intended to be “complementary” to national courts, functioning as a court of last resort.<sup>21</sup> In practical terms, complementarity means that an ICC investigation or case generally is not admissible if the case is being investigated or prosecuted at the national level. This standard was intended to balance the universalist goals of international criminal justice with traditional conceptions of sovereignty and to provide states where atrocities occur with an incentive to investigate and prosecute perpetrators.<sup>22</sup>

The legal regime enforcing complementarity is contained in Article 17(1) of the Rome Statute, which governs the circumstances in which an ICC case may be found inadmissible. Article 17(1) starts with the assumption that cases before the Court are admissible; a case will be found inadmissible only when one of four criteria is satisfied:

- (a) The case is being investigated or prosecuted by a State that has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

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19. See Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 890–97 (2002) (describing motivations of states parties in the Rome Statute drafting process); see also Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 27 (2001) (“The complementarity principle is . . . the critical node in ascertaining whether the ICC will trample on the sovereign prerogatives of states, or will coexist in a constructive and beneficial relationship with all nations.”).

20. This fear was particularly salient to the delegation from the United States, because of the U.S.’s large military commitments outside its borders. See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 86–87 (2002).

21. Rome Statute, *supra* note 1, pmb1.

22. See El Zeidy, *supra* note 19 (discussing the development of the principle of complementarity in the drafting of the Rome Statute).

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.<sup>23</sup>

The collective effect of these four criteria is to set up a system of complementary but arguably competitive jurisdictions. Once a case has been brought before the ICC, a litigant may challenge the Court's ability to hear the case either by arguing that national proceedings render it inadmissible or that the ICC cannot proceed because the case is of insufficient gravity.<sup>24</sup> Since the Rome Statute went into effect in 2004, a substantial body of jurisprudence has developed regarding each of the provisions of Article 17(1). However, for the purposes of this Article, the most important parts of the provision are 17(1)(a), which governs situations in which a state is investigating or prosecuting the case before the ICC, and 17(1)(b), which governs situations in which a state previously investigated the case before the ICC, but decided not to prosecute.

The ICC's first decision<sup>25</sup> implicating Article 17(1) came in 2009 in *Prosecutor v. Kony*,<sup>26</sup> in which the Pre-Trial Chamber established firmly that the question of complementarity is to be adjudicated by the ICC, not by states parties, and confirmed the Court's ability to examine admissibility using its *proprio motu* powers without a motion by a litigant.<sup>27</sup> Shortly thereafter, the Appeals Chamber decided *Prosecutor v. Katanga & Ngudjolo*,<sup>28</sup> the first

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23. Rome Statute, *supra* note 1, art. 17(1).

24. *See id.* art. 19.

25. Much of the early litigation under these provisions centered on the question of whether a case before the ICC was admissible if domestic authorities declined to prosecute a case in anticipation of ICC action. *See, e.g.,* Thomas Obel Hansen, *A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity*, 13 MELB. J. INT'L L. 217, 218 & n.4 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2046077&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046077&download=yes) [<http://perma.cc/4RB8-HY4R>] (archived May 18, 2015) (referencing such litigation).

26. *Prosecutor v. Kony, Otti, Odhiambo & Ongwen*, Case No. ICC-02/04-01/05, Decision on the Admissibility of the Case Under Article 19(1) of the Statute (Mar. 10, 2009) [hereinafter *Kony Decision on Admissibility*].

27. *See id.* ¶¶ 14, 45, 51. The Court in *Kony* ultimately concluded *sua sponte* that the Annexure to the Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement did not render the ICC case inadmissible because the case was not being "investigated or prosecuted" by Ugandan authorities under the meaning of Article 17(a)(1). *See id.* ¶¶ 2, 7, 47, 51–52.

28. Case No. ICC-01/04-01/07 OA 8, 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 (Sept. 25, 2009) [hereinafter *Katanga Judgment on Appeal*]. In 2007, Congolese authorities surrendered to the ICC Germain Katanga, a former leader of the Patriotic Resistance Force in Ituri (FRPI) who had been indicted by the ICC for war crimes and crimes against humanity. *See* Press Release, International Criminal Court, Office of the Prosecutor, Statement of Deputy Prosecutor Fatou

complementarity challenge brought by a defendant.<sup>29</sup> In that case,<sup>30</sup> the Court clarified that an inquiry under Article 17(1)(a) (and, by analogy, 17(1)(b)) consists of two steps. First, the Court must ask if domestic authorities are investigating or prosecuting the case against the defendant. If they are not, then the ICC case is admissible and the analysis need go no further. If—and only if—domestic authorities are investigating or prosecuting the case, then the Court will proceed to the second step and ask whether the state is unable or unwilling genuinely to carry out the investigation or prosecution.<sup>31</sup> In 2011, approximately two years after *Katanga*, the Appeals Chamber further clarified the structure of the 17(1)(a) inquiry in *Prosecutor v. Muthaura*. In that case, which stemmed from Kenya's 2007 election violence, the Appeals Chamber confirmed that the first component of the complementarity test is satisfied only if the domestic investigation/case is investigating the "same individual" and

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Bensouda to the Media Regarding the Surrender of Germain Katanga (Oct. 19, 2007), <http://www.icc-cpi.int/NR/ronlyres/21DF03DC-B184-4019-8CAB-31C6ECE3DBF1/277284/ICCOTPSTFB200710197.pdf> [<https://perma.cc/26RA-SP68>] (archived Feb. 1, 2015). Katanga subsequently challenged the admissibility of his case on a variety of complementarity-related grounds, among them that Congolese authorities had been investigating the conduct that formed the basis of the ICC indictment (thus rendering the case inadmissible under 17(a)(1)), *see* *Prosecutor v. Katanga & Ngudjolo*, Case No. ICC-01/04-01/07, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, Pursuant to Article 19(2)(a) of the Statute, ¶¶ 50–52 (Mar. 11, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc642392.pdf> [<https://perma.cc/5QSH-MSMR>] (archived Feb. 1, 2015), and that the Congo's act of surrendering him to the ICC constituted a decision "not to prosecute" under Article 17(1)(b). *See* *Prosecutor v. Katanga & Ngudjolo*, Case No. ICC-01/04-01/07-1015, Defence Reply to Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, Pursuant to Article 19(2)(a), ¶¶ 9–10 (Apr. 1, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc656348.pdf> [<https://perma.cc/C2KS-7VBC>] (archived Feb. 1, 2015).

29. *See* Ben Batros, *The Evolution of the ICC Jurisprudence on Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 558, 564 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

30. *See* *Katanga Judgment on Appeal*, *supra* note 28. The Pre-Trial Chamber rejected Katanga's arguments and held the case admissible, and Katanga exercised his right of appeal to the Appeals Chamber. *See id.*

31. *See id.* ¶¶ 74–79. Applying this reading of the statute to Katanga's case, the Appeals Chamber found that because Congolese authorities declined to pursue Katanga's case in anticipation of the ICC prosecution, the case had not been "investigated or prosecuted" under the meaning of 17(1)(a). *See id.* ¶ 80; *see also* Batros, *supra* note 29, at 567–68. Thus, the Appeals Chamber determined that the case was admissible without considering the second part of the 17(1)(a) test. *See* Batros, *supra* note 29, at 568 ("[T]he Appeals Chamber did not examine the 'second form of unwillingness' that the Trial Chamber had relied upon. Rather, it shifted the focus of admissibility assessments squarely back to whether the state is taking any action.")

“substantially the same conduct” as the ICC case<sup>32</sup> and applied that standard to find the ICC’s investigation in Kenya admissible.<sup>33</sup>

One outcome of these early complementarity cases was that Article 17(1) (both (a) and (b)) became bifurcated. The first so-called arm of the Article 17 inquiry—whether the country at issue was actually investigating or prosecuting the accused—became a threshold test for the Court to evaluate at the outset of a complementarity challenge. The second arm—whether the country was unable or unwilling to investigate or prosecute—is only relevant when the country has proven it satisfies the first arm’s requirements.

Because until recently all complementarity challenges have been resolved under the first “limb” of the Article 17(1)(a) test (whether there is an investigation or prosecution), the law of the second limb of the test remains underdeveloped. Prior to the Libya decisions, most of what was known definitively about the second arm came in the form of asides from earlier decisions focused on other aspects of complementarity. For example, the Appeals Chamber in *Katanga*, as well as in *Prosecutor v. Bemba*, confirmed that the second part of the test is disjunctive: the ICC may maintain jurisdiction *either* if the state is “unable genuinely” or “unwilling genuinely” to investigate or prosecute.<sup>34</sup> However, many other questions remain unsettled. First, the meanings of both “unable” and “unwilling” remain subjects of debate. The “unable” category appears to have been meant to deal primarily with situations in which the national government cannot proceed due to systemic collapse of judicial infrastructure, as might be expected in many of war-torn states where the ICC investigates.<sup>35</sup> However, the extent to which capacity must be impaired to trigger the inability provision remains ambiguous.

The Rome Statute provides more clues as to the meaning of “unwilling.” Article 17(2) provides, in full:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized

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32. Muthaura Judgment on Appeal, *supra* note 7, ¶ 1.

33. *See id.* ¶ 123. Kenya’s investigation, the Appeals Chamber found, was not sufficiently advanced or targeted at the same individuals or conduct to render the ICC case inadmissible. *Id.*

34. *See* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/09, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against the Decision of Trial Chamber III of 24 June 2010 Entitled “Decision on the Admissibility and Abuse of Process Challenges”, ¶ 107 (Oct. 19, 2010) (referring to “the unwillingness or inability of the State genuinely to prosecute”); *Katanga* Judgment on Appeal, *supra* note 28, ¶ 78 (explaining that the second prong of the test is unnecessary if the first prong is satisfied).

35. *See* Jessica Almqvist, *Complementarity and Human Rights: A Litmus Test for the International Criminal Court*, 30 LOY. L.A. INT’L & COMP. L. REV. 335, 338 (2008) (citation omitted) (“In determining state inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to ‘obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.’”).

by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.<sup>36</sup>

Though this additional text focuses the unwilling inquiry, it, too, leaves open questions. First, what is the meaning of the Statute's reference to "principles of due process recognized by international law"? Second, is unwillingness defined exclusively by the specific circumstances enumerated in 17(2)(a)–(c), or are those circumstances merely examples of situations where unwillingness would be found? And finally, what is the meaning of "bring[ing] the person concerned to justice" in 17(2)(c)?<sup>37</sup>

These questions became crucial in the debate with which this Article most directly engages: whether the ICC can hear a case under the second arm of Article 17 when the domestic investigation or prosecution of the accused presents due process concerns. As other commenters have noted,<sup>38</sup> this question sits uncomfortably within the framework of the Rome Statute. When the Rome Conference delegates crafted the Article 17 exceptions to complementarity, their primary concern was that states would use the complementarity regime to shield ICC indictees from justice. The possibility of complementarity being used to facilitate show trials or victor's justice was less salient.<sup>39</sup> One school of thought on this issue, which has been termed the "due process thesis," leans heavily on the Statute's reference to "principles of due process recognized by international law" to conclude that a state that fails to abide by international due process norms in its investigation or prosecution is "unwilling" to investigate or prosecute under the meaning of the Statute.<sup>40</sup>

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36. Rome Statute, *supra* note 1, art. 17(2).

37. *Id.*

38. See Van Schaack, *supra* note 8 ("The statutory framework does not easily apply to an over-zealous national system.")

39. See *id.* (noting that complementarity was designed to deal with situations in which authorities are shielding the accused or the system has collapsed).

40. See Ellis, *supra* note 10 (discussing the "due process theory"); see also Dawn Yamane Hewett, Recent Development, *Sudan's Courts and Complementarity in the Face of Darfur*, 31 YALE J. INT'L L. 265, 276 (2006) (arguing that the ICC should consider due process concerns in evaluating complementarity in the Darfur context);

Additionally, according to many proponents of the due process thesis, a proceeding that does not comport with due process norms would be inconsistent with an intent to “bring the person concerned to justice” because the term “bring to justice” arguably implies punishment after a fair criminal trial. However, an alternative view, which was first explored by Professor Kevin Jon Heller and latter elaborated by other scholars,<sup>41</sup> contends that there are no due process safeguards in Article 17. The core of Heller’s argument was that the Article 17(2)(c) exception applies only if the state’s intent is other than bringing the person concerned to justice, and that the term “bring . . . to justice” is “synonymous with the intent to obtain a conviction in both ordinary ICC parlance and in international law generally.”<sup>42</sup> The details of this debate are too voluminous to fully explore here, so it will suffice to say that the due process question has no clear answer.

Regardless of which thesis one finds persuasive, the due process debate raises profound questions about the proper role of the ICC and states parties in international criminal justice. If one accepts the original Heller thesis—that due process violations in national proceedings are simply irrelevant—then one is left with the potential for outrageous situations that might threaten the legitimacy of international criminal law. Could the ICC be forced to cede a case to a state that makes abundantly clear it plans to subject the accused to a show trial? Such an outcome would seem difficult to stomach, particularly for the pro-human rights governments and NGOs that have supported the ICC since its inception.<sup>43</sup> Yet accepting the full due process thesis would place the ICC in an awkward position. The ICC is not a human rights court and is perhaps ill equipped to consistently make determinations about the capacity of domestic judicial institutions. Placing the ICC in this role could also exacerbate tensions between states parties and the Court. Even the “middle ground” options between the due process thesis and the Heller thesis present problems. For example, Heller’s more recent suggestion, that due process should be relevant to complementarity insofar as a state

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Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 CRIM. L.F. 87, 97 (2008); Carsten Stahn, *Libya, the International Criminal Court and Complementarity*, 10 J. INT’L CRIM. JUST. 325, 344–45 (2012) (arguing that the ICC should take account of due process concerns when considering admissibility in the Libya cases).

41. See Heller, *supra* note 11 (arguing that the due process thesis is incorrect); see also Elinor Fry, *Between Show Trials and Sham Prosecutions: The Rome Statute’s Potential Effect on Domestic Due Process Protections*, 23 CRIM. L.F. 35, 44–50 (2012) (arguing in favor of a modified form of the Heller argument, which would permit consideration of only a limited amount of due process concerns); Frédéric Mégret & Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials*, 11 J. INT’L CRIM. JUST. 571, 573–74 (2013).

42. Heller, *supra* note 11, at 261.

43. See Almquist, *supra* note 34, at 354–56 (cataloging problems with the permissive approach toward domestic trials with respect to due process).

is not abiding by its *own* principles of due process,<sup>44</sup> would give states a pernicious incentive to create loopholes in its domestic due process rules for prosecutions of international law crimes. Similarly, a number of commentators have suggested that due process should enter into the complementarity analysis only when the alleged violations are particularly severe: for example, when the domestic proceeding is “flawed beyond recognition.”<sup>45</sup> Though the impulse behind such arguments seems logical, the question remains how to distinguish between severe and non-severe violations in a manner consistent with the Rome Statute and customary international law.

### III. LIBYA AND THE EMERGENCE OF PREDICTIVE DUE PROCESS

Perhaps the most significant development to date in the debate over complementarity and due process has occurred over the last two years, during which the Court has decided two cases under Article 17: Libya’s challenges to the ICC cases against Saif Al-Islam Gaddafi and Abdullah Al-Senussi. This Part analyzes the impact of these cases on the due process question and concludes that the ICC is moving toward a limited version of the due process thesis and that this shift has necessitated predictive analysis of the behavior of states challenging complementarity. There are three subparts. Subpart A provides a brief introduction to the background behind the ICC’s Libya cases and summarizes the Court’s recent holdings. Subpart B demonstrates that the Court is open to considering limited due process norms through predictive analysis by assessing the text and structure of the Gaddafi and Senussi opinions in the context of existing ICC jurisprudence. Finally, subpart C employs a rational actor conception of judicial behavior to show that some consideration of due process factors by the ICC is likely inevitable.

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44. See Kevin Jon Heller, *Why the Failure to Provide Saif with Due Process Is Relevant to Libya’s Admissibility Challenge*, OPINIO JURIS (Aug. 2, 2012, 10:01 PM), <http://opiniojuris.org/2012/08/02/why-the-failure-to-provide-saif-with-due-process-is-relevant-to-libyas-admissibility-challenge/> [<http://perma.cc/TA7S-NRMN>] (archived Jan. 19, 2015) (“[Libya’s] failure [to live up to international standards] is irrelevant. . . . But [the] Libyan government’s failure to live up to the standards of *its own* criminal-justice system is exceptionally relevant.”).

45. Jonathan O’Donohue & Sophie Rigney, *The ICC Must Consider Fair Trial Concerns in Determining Libya’s Application to Prosecute Saif al-Islam Gaddafi Nationally*, EJIL: TALK! (June 8, 2012), <http://www.ejiltalk.org/the-icc-must-consider-fair-trial-concerns-in-determining-libyas-application-to-prosecute-saif-al-islam-gaddafi-nationally/#more-5011> [<http://perma.cc/8G9Q-3N3D>] (archived Jan. 19, 2015); see also Fry, *supra* note 41 (discussing the “moderate” due process thesis); Mégret & Samson, *supra* note 41, at 586 (describing cases that might be characterized as “flawed beyond recognition”).

### A. Summary of the Libya Decisions

The ICC's involvement in Libya began on February 26, 2011.<sup>46</sup> Earlier that month, Libyan leader Colonel Muammar Gaddafi had responded to protests to his rule by violently repressing demonstrators.<sup>47</sup> After the violence escalated and the Gaddafi regime deployed warplanes and attack helicopters against protestors, the UN Security Council met and instituted a package of measures designed to isolate Gaddafi, including an arms embargo, travel bans, and referral of the Libya situation to the ICC.<sup>48</sup> The Office of the Prosecutor (OTP) acted quickly and, on March 3, 2011, opened a formal investigation into the Libya situation. The United States and EU states subsequently intensified pressure on the Gaddafi regime<sup>49</sup> and about two weeks later initiated a military campaign in support of Libyan insurgents.<sup>50</sup> On June 27, 2011, the ICC Pre-Trial Chamber approved arrest warrants for three individuals: Muammar Gaddafi, his son Saif Al-Islam Gaddafi, and Libyan intelligence chief Abdullah Al-Senussi.<sup>51</sup> The war in Libya effectively ended in late August 2011 when the rebels captured Tripoli.<sup>52</sup> About two months later, Muammar Gaddafi was captured and killed by an enraged mob.<sup>53</sup>

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46. See *Security Council Imposes Sanctions on Libyan Authorities in Bid to Stem Violent Repression*, UN NEWS CENTRE (Feb. 26, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37633&Cr=Libya&Cr1=#.Uyh8evldWS0> [<http://perma.cc/NR7V-MSF3>] (archived Jan. 19, 2015).

47. See J. David Goodman, *Battle Lines Harden Across the Mideast as Rules Dig In*, N.Y. TIMES (Feb. 18, 2011), [http://www.nytimes.com/2011/02/19/world/middleeast/19protests.html?\\_r=0](http://www.nytimes.com/2011/02/19/world/middleeast/19protests.html?_r=0) [<http://perma.cc/AHN3-6UD4>] (archived Jan. 19, 2015) (discussing attacks on protestors in Libya, Bahrain, and Yemen).

48. See Anna F. Triponek & Paul R. Williams, *Clash of the Titans: Justice and Realpolitik in Libya*, 28 AM. U. INT'L L. REV. 775, 799–800 (2013).

49. See *id.* at 814–16.

50. See David D. Kirkpatrick, Steven Erlanger & Elisabeth Bumiller, *Allies Open Air Assault on Qaddafi's Forces in Libya*, N.Y. TIMES (Mar. 19, 2011), <http://www.nytimes.com/2011/03/20/world/africa/20libya.html> [<http://perma.cc/9NR7-R7YC>] (archived Jan. 19, 2015).

51. See Press Release, International Criminal Court, Pre-Trial Chamber I Issues Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi (June 27, 2011) (on file with author); see also Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11-4-Red, Prosecutor's Application Pursuant to Article 57 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi (May 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf> [<http://perma.cc/V5UB-9NPJ>] (archived Jan. 19, 2015).

52. See Kareem Fahim & David D. Kirkpatrick, *Rebels Pour into Central Tripoli, Declaring Victory over Qaddafi: Say They Captured 2 Qaddafi Sons – Crowds Rejoice*, N.Y. TIMES (Aug. 20, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9D04E3D81F39F931A1575BC0A9679D8B63> [<http://perma.cc/S34J-PFRV>] (archived Jan. 19, 2015).

53. See Kareem Fahim et al., *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES (Oct. 20, 2011), <http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html?pagewanted=all> [<http://perma.cc/6238-UUHY>] (archived Jan. 19, 2015).

Saif Al-Islam was subsequently captured by a local militia while trying to escape Libya and was held by local authorities in the southern town of Zintan.<sup>54</sup> Abdullah Al-Senussi was found in Mauritania several months later, in early 2012,<sup>55</sup> and in September 2012 was extradited back to Libya.<sup>56</sup>

After the war ended, Libya's National Transitional Council (NTC) made clear that it intended to try Gaddafi, and later, Senussi, in Libyan court.<sup>57</sup> However, charges against both Gaddafi and Senussi had already been confirmed in the ICC. The result was litigation between the ICC and the NTC. In April 2012, the ICC ordered the Libyan government to surrender Gaddafi to its custody.<sup>58</sup> The Libyan government refused and challenged the admissibility of the case against Gaddafi, invoking complementarity and Article 17 of the Rome Statute.<sup>59</sup> The Senussi proceedings followed a similar pattern after Senussi was captured. The ICC demanded that Libya surrender Senussi but the Libyan government refused and

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54. See Clifford Krauss & David D. Kirkpatrick, *Libyan Fighters Catch Qaddafi's Last Fugitive Son*, N.Y. TIMES (Nov. 19, 2011), <http://www.nytimes.com/2011/11/20/world/africa/gaddafi-son-captured-seif-al-islam-qaddafi-libya.html?pagewanted=all> [<http://perma.cc/7MX5-ZJ86>] (archived Jan. 19, 2015).

55. See David D. Kirkpatrick, *Spy Chief and Torturer for Qaddafi is Captured*, N.Y. TIMES (Mar. 17, 2012), <http://www.nytimes.com/2012/03/18/world/africa/ex-libya-intelligence-chief-captured-in-mauritania.html> [<http://perma.cc/PSP7-2F7L>] (archived Jan. 19, 2015).

56. See David D. Kirkpatrick & Suliman Ali Zway, *Spy Chief for Qaddafi Is Extradited to Libya*, N.Y. TIMES (Sept. 5, 2012), [http://www.nytimes.com/2012/09/06/world/africa/senussi-qaddafi-spy-chief-is-extradited-to-libya.html?\\_r=0](http://www.nytimes.com/2012/09/06/world/africa/senussi-qaddafi-spy-chief-is-extradited-to-libya.html?_r=0) [<http://perma.cc/KH4U-KT5X>] (archived Jan. 19, 2015).

57. See *Libya Says its Courts Capable of Trying Spy Chief Abdullah Senussi*, TELEGRAPH (Mar. 18, 2012), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9151301/Libya-says-its-courts-capable-of-trying-spy-chief-Abdullah-Senussi.html> [<http://perma.cc/SDL3-PAKL>] (archived Jan. 19, 2015); Ingrid Formanek, *Transitional Government Prefers to Try Gadhafi Son in Libya*, CNN (Oct. 30, 2011), <http://www.cnn.com/2011/10/30/world/africa/libya-gadhafi-son/> [<http://perma.cc/2FC6-GGZ7>] (archived Jan. 19, 2015).

58. See *Prosecutor v. Gaddafi & Al-Senussi*, Case No. ICC-01/11-01/11, Decision Regarding Second Request by Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi (Apr. 4, 2012), [http://www.iccnw.org/documents/Decision\\_Regarding\\_Second\\_Request\\_by\\_Government\\_ofLibya\\_for\\_Postponement.pdf](http://www.iccnw.org/documents/Decision_Regarding_Second_Request_by_Government_ofLibya_for_Postponement.pdf) [<http://perma.cc/LRL4-LURK>] (archived Jan. 19, 2015); see also Ivana Sekularak & Marie-Louise Gumuchian, *ICC Rejects Libya's Request Over Gaddafi Son Surrender*, REUTERS (Apr. 4, 2012), <http://www.reuters.com/article/2012/04/04/us-libya-icc-idUSBRE8331BJ20120404> [<http://perma.cc/R78P-H9YH>] (archived Jan. 19, 2015) (discussing the ICC's surrender decision).

59. See *Prosecutor v. Gaddafi & Al-Senussi*, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute (May 1, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf> [<http://perma.cc/U5H4-R6FV>] (archived Jan. 19, 2015).

subsequently filed a complementarity-based challenge to the ICC case's admissibility.<sup>60</sup>

The litigation between the ICC and NTC for Gaddafi and Senussi set up a fascinating legal controversy that had the potential to radically shape the ICC's complementarity jurisprudence. The core legal position advanced by the Prosecutor in both cases was a version of Heller's new "modified due process theory." According to the Prosecutor, a state should be considered "unwilling" to prosecute under Article 17 "where the national investigation or proceedings lack fundamental procedural rights and guarantees to such a degree that the national efforts can no longer be held to be consistent with the object and purpose of the Statute and Article 21(3)."<sup>61</sup> Gaddafi's and Senussi's defense teams, both of which preferred trial in the ICC to trial in Libya, advanced stronger positions.<sup>62</sup> Proceeding from a pro-due process legal position, the defense teams argued that Libya could not establish complementarity because of significant due process flaws in the Libyan proceedings.<sup>63</sup> The Prosecutor agreed in the Gaddafi case that Libya's lack of control over the defendant could ground an inability finding<sup>64</sup> but argued in the Senussi case that

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60. See *Prosecutor v. Gaddafi & Al-Senussi*, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Relating to Abdullah Al-Senussi Pursuant to Article 19 of the ICC Statute, (Apr. 2, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1575650.pdf> [<http://perma.cc/R4UZ-ZRZ3>] (archived Jan. 19, 2015); see also *ICC Demands Libya Hand Over Gaddafi Ex-Spy Chief Senussi*, AHRAM ONLINE (Feb. 7, 2013), <http://english.ahram.org.eg/NewsContent/2/8/64283/World/Region/ICC-demands-Libya-hand-over-Gaddafi-exspy-chief-Se.aspx> [<http://perma.cc/6RRT-BNK7>] (archived Jan. 19, 2015) (discussing the ICC's demand that Libya hand over Al-Senussi).

61. *Prosecutor v. Gaddafi & Al-Senussi*, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, ¶ 188 (Oct. 11, 2013) [hereinafter *Decision on Admissibility Against Al-Senussi*].

62. See *id.* ¶¶ 179–84 (listing arguments by the defense); *Prosecutor v. Gaddafi & Al-Senussi*, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶¶ 154–76 (May 31, 2013) [hereinafter *Decision on Admissibility Against Gaddafi*] (outlining the defense's arguments).

63. According to Gaddafi's defense counsel, a core problem was that the Libyan government did not physically possess the defendant, as the Zintan militia that had originally captured Gaddafi had not yet surrendered him to the NTC. In the *Senussi* case, the defense's core allegation was that Al-Senussi had not been given access to legal counsel, despite having been held for over a year. See *Decision on Admissibility Against Al-Senussi*, *supra* note 61, ¶ 183; *Decision on Admissibility Against Gaddafi*, *supra* note 62, ¶ 162. Additionally, in both cases various due process flaws were alleged by the defense: Libya's procedures offered insufficient protections to defendants, Libya's court system appeared biased against former members of the Gaddafi regime, and Libya lacked the capacity to summon and protect witnesses, ensure timely proceedings, and manage a massive trial for complex international crimes. See *Decision on Admissibility Against Al-Senussi*, *supra* note 61, ¶¶ 179–84; *Decision on Admissibility Against Gaddafi*, *supra* note 62.

64. See *Decision on Admissibility Against Gaddafi*, *supra* note 62, ¶¶ 139–54 (listing the Prosecutor's submissions).

Libya was not “unwilling” or “unable” under Article 17 and that the ICC case was inadmissible.<sup>65</sup>

Libya responded to both the factual and legal allegations advanced by the Prosecutor and the defense teams. Factually, Libya disputed that it was not providing sufficient due process to Gaddafi and Senussi, arguing that its judicial system would handle both cases in a fair manner.<sup>66</sup> Legally, Libya advanced a version of the original Heller argument, arguing that the only relevant consideration in the Article 17 “unwillingness” inquiry is whether the state is genuinely attempting to convict the defendant, with due process considerations being irrelevant.<sup>67</sup>

The Pre-Trial Chamber’s decision in the Gaddafi case was issued first, at the end of May 2013. Rejecting Libya’s arguments, the Court ruled that the ICC’s case against Gaddafi was admissible.<sup>68</sup> The Chamber first attempted to address the legal question of due process. The Chamber explained,

[T]he 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. In other words, the Chamber must assess whether the Libyan authorities are capable of investigating or prosecuting Mr Gaddafi “in accordance with the substantive and procedural law applicable in Libya.”<sup>69</sup>

However, after explaining that national procedure is the touchstone in the “inability” inquiry, the Chamber noted in describing Libya’s national procedure that “Libya has ratified relevant human rights instruments.”<sup>70</sup>

After laying out its legal standard for inability under Article 17, the Chamber concluded that Libya’s “national system cannot yet be applied in full in areas or aspects relevant to the case.”<sup>71</sup> The Chamber first noted that Libya did not actually possess control over Gaddafi and was “not persuaded that this problem may be resolved in the near future,”<sup>72</sup> a fact it found particularly damning because Libyan criminal procedure does not provide for trial in absentia.<sup>73</sup>

65. See Decision on Admissibility Against Al-Senussi, *supra* note 61, ¶¶ 185–90.

66. See *id.* ¶ 176; see also Decision on Admissibility Against Gaddafi, *supra* note 62, ¶¶ 182–96. According to Libya, deficits like the lack of control over Saif and the lack of legal counsel were being remedied and would be resolved.

67. See Decision on Admissibility Against Al-Senussi, *supra* note 61, ¶¶ 173–74.

68. See Decision on Admissibility Against Gaddafi, *supra* note 62, ¶ 219.

69. *Id.* ¶ 200.

70. *Id.* ¶ 202.

71. *Id.* ¶ 205.

72. *Id.* ¶ 207.

73. See *id.* ¶ 208 (“[I]n absentia trials are not permitted under Libyan law when the accused is present on Libyan territory and his location is known.”).

The Chamber also identified as a factor in its decision Libya's "lack of capacity to obtain the necessary testimony due to the inability of judicial and governmental authorities to ascertain control and provide adequate witness protection."<sup>74</sup> Finally, the Chamber focused on Libya's failure to secure legal representation for Gaddafi and, despite Libya's submission that Gaddafi would be provided with a lawyer, concluded that its assurances "fall short of substantiating whether and how the difficulties in securing a lawyer . . . may be overcome in the future."<sup>75</sup> On the basis of these factors, the Pre-Trial Chamber concluded that Libya was unable to carry out the investigation or prosecution of Gaddafi and accordingly did not reach the question of whether Libya was "unwilling" under Article 17.<sup>76</sup> In May 2014, the Appeals Chamber affirmed the original decision and confirmed the legitimacy of the Pre-Trial Chamber's approach without extensive additional analysis.<sup>77</sup>

The Pre-Trial Chamber promulgated its decision in the Senussi complementarity challenge in October 2013. The court applied a legal standard similar to that from the Gaddafi case, but reached the opposite result, concluding that Libya was neither unable nor unwilling to prosecute Senussi and accordingly that the ICC case against Senussi was inadmissible.<sup>78</sup> Although the court acknowledged that unwillingness and inability are distinct legal issues, it declared at the outset that it would "not attempt a separate analysis of the two aspects" because both issues were dependent on the same nucleus of facts.<sup>79</sup> The Chamber also reiterated the Gaddafi court's stance that inability and unwillingness "must be assessed in light of [Libyan] law," and restated its conclusion that Libya's ratification of international human rights instruments was relevant to the assessment of Libyan national law.<sup>80</sup> However, the Chamber went beyond the Gaddafi explanation of due process in Article 17, holding that "as far as the State's alleged unwillingness [under Article 17] is concerned . . . depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to

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74. *Id.* ¶ 209.

75. *Id.* ¶ 214.

76. *See id.* ¶¶ 215, 218 ("Libya has been found to be unable genuinely to carry out the investigation or prosecution against Mr Gaddafi. Therefore, the Chamber need not address the alternative requirement of 'willingness' . . .").

77. *See* Prosecutor v. Gaddafi & Al-Senussi, Case No. ICC-01/11-01/11, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled "Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi," (May 21, 2014).

78. *See* Gaddafi & Al-Senussi, Decision on Admissibility Against Al-Senussi, *supra* note 61, ¶¶ 293, 310.

79. *See id.* ¶ 170–71.

80. *See id.* ¶ 203.

the principles of due process recognized under international law.”<sup>81</sup> However, the Chamber noted that even when international due process concerns are implicated, a violation of the Article 17 unwillingness requirement inheres “only when the manner in which the proceedings are being conducted . . . is . . . inconsistent with the intent to bring the person to justice.”<sup>82</sup>

The Chamber then turned to evidence pointing toward Libya’s Article 17 inability or unwillingness. The Chamber first considered and rejected the defense’s argument that Libya’s failure to bring Senussi to trial (despite having had custody of him for over a year) constituted an unjustified delay inconsistent with an intent to bring Senussi to justice. The Chamber noted that Al-Senussi had not been provided with a lawyer, despite legal counsel being a requirement under Libyan law and Senussi having been subject to numerous interrogations. The Chamber acknowledged that Libya’s failure to provide Senussi with counsel weighed against Libya’s complementarity argument but concluded that it was primarily the result of the security situation in Libya and dismissed the argument as insufficient to ground an unwillingness finding.<sup>83</sup>

The Chamber also considered the defense’s suggestion that the substantive treatment of Senussi at the hands of Libya might be in violation of due process norms, potentially including norms against torture, mistreatment of prisoners, and procedural rights.<sup>84</sup> On this point, the Chamber held that the defense had not raised the allegations with an adequate degree of specificity to make it necessary for the Chamber to determine whether they were relevant to Article 17,<sup>85</sup> and it also suggested that it found convincing Libya’s responses to the charges.<sup>86</sup> Finally, the Chamber addressed and dismissed a number of other defense arguments it found less compelling, including that the Libyan judiciary was biased against Senussi and that Libya lacked effective control over detention facilities and the ability to address security challenges relevant to a potential trial.<sup>87</sup> After rejecting each of the defense’s arguments, the Chamber found the ICC case inadmissible on complementarity grounds and left Senussi to Libya.

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81. *Id.* ¶ 235.

82. *Id.* However, the chamber did not provide any specific further guidance on the meaning of the term “bring to justice.”

83. *See id.* ¶ 292.

84. *See id.* ¶ 238.

85. *See id.* ¶ 239 (“[T]he Chamber considers that the above submissions by the Defence amount to generic assertions without any tangible proof.”).

86. *See id.* ¶ 240 (“[M]ost of these matters put forward by the Defence have indeed been addressed by Libya in its submissions before the Chamber.”).

87. *See id.* ¶¶ 263–65.

The Appeals Chamber subsequently affirmed the Pre-Trial Chamber's judgment.<sup>88</sup> Addressing a variety of challenges to the underlying proceeding brought by Senussi, the Appeals Chamber concluded first that Libya's failure to appoint counsel for Senussi did not make it unwilling to prosecute under the Rome Statute.<sup>89</sup> The Pre-Trial Chamber's determination that counsel had not been appointed because of security reasons was "not unreasonable," according to the Appeals Chamber.<sup>90</sup>

The Appeals Chamber also considered whether the procedural deficiencies in Libya's domestic prosecution were sufficient to render it "unwilling" under Article 17. The Chamber explained that "the primary reason" for the inclusion of Article 17(2) was not to guarantee fair trial rights of the accused and noted that "the Court was not established to be an international court of human rights."<sup>91</sup> However, it also noted that "[t]he concept of independence and impartiality is one familiar in the area of human rights law" and that "human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted 'independently or impartially' within the meaning of article 17(2)(c)."<sup>92</sup> Though the Chamber left unclear how this standard should be applied in practice, it observed that "[a]t 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 our most basic understanding of justice, as being sufficient to render a case inadmissible."<sup>93</sup> Applying this standard to Senussi's case, the Appeals Chamber held that the Pre-Trial Chamber's conclusions were not unreasonable.<sup>94</sup>

### B. *Signs of a Limited Due Process Jurisprudence*

In addressing complementarity and Article 17 generally, ICC officials have frequently stressed that the Court's role is not to render judgments on domestic judicial systems.<sup>95</sup> Some academic

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88. See Prosecutor v. Gaddafi & Al-Senussi, Case No. ICC-01/11-01/11 OA 6, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 Oct. 2013 Entitled "Decision on the Admissibility of the Case Against Abdullah Al-Senussi," ¶ 170, (July 24, 2014) [hereinafter Judgment on Appeal of Al-Senussi] (dismissing the argument that the Pre-Trial Chamber misapplied the evidentiary standard).

89. See *id.* ¶ 200.

90. *Id.* ¶ 201.

91. *Id.* ¶¶ 218–19.

92. *Id.* ¶ 220.

93. *Id.* ¶ 230.

94. *Id.* ¶ 239.

95. See, e.g., OTP PAPER, *supra* note 6 (discussing the nature of the ICC).

commentators have made similar points.<sup>96</sup> However, since the Pre-Trial Chamber began developing a jurisprudence of the “unwilling” and “unable” prongs of Article 17 in *Gaddafi*, it has become apparent that, to a limited extent, the ICC is willing to judge the quality of domestic court proceedings when it assesses the second arm of complementarity. The *Gaddafi* and *Senussi* opinions, when understood in the context of the broader complementarity jurisprudence, show that the Court is willing to make difficult judgments about whether state judicial systems provide defendants with sufficient due process for the ICC to relinquish a case. At least to a limited extent, the Court open to using international norms of due process when doing it.

When the ICC adjudicates the second arm of complementarity, it addresses questions about whether the domestic state *will* do something in the prosecution of a particular defendant. Will the state provide legal representation to the accused? Will the state protect witnesses to allow for a full presentation of the evidence at trial? (These sorts of questions are particularly salient in cases, like *Libya*, where the primary danger is an overzealous prosecution, rather than a recalcitrant one.) Thus, a primary consequence of the Court’s consideration of due process is that it must make subjective judgments about the *future* capacity of domestic institutions. In other words, the inquiry of the second arm of Article 17 appears to be whether the Court trusts the state challenging complementarity to stay within minimal due process bounds. The remainder of this subpart is devoted to showing that the seeds of this predictive jurisprudence are present in the Court’s recent decisions on complementarity. To be clear, this subpart’s claim is not that the Court has fully embraced a predictive, due process-centric model, but rather that the Court’s recent decisions suggest that it remains open to such a system.

Three factors in particular from the recent cases suggest the emergence a new predictive due process model in the ICC:

1. *The continuing viability of a limited due process thesis*: For all the bluster of the Court in the *Gaddafi* and *Senussi* decisions about the importance of respecting state procedural due process norms and the Rome Statute’s limited text, both cases suggest that the Court may, at least to a limited extent, consider international due process standards when making decisions under the second limb of Article 17.

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96. See, e.g., Mégret & Samson, *supra* note 41, at 581. But see Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B. OF UN L. 591, 597 (2003) (“[I]t may be argued that the Court is an institution entrusted with the protection of human rights of the accused in the national enforcement of international criminal justice.”).

The Appeals Chamber's opinion in *Senussi* is arguably more skeptical of due process considerations, but it, too, leaves open the door for such considerations to play a role under Article 17.

The Gaddafi opinion supports the due process connection somewhat subtly. As discussed in Part III.A, the *Gaddafi* opinion takes pains to explain that the inability analysis should be conducted with reference to Libyan procedural norms. Thus, one reading of the opinion (perhaps even the most obvious reading) is that it is adopting the new Heller thesis—that the ICC's due process analysis is to be guided exclusively by the state's own standards of due process. However, after providing this disclaimer, the *Gaddafi* court did not merely analyze Libyan law—rather, it stipulated “that Libya has ratified relevant human rights instruments.”<sup>97</sup> Because ratified treaties become part of a state's domestic law, the Court's reference to international norms in this context can be understood to mean that a state's failure to abide by its own international law obligations is relevant to the Article 17 calculus. In referencing Libya's ratification of human rights instruments, the Gaddafi court pointed to specific human rights instruments ratified by Libya, including the ICCPR, the UN Convention Against Torture, and the African Charter on Human and People's Rights.<sup>98</sup> The ICCPR has 167 states parties,<sup>99</sup> including every country where the ICC has initiated a prosecution and all states but one in Africa. Many other human rights instruments have similarly universal acceptance.<sup>100</sup> Thus, at a minimum, treaty based-human rights norms will virtually always be relevant—at least to a limited extent—to the Article 17 inability analysis. Moreover, if one reads the opinion more broadly, one could conclude that customary international law norms—which are generally thought of as part of the law of domestic states<sup>101</sup>—are also relevant.

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97. Decision on Admissibility Against Gaddafi, *supra* note 62, ¶ 202.

98. *See id.* ¶ 202 n.335.

99. *See International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION (last visited Feb. 3, 2015), [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-4&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en) [<http://perma.cc/UY94-NPXD>] (archived Jan. 15, 2015); *Investigations*, INTERNATIONAL CRIMINAL COURT (last visited Feb. 3, 2015, 8:52 PM), [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/investigations/Pages/investigationsnew.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/investigations/Pages/investigationsnew.aspx) [<http://perma.cc/8BGY-JRLU>] (archived Jan. 15, 2015).

100. *See* ANNE F. BAYEFSKY, REPORT: THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 2 (2001), available at <http://www.bayefsky.com/report/finalreport.pdf> [<http://perma.cc/SHW6-E6XF>] (archived Jan. 15, 2015) (noting that “every UN member state is a party to one or more of the six major human rights treaties” and “80% of states have ratified four or more”).

101. *See* *The Paquete Habana*, 175 U.S. 677, 707 (1900) (“The examples and practice generally followed establish this humane and beneficent exception as an international rule, and this rule may be considered as adopted by customary law and by all civilized nations.”)

The Pre-Trial Chamber's Senussi opinion also supports a limited version of the due process thesis and its conclusions may reach even further than that of the Gaddafi opinion. As discussed in Part III.A, in discussing the relevance of due process considerations, the *Senussi* Court explicitly stated that international due process concerns are relevant insofar as they bear on one of the scenarios enumerated in Article 17(2), such as the state's intent to bring the accused "to justice."<sup>102</sup> Though the meaning of the term "bring to justice" is never defined, leaving the ultimate question of the relevance of international norms unsettled, this explanation coheres with an account of complementarity that accepts the due process thesis, and the Court's actual application of the unwillingness standard suggested a concern for international norms. For example, the Chamber relied on a report published by Human Rights Watch that evaluated Libya's treatment of Senussi in the context of international norms as evidence that Senussi's treatment in captivity did not contravene Article 17.<sup>103</sup> Such analysis goes beyond the Gaddafi opinion because it interposes international human rights norms into the analysis without any reference at all to Libya's acceptance of those norms.

In its opinion affirming the judgment of the Pre-Trial Chamber, the Appeals Chamber in *Senussi* likewise agreed that such considerations have weight. In weighing Senussi's Article 17 challenge, the Appeals Chamber noted first that "the intent to bring the person concerned to justice" discussed in Article 17 "cannot primarily be concerned with whether there have been violations of the rights of a suspect."<sup>104</sup> At one point, the opinion went so far as to characterize the jurisprudence of human rights tribunals as "of only very limited relevance."<sup>105</sup> However, the Chamber's skepticism toward due process principles writ large was more muted. In fact, the Chamber specifically gave weight to whether the proceeding had been conducted "independently or impartially" and noted that those

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102. See Decision on Admissibility Against Al-Senussi, *supra* note 61, ¶ 235 ("In order to have a bearing on the Chamber's determination, any such alleged violation must be linked to one of the scenarios provided for in article 17(2) or (3).").

103. See *id.* ¶ 240. Although it is possible to imagine the ICC making judgments about the capacity of states solely with reference to their own domestic procedures, the fact that international law remains relevant makes it far easier to foresee the ICC engaging in a searching, capacity-based analysis of the judicial systems of states challenging admissibility. The ICC's capacity to act as an arbiter of international due process norms is perhaps limited, but it far outstrips the Court's ability to perform meaningful analysis or application of domestic laws of constitutional and criminal procedure. As an international court staffed with experts on international law, it is not implausible that the ICC judges would be able to perform meaningful analysis of treaties other than the Rome Statute.

104. Judgment on Appeal of Al-Senussi, *supra* note 88, ¶ 221.

105. *Id.* ¶ 169.

concepts are “familiar in the area of human rights law.”<sup>106</sup> Ultimately, the Chamber took up the show trial hypothetical and noted that it could not countenance “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.” However, the Chamber expressly declined to note exactly when due process concerns become so overwhelming as to command the Article 17 analysis, noting that “[w]hether a case will ultimately be admissible in such circumstances will necessarily depend on its precise facts.”<sup>107</sup> The Appeals Chamber’s opinion illustrates the tension in the question that is the subject of this Article. The Chamber was clearly wary of transforming itself into a human rights tribunal, yet it was plainly so bothered by the show trial hypothetical that it left the door open for consideration of due process and human rights norms.

Thus, at a minimum, the Court in the Libya cases—particularly the Pre-Trial Chamber—has left itself more than enough room to consider international due process norm in future complementarity decisions, should it desire to do so.

2. *The Pre-Trial Chamber’s willingness to engage in predictive analysis of due process considerations*: Because consideration of due process factors almost by definition entails consideration of what a state *will* do (or will refrain from doing) to the accused in a hypothetical future proceeding, the ICC’s willingness to consider due process factors necessitated a move away from the Court’s approach to the first limb of the complementarity test. Since the Appeals Chamber’s judgment in *Katanga*, it has been settled doctrine that admissibility challenges brought under the first limb of Article 17 must be based on the facts as they exist at the time of the challenge, not on the situation as it may exist in the future.<sup>108</sup> Even before *Katanga*, the *Kony* court declined to consider the impact on Article 17 of Ugandan laws not yet enforced, on the ground that doing so “would be tantamount to engaging in hypothetical judicial determination, which appears *per se* inappropriate.”<sup>109</sup> Although this rule remains the stated doctrine of the Court, there is significant evidence in recent opinions, particularly the *Gaddafi* and *Senussi* decisions, suggesting that the Court has adopted a different kind of rule for challenges

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106. *Id.* ¶ 220.

107. *Id.* ¶ 230.

108. *Katanga* Judgment on Appeal, *supra* note 28, ¶¶ 56, 80, 111; *see also* *Batros*, *supra* note 29, at 580 (“The Appeals Chamber has . . . made it clear that the [admissibility] determination must be based on the facts as they exist *at the time of the admissibility challenge*.”).

109. *Kony* Decision on Admissibility, *supra* note 26, ¶¶ 49–51 (Mar. 10, 2009); *see also* *Batros*, *supra* note 29, at 580 (“Given that admissibility must be determined based on concrete facts, it cannot be based on what a participant claims can, will or should happen in the future.”).

relating to unwillingness or inability to prosecute. In fact, the defining characteristic of the ICC's recent complementarity jurisprudence is the Court's willingness to engage in predictive analysis of whether a state is likely to manage properly the investigation or prosecution of a defendant and provide the defendant with due process rights.

Addressing the second limb of the admissibility test for the first time, the Pre-Trial Chamber in *Gaddafi* was not guarded about its reliance on predictive judgments about the capacity of the Libyan justice system. In determining that the inability prong was satisfied, the Chamber's analysis was arguably framed as a prediction about whether Libya *would* be able to prosecute Gaddafi, not a statement about its inability, thus far, to do so: "The Chamber is of the view that [Libya's] national system cannot yet be applied in full in areas or aspects relevant to the case."<sup>110</sup> Though, again, this statement could be read as a reference to the present state of the Libyan judiciary, its full implication is inherently predictive. The Court examined the Libyan judiciary and made a predictive judgment about whether it *would* be able to handle the Gaddafi trial. The remainder of the opinion contains similar predictive references. In paragraph 207, the Chamber noted, with respect to Libya's inability to obtain Gaddafi, that it "[was] not persuaded that this problem may be resolved *in the near future*."<sup>111</sup> In paragraph 211, the Chamber explained that it was not "persuaded" that Libyan authorities had the capacity to ensure protective measures of witnesses (and the Libyan proceedings had not reached the point where witnesses were being called).<sup>112</sup> And in paragraph 214, the Court concluded that Libya's failure to provide Gaddafi with a lawyer was relevant to the inability analysis because Libya's submissions "[fell] short of substantiating whether and how the difficulties in securing a lawyer . . . may be overcome *in the future*."<sup>113</sup>

The Pre-Trial Chamber in *Senussi* was in some respects schizophrenic about its desire to move into predictive analysis, but it, too, ultimately engaged in numerous instances of predictive inquiry. Although the Court took pains in some parts of the opinion to avoid speculation about whether Libya would afford Senussi due process guarantees, it made predictive inferences openly in others. The Chamber's analysis of the unwillingness question (to the extent it is distinguishable from the inability inquiry) was more closely grounded in the present. In dismissing the defense's argument that Libya's failure to provide a lawyer to Senussi evinced unwillingness, the

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110. Decision on Admissibility Against Gaddafi, *supra* note 62, ¶ 205.

111. *Id.* ¶ 207 (emphasis added).

112. *Id.* ¶ 211.

113. *Id.* ¶ 214 (emphasis added).

Chamber noted that “it appears that Mr. Al-Senussi’s right to legal representation has been primarily prejudiced so far by the security situation in the country,”<sup>114</sup> thus attempting to establish unwillingness as a matter of intent, which is more easily established without resorting to prediction or intensive analysis of the Libyan judicial system. One could infer from the structure of the opinion, however, that lurking under the surface of this statement was a judgment that Libya *would* provide Senussi with a lawyer in the future once the security concerns abated.<sup>115</sup>

The Pre-Trial Chamber’s analysis of the inability question centered squarely on a predictive assessment of whether Libya will be able to try Senussi consonant with due process guarantees. Libya’s submissions on the inability point were future oriented. For example, Libya noted with respect to its mechanisms for protecting witnesses that “the sufficiency or otherwise of such measures should not be judged prematurely and speculatively before the need for protective measures has arisen.”<sup>116</sup> In rendering its decision on whether the inability criterion was satisfied the Chamber made an explicitly predictive judgment—that the Libyan judicial system had the capacity to guarantee to Senussi sufficient due process rights. The Chamber explained that “Libya appears to be in a position to address the ongoing security difficulties in order that the proceedings against Mr Al-Senussi not be hindered,”<sup>117</sup> and, similarly, that there is “[n]o indication that collection of evidence and testimony has ceased *or will cease* because of unaddressed security concerns for witnesses in the case against Mr Al Senussi.”<sup>118</sup>

The Appeals Chamber in *Senussi* did not rely on predictive analysis to the same degree as the Pre-Trial chamber in *Senussi*. However, this is unsurprising given the Pre-Trial chamber’s greater emphasis on adjudicating factual matters. The Appeals Chamber did explicitly validate the Pre-Trial’s use of predictive analysis. The Chamber noted that “it was not unreasonable for the Pre-Trial Chamber to conclude that, although in the past it had not been possible to appoint counsel for Mr Al-Senussi because of the security situation, there was a prospect of this happening in the future. Although the Pre-Trial Chamber’s conclusion did involve an element of prediction, this is not unreasonable for issues such as the present one.”<sup>119</sup>

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114. Decision on Admissibility Against Al-Senussi, *supra* note 61, ¶ 292.

115. This inference is bolstered by the fact that Libya itself submitted as evidence an assurance that it would provide Senussi with legal counsel. *Id.* ¶ 232.

116. *Id.* ¶ 280.

117. *Id.* ¶ 303.

118. *Id.* ¶ 298 (emphasis added).

119. Judgment on Appeal of Al-Senussi, *supra* note 88, ¶ 201.

Although the Court has not fully embraced predictive analysis in any of its opinions, the Court's recent cases show that the line between officially permissible and impermissible reasoning is extremely thin. Though the Court has stated in the past that complementarity decisions must be made on the basis of the facts as they exist at the time of the challenge, what actually comprises the nucleus of "facts" that may be considered under this doctrine? Fully instantiated occurrences certainly qualify: whether the defendant has been provided with a lawyer, for example, is obviously valid evidence. But what about occurrences that bear on the likelihood of something happening in the future? For example, is an assurance from the state that the defendant *will* be given a lawyer permissible evidence of the state's compliance with due process norms? And finally, what about future-oriented inferences from present-based facts? For example, can the Court infer from the fact that a state generally does not provide counsel to defendants charged with war crimes that the defendant at issue *will not* be afforded counsel? These categories of questions are not analytically distinct and they tend to blend together in practice. Moreover, there is little in the Court's own jurisprudence that would shed light on which are and are not permissible. Thus, in the Libya decisions, there was ample room for the Court to play with the line it had previously set with regards to predictive reasoning and to make almost probabilistic determinations about the likelihood of the state engaging in particular kinds of behavior in the future. In practice, it is difficult to understand these kinds of determinations as anything but predictive analysis.

3. *The melding of the unwillingness and inability inquiries:* Strong evidence of the Court's shift toward predictive due process analysis is found in the Court's structuring of the unwillingness and inability inquiries in *Gaddafi* and *Senussi*. Since the Rome Statute was first drafted, the unwillingness and the inability prongs under Article 17(1) have been considered two distinct inquiries, an understanding that was confirmed by the Pre-Trial Chamber in *Katanga*.<sup>120</sup> Unwillingness is determined by reference to the factors outlined in Article 17(2), whereas the inability inquiry is guided by the standard laid out in 17(3). The *Gaddafi* opinion followed this rule strictly, considering inability exclusively and deliberately refraining from reaching the unwillingness inquiry.<sup>121</sup> However, there is evidence in the *Senussi* opinion that this norm may be giving way, in practice if not exactly in form.

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120. See *Katanga Judgment on Appeal*, *supra* note 28, ¶ 3 (quoting *Prosecutor v. Ngudjolo*, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, ¶¶ 19–20 (July 6, 2007)).

121. See Decision on Admissibility Against *Gaddafi*, *supra* note 62.

Although the Pre-Trial Chamber's *Senussi* decision's analysis of Article 17 began by distinguishing between unwillingness and inability, the Pre-Trial Chamber concluded that "the two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked," and that evidence relevant to each limb may overlap.<sup>122</sup> Thus, the Chamber proceeded to analyze the vast majority of the claims put forward by the parties without regard to whether they pertained to unwillingness or inability, and in several instances the Chamber appeared to use the two terms interchangeably.<sup>123</sup> The opinion's final section, in which the Court separates unwillingness from inability before rendering its final holdings, is truncated and conclusory.<sup>124</sup>

Although this shift may seem surprising, given the Court's prior insistence on the distinctiveness of the two inquiries, it is a logical consequence of the Court's use of predictive due process analysis. Analysis of due process concerns necessarily entails a subjective, fact-intensive inquiry of the kind typically associated with human rights tribunals. To adjudicate due process concerns, the Court cannot simply focus on the literal meanings of "unwilling" and "unable" in the statute—under international law, it must conduct something closer to an all-things-considered inquiry into whether Libya's alleged actions were permissible limitations on the rights of the defendants.<sup>125</sup> This kind of inquiry does not fit neatly into the unwilling or unable framework, as it entails questions into *both* the capacity and the intent of the state challenging complementarity. Thus, the peculiar structure of the *Senussi* opinion can be understood as a product of the Court's willingness to engage in due process analysis.<sup>126</sup>

### C. *Intensive, Predictive Analysis of State's Judicial Systems is Inevitable*

The previous subpart of this Article attempted to show that the ICC is moving toward a system in which the Court makes subjective assessments of the judicial systems of states challenging complementarity, including predictive judgments about the likelihood that states will abide by certain basic due process principles. This subpart argues that such a shift is inevitable. Applying a rational actor view to the ICC that treats ICC judges as autonomous actors with distinct preferences, it becomes clear that the panels of judges

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122. Decision on Admissibility Against Al-Senussi, *supra* note 61, ¶ 210.

123. See, e.g., *id.* ¶¶ 221, 233, 243.

124. See *id.* ¶¶ 289–310.

125. See *infra* Part IV.C.

126. Admittedly, the structure of the *Senussi* opinion does not *prove* that the court is engaging in due process analysis, but it does constitute probative evidence that such analysis is occurring.

deciding complementarity challenges have strong incentives to engage in predictive analysis of state judicial systems and, more generally, to assess whether domestic legal systems are willing or able to abide by basic due process norms. Although the normative valence of this system is a question beyond the scope of this Article, a system of substantial analysis of domestic legal systems may be the best possible arrangement given the Rome Statute's current structure, at least for those who wish to see the ICC continue to build legitimacy among states party to the Rome Statute.

Three assumptions undergird this argument. The first assumption is that the judges who serve on the ICC have a preference to see the ICC continue to gain support as a mainstay of the international criminal justice system. On this point there is no direct proof, save various statements and articles from ICC judges opining on the court's prospects.<sup>127</sup> However, it stands to reason that people who play an important and highly public role in a high-profile institution have an interest in that institution's success. The second, related assumption is that a relevant metric for the success of the ICC is its legitimacy among stakeholders, including states parties, the United Nations, and the populations of states in which the ICC initiates investigations and prosecutions. Some commenters might dispute the importance of legitimacy, particularly short-term legitimacy, as a touchstone for success, perhaps focusing more on the number of convictions obtained or crimes averted.<sup>128</sup> However, Luis Moreno-Ocampo himself has stressed the importance of building the court's legitimacy,<sup>129</sup> and many scholars have made similar points.<sup>130</sup>

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127. See, e.g., Franck Petit, *Interview with ICC Judge Bruno Cotte, Presiding Judge at the Second Trial of the ICC*, RADIO NETHERLANDS WORLDWIDE (June 20, 2012, 10:31 AM), <http://www.rnw.nl/international-justice/article/judge-cotte-%E2%80%9Cwe-are-making-progress%E2%80%9D> [<http://perma.cc/Q7UH-2YBB>] (archived Jan. 15, 2015) (discussing with a sitting ICC judge ways in which the ICC can improve its legitimacy amongst populations in states where investigations have taken place); *An Interview with Judge Kirsch, Former ICC President*, INTERNATIONAL BAR ASSOCIATION (last visited Apr. 4, 2014), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=d33d6a9c-d3f5-481a-82c1-928a3cbdc857> [<http://perma.cc/6LGS-RFMQ>] (archived Jan. 15, 2015) (discussing ways for the ICC to succeed in the future); Mark Kersten, *An Interview with the ICC's Judge Howard Morrison*, JUSTICE IN CONFLICT (Mar. 4, 2012), <http://justiceinconflict.org/2012/03/04/an-interview-with-the-iccs-judge-howard-morrison/> [<http://perma.cc/TU22-JNXX>] (archived Jan. 15, 2015) (discussing ICC judge's long career in international criminal law and sensitivity to criticisms of the Court).

128. See James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 4 (2009) (emphasizing prevention of atrocities as a core goal of the ICC); Lilian A. Barria & Steven D. Roper, *How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT'L J. HUM. RTS. 349, 349 (2006) (measuring the success of international criminal tribunals based on the number of individuals apprehended).

129. See Sheila Velez, *Luis Moreno-Ocampo, Chief Prosecutor of the ICC: "I Have the Most Important Mission in the World"*, AEGIS (Feb. 22, 2011), <http://www.aegistrust.org/index.php/International-Justice/luis-moreno-ocampo-chief-prosecutor-of-the-icc-qi-have-the->

Because the court has weak independent investigatory powers<sup>131</sup> and lacks the ability to track down and obtain fugitives on its own, its operations are dependent on state support, making legitimacy among states crucial.<sup>132</sup>

The third, and perhaps most controversial, assumption is that the jurisprudence of ICC judges is influenced by their desire to see the ICC gain legitimacy and succeed. To date, many of the most prominent studies of Rome Statute doctrine have considered ICC decisions in a vacuum, assuming implicitly that the ICC can and will interpret the Statute in the way that makes the best sense of its language and structure.<sup>133</sup> Though such analyses are valuable, there is ample empirical and historical evidence that judges are influenced by their desire to protect the institutional credibility of the courts on which they serve.<sup>134</sup> There is also evidence that other components of the ICC have made decisions, in part, based on policy considerations.<sup>135</sup> Though I am not aware of any study systematically documenting legitimacy-conserving behavior in ICC judges, scholars have previously suggested that certain ICC decisions were motivated by policy factors, such as institutional credibility.<sup>136</sup> Given all that is

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most-important-mission-in-the-worldq.html [http://perma.cc/75CC-7AHH] (archived Jan. 15, 2015).

130. See Philippe Kirsch, *The International Criminal Court: A New And Necessary Institution Meriting Continued International Support*, 28 FORDHAM INT'L L.J. 292, 306 (2005) ("The support of States, inter-governmental and non-governmental organizations ('NGOs'), and the international community at large, is necessary for [the ICC's] success."); Vessilin Popovski, *International Criminal Court: A Necessary Step Towards Global Justice*, 31 SEC. DIALOGUE, 405, 405-06 (2000) (arguing that an important measure of the ICC's success is its influence over domestic states in setting standards of conduct).

131. See, e.g., William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 64-65 (2008) (describing how the ICC was deliberately created as a court of limited powers).

132. See Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 534-36 (2003) (arguing that the ICC is dependent on legitimacy amongst states parties to ensure compliance from states where investigations occur).

133. See, e.g., Heller, *supra* note 11; Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUSTICE 695 (2005).

134. See RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE* 357-58 (2013) (noting that the U.S. Supreme Court operates within "politically constructed bounds" and shapes its decisions to preserve institutional legitimacy); TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 14-15 (2011) (noting that decisions of courts in both the United States and abroad are sometimes motivated by legitimacy-related considerations).

135. See Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 271-74 (2012).

136. See Van Schaack, *supra* note 8 (asserting that a Pre-Trial Chamber decision was at least partially motivated by recognition that the country involved would not cooperate in a transfer).

known from legal realism about how judges make decisions,<sup>137</sup> the conclusion that ICC judges are influenced by legitimacy and credibility considerations seems reasonable.

Accepting these assumptions, it is only logical that the ICC will tend toward predictive evaluations of states challenging complementarity and their legal systems that incorporate basic international due process norms. The reason is that such a system is the one most likely to preserve the Court's legitimacy amongst key actors. To see why, it is necessary to consider the dynamics of complementarity challenges. The first key point is that the structure of the Rome Statute encourages states to bring complementarity challenges as quickly as possible. Article 19(4) requires that most challenges to admissibility brought prior to commencement of trial in the ICC.<sup>138</sup> The Trial Chamber used this provision to construct a tripartite system to govern when states may bring admissibility challenges: (1) prior to confirmation of a case, state challenges may be brought based on any aspect of admissibility, (2) after a case has been confirmed but before trial, complementarity challenges may only be brought on the principle of *ne bis in idem* under Article 17(1)(1) (thus excluding all unwillingness or inability challenges),<sup>139</sup> and (3) after the Trial Chamber has been constituted, challenges (limited to 17(1)(c) challenges) may only be made in exceptional circumstances with the leave of the Chamber.<sup>140</sup> The jurisprudence on when a challenge may be brought is still sparse, but the case law as it exists provides a clear incentive for states that wish to bring a challenge to do so as early as possible to ensure it will be heard. The result is that when the Pre-Trial Chamber hears an admissibility challenge, the domestic investigation or prosecution of the national state normally will be at an early stage. In general, domestic investigations or prosecutions tend to lag behind parallel ICC investigations or prosecutions, so it seems exceedingly unlikely that the Pre-Trial Chamber will ever hear an admissibility challenge where the domestic proceeding has reached the point of a trial. Far more likely is the Libya scenario: the domestic state has begun an investigation,

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137. Studies have also suggested that judges on international courts specifically are influenced by non-doctrinal considerations in reaching decisions. See Erik Voeten, *The Impartiality of International Judges: Evidence From The European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

138. See Rome Statute, *supra* note 1, pmb., art. 19.

139. In other words, an admissibility challenge brought after a case has been confirmed is only permissible if the basis of the challenge is that the ICC case would subject the accused to trial for an offense for which he/she has already been tried. See *id.* art. 17(1)(a).

140. See Katanga Judgment on Appeal, *supra* note 28, ¶¶ 28–29; Batros, *supra* note 29, at 23.

is gathering evidence, and perhaps has reached the point of pre-trial procedural wrangling.

Also critical is the fact that Article 19 of the Rome Statute severely limits states' ability to bring multiple admissibility challenges. Under Article 19(4), a person or state may challenge admissibility only once, with subsequent challenges availability in "exceptional circumstances."<sup>141</sup> Although, again, the meaning of "exceptional circumstances" remains unclear, it seems relatively unlikely that the Court will grant a second hearing with any frequency. The result is that when the Court adjudicates an admissibility challenge—most of which will come when domestic proceedings are still nascent—it is producing what in all likelihood is the final word on the admissibility of the case. Unlike human rights courts, some of which may reserve the ability to revisit their decisions about domestic legal proceedings as they progress further, the Pre-Trial Chamber must attempt to resolve complementarity issues conclusively while parallel domestic proceedings are still unfolding.

Assume for a moment that the only goal of ICC judges in their complementarity opinions is to maximize the Court's legitimacy. How should they handle complementarity challenges? One axis the Court would have to consider is whether it should be more deferential or less deferential to the state challenging complementarity with respect to due process issues. It is not immediately obvious how the legitimacy goal interacts with this choice. One possibility is that being more deferential to states would increase legitimacy by demonstrating the ICC's respect for traditional notions of sovereignty—a value that may be resurgent among rising powers and in the international system generally.<sup>142</sup> Another possibility is that being deferential toward states could cost the ICC legitimacy by making it look like a puppet of states parties—a criticism that might be particularly salient with the ICC's most ardent backers, European states concerned with ending impunity. The level of deference that may be accorded to states parties in future admissibility proceedings thus remains unclear.

The other axis the Court would have to consider is how thoroughly, regardless of how deferential it is to the Prosecutor or states, it should integrate due process concerns into the analysis under Article 17. The scholarly debate over the due process thesis is inconclusive, so legitimacy-related considerations are likely to be particularly salient here. From a legitimacy perspective, at least some

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141. Rome Statute, *supra* note 1, art. 19.

142. See generally William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism* (Pub. Law and Legal Theory Research Paper Series, Paper No. 14-2, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2378912](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2378912) [<http://perma.cc/3QEQ-DWCE>] (archived Jan. 15, 2015) (discussing the emphasis placed on sovereignty and participation by rising powers).

consideration of international due process factors is likely the optimal risk-averse option because it minimizes the likelihood of the Court being exposed to a situation that would result in a large loss of legitimacy. In the domestic law context, scholars have noted that judges crafting rules of decision are incented to behave in risk-averse, reputation-conserving ways.<sup>143</sup> If the Court developed a firm rule that it could *not* consider international due process considerations under Article 17, there would be an extant possibility that at some point, a country would indicate its intent to subject an ICC indictee to a true show trial and the ICC would be forced to give that state its imprimatur. Such an event could have profound consequences to the Court's legitimacy.<sup>144</sup> By contrast, an indefinite standard that leaves room for the ICC to consider certain international due process norms would give the court a safety valve fully within its own control; potential show trials could be averted regardless of the state of the domestic law of the country challenging admissibility. Perhaps such a regime would expose the court to criticisms that it is venturing outside its core competency but from the perspective of a risk-averse, legitimacy-concerned pool of judges,<sup>145</sup> the potential risk of such criticisms likely would be much lower than the alternative.

If, as this Article has argued, the ICC does have strong incentives to retain some due process considerations as part of the Article 17 inquiry, the Court would also have strong incentives to engage in predictive analysis. As discussed above, the vast majority of admissibility challenges will come while domestic proceedings are still in their nascent stages and will constitute the last word on the admissibility of the case at issue. If the Court accepts due process considerations as part of the Article 17 inquiry, it would be very difficult for the Court to analyze whether the state is sufficiently abiding by those norms at an early stage if it is only looking at a state's past and present behavior. For example, how could the Pre-Trial Chamber analyze whether the state in question is respecting the right to call witnesses in one's defense if the domestic proceeding is nowhere near the point where witnesses would be called? Again, in

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143. See Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees is What the Public Gets*, 94 MINN. L. REV. 1914, 1958 n.237 (2010) ("Commentators often characterize judges as risk-averse."); Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 82 (1993) (asserting that "judges . . . by temperament are likely to be risk averse").

144. Given that many of the court's strongest supporters are countries with firm commitments to international human rights, the ICC's signing off on a true "show trial" would have the potential to profoundly damage support for the court amongst its most ardent supporters. Possible results could include reductions in funding or decreased support for the Court in the UN decision making apparatus.

145. See, e.g., Mégrét & Samson, *supra* note 41, at 573 (asserting that the ICC should only find a case admissible when "certain human rights violation [occur that] go to the heart of whether a state is actually willing or able to carry out a trial at all").

this situation, the optimal strategy from a risk-averse, legitimacy-protecting standpoint is to engage in predictive analysis of whether due process would be granted by the domestic court because such analysis would be the best way to minimize the likelihood of the ICC giving its blessing to a deeply flawed proceeding.

Use of predictive analysis is also preferable from a legitimacy standpoint because it offers more flexibility than would an approach tied to a state's performance up till the point of the admissibility challenge. Were the Court to adopt an approach that did not incorporate predictive analysis, it likely would be forced to measure state performance against set benchmarks that could be awkward to apply to the full variety of situations before the court. By contrast, a predictive approach—because it allows the Court leeway to consider subjective factors bearing on future performance—would help the Court avoid rote, artificial due process rules. Finally, the legitimacy costs to the Court of engaging in predictive analysis are manageable because the line between (nominally prohibited) predictive analysis and inferences from existing evidence is so thin and because there is much jurisprudence throughout international law on how to integrate due process considerations regarding domestic proceedings into the decision making of international tribunals (see *infra*, Part V).

Thus, the sort of behavior described in Part III.B(iv) should come as no surprise. It is likely that the Court is attempting to protect its legitimacy by engaging in the kind of analysis least likely to cause long-term damage to the institution.

#### IV. IMPLICATIONS OF PREDICTIVE DUE PROCESS

Part III of this Article argued that the ICC is moving toward a due process-aware assessment of the domestic legal systems of states challenging admissibility and that, as part of that model, the Court is making predictive judgments about the capacity of states to prosecute offenders. Accepting this conclusion as true, this Part assesses the implications of the ICC's evolving complementarity jurisprudence and offers some normative prescriptions for the Court's leaders. Some commentators may bemoan that by engaging in substantive analysis of the capacity and willingness of states to abide by due process norms, the ICC risks moving beyond its core competency into an area best suited for human rights tribunals.<sup>146</sup> Some ICC decisions have reflected this concern as well.

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146. See Mégret & Samson, *supra* note 41, at 578 (“The ICC was not established or designed to provide an antidote to domestic violations of due process. Such violations fall under the bailiwick of international human rights courts . . .”); Benzing, *supra* note 96, at 598 (arguing that the ICC was not created to function as a human rights tribunal); see also Trahan, *supra* note 12, at 586 (noting that the ICC was not intended

However, this criticism reveals an unintended point. If, for reasons of institutional legitimacy, the ICC *is going to* dabble in the domain of assessing the capacity of foreign legal systems, it may as a result face second-order legitimacy problems as some states doubt their ability to engage in the usual business of human rights tribunals. That being the case, the ICC should learn from the practices of these other tribunals when making complementarity decisions. In fact, there is a thriving jurisprudence, existent in many international legal bodies, of international courts evaluating domestic legal systems and the likelihood that those legal systems will take particular actions in the future. By drawing on the lessons of this jurisprudence, the ICC stands to mitigate the potentially negative effects of predictive evaluation of domestic legal systems.<sup>147</sup>

Before proceeding further, it is worth articulating the criticisms of the ICC as arbiter of the quality of domestic legal proceedings so as to understand the problems that need to be addressed. Roughly speaking, the criticisms break down into two categories. The first category of criticism is epistemological: the ability of the ICC to reach correct decisions about whether states can and will uphold due process norms in domestic proceedings may be weak or, at least, weak enough such that the issue would be better left to human rights tribunals.<sup>148</sup> These criticisms certainly have some merit. ICC judges are not necessarily steeped in the law of due process and human rights and the Court's procedural format may not be optimized to

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to serve as a "supra-national" appeals court for domestic legal systems); Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. INT'L L. & FOREIGN AFF. 77, 105 (2009) (noting that the ICC "works retroactively to vindicate the Rule of Law" due to its "institutional design").

147. See *supra* Part III. There is a link between the legitimacy concerns discussed in Part III that may be motivating the Court's move toward predictive due process analysis, and the legitimacy concerns discussed in the Part—which are arising as a *consequence* of the ICC's move toward such analysis. This Part is framed principally in normative terms: that the ICC *should* mitigate these second-order legitimacy concerns by drawing on the jurisprudence of outside tribunals. However, it is possible to understand this Part's argument as another leg of the descriptive argument made in Part III.C: the Court has the proper incentives to move toward predictive due process analysis in part *because* it has so much jurisprudence to draw from other Courts. This paper frames the argument normatively largely because second order legitimacy concerns have not fully developed, so it makes more sense to speak prescriptively in terms of how they may be avoided. Additionally, it is likely the case that the second order legitimacy concerns discussed in this Part are less serious than the concerns discussed in Part III, so the existence of solutions to the second order concerns may not be necessary for the descriptive argument made in Part III.C to remain valid.

148. As Professor Elinor Fry explains, "[I]t must be an extremely difficult task for the Court to determine whether a violation of due process rights took place to the benefit or the detriment of the accused." Fry, *supra* note 41, at 43.

address questions related to state capacity. After all, the ICC was designed as a forum to try individual criminal defendants.<sup>149</sup>

The second category is criticisms related to legitimacy. Circulating throughout the discourse on complementarity and due process is the idea that if the ICC dives too deeply into analysis of domestic legal systems and their propensity to provide due process it risks alienating the domestic states by sending a didactic or even imperialistic message.<sup>150</sup> Professor Almqvist articulates the critique:

[G]iven the absence of a common standard and the fact that a national settlement is not the manifestation of a haphazard or coincidental series of events, but rather the upshot of a national understanding of justice, an outside intervention (in this case an international judicial intervention) could be seen as an arbitrary attack on settled national judicial arrangements and an affront to the beliefs that underlie and shape them.<sup>151</sup>

As discussed in Part III.C, legitimacy is a slippery concept and precisely what kind of jurisprudence will maximize stakeholder buy-in to the ICC likely is an unanswerable question. However, there is anecdotal evidence that intensive ICC analysis of domestic state investigations can have pernicious effects on perceptions of the ICC within those states. For example, President Uhuru Kenyatta successfully used resentment against the ICC investigation in Kenya, and its rejection of Kenya's admissibility challenge, to fuel his successful bid for reelection.<sup>152</sup>

The remainder of this Part analyzes in turn three distinct areas of law in which courts have had to evaluate the competence of other courts to carry out proceedings. In each of these areas, courts have, like the ICC, been forced to engage in predictive analysis of whether the legal system being analyzed would, hypothetically, provide some guarantee. The three case studies are 11 *bis* proceedings in the ICTY, the experience of international trade and investment law with

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149. This criticism is also particularly salient to the extent that the ICC is engaging in predictive analysis of what a state will or will not do.

150. See Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks*, 50 B.C. L. REV. 1, 12–13 (2009) (arguing that, as a general matter, the decisions of international tribunals suffer from legitimacy deficits in the states where atrocities occurred as compared to the decisions of local courts); Gregory S. McNeal, *supra* note 12, at 349–50 (noting that it will be difficult for the ICC to provide technical assistance and capacity-building support to developing countries if “there is a perception that very few domestically constituted tribunals can meet the standards necessary to preclude ICC jurisdiction”).

151. Almqvist, *supra* note 35, at 352–53.

152. See Geoffrey Mosoku, *How Pair Defied International Criminal Court Rhetoric to Clinch Win*, STANDARD DIGITAL (Mar. 3, 2014), [http://www.standardmedia.co.ke/?articleID=2000105904&story\\_title=how-pair-defied-icc-rhetoric-to-clinch-win](http://www.standardmedia.co.ke/?articleID=2000105904&story_title=how-pair-defied-icc-rhetoric-to-clinch-win) [<http://perma.cc/EDD9-WLXC>] (archived Jan. 15, 2015) (discussing how Uhuru Kenyatta and William Ruto formed a political alliance based on resentment of the ICC). See generally Chandra Lekha Sriram & Stephen Brow, *Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact*, 12 INT'L CRIM. L. REV. 219 (2012).

variable standards of review, and the proportionality jurisprudence of international and regional human rights bodies. From each study, this Article briefly draws parallels and lessons that can inform how the ICC should go about adjudicating admissibility challenges when due process concerns are an issue. The aim of these case studies is not to provide an exhaustive listing of all that the ICC can draw from other legal systems in the context of complementarity, but rather to show, by way of example, that the ICC can and should—in a manner consistent with the Rome Statute—draw from other legal systems when it must analyze due process considerations as part of complementarity challenges.

*A. The International Criminal Tribunal for the Former Yugoslavia, Rule 11 Bis, and The Need for Special Panels and Post-Decision Monitoring*

Likely the best analogy to Article 17 litigation in the ICC is the ICTY's experience with Article 11 *bis*. Article 11 *bis* of the ICTY's Rules of Procedure and Evidence permits the Tribunal to transfer certain defendants that have already been indicted in the ICTY to states parties for domestic trial, provided certain criteria are met.<sup>153</sup> Since the UN Security Council directed the ICTY to concentrate on high-level offenders, transfers under 11 *bis* have become an important strategy used by the Tribunal to free up resources and speed completion of the Tribunal's mandate.<sup>154</sup> Since transfers began, a relatively elaborate jurisprudence has built up around when and how an 11 *bis* petition is evaluated.

Eleven *bis* petitions may be initiated either by the prosecution or directly by the Tribunal. Because the ICTY operates under the principle of primacy, transfers are always discretionary. After an 11 *bis* proceeding has been initiated, it is heard by a special panel of three permanent ICTY judges known as the referral bench.<sup>155</sup> The members of the referral bench are appointed by the Tribunal's president and need not be the same from case to case.<sup>156</sup> However, to

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153. See International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev. 44, Rule 11 *bis* (adopted Dec. 10, 2009) [hereinafter ICTY Rules of Procedure and Evidence], [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_rev44\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf). [<http://perma.cc/L2Z8-TGLJ>] (archived Jan. 15, 2015).

154. See Susan Somers, *Rule 11 Bis of the International Criminal Tribunal for the Former Yugoslavia: Referral of Indictments to National Courts*, 30 B.C. INT'L & COMP. L. REV. 175, 176 (2007).

155. See *id.* at 177.

156. See Olympia Bekou, *Rule 11 Bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence*, 33 FORDHAM INT'L L.J. 723, 731 (2010).

date, the members of the referral bench generally have remained the same.<sup>157</sup>

In deciding whether to make a referral, the referral bench considers a series of factors. First, in accordance with the text of 11 *bis*, the panel considers the “gravity of the crimes charged and the level of responsibility of the accused,”<sup>158</sup> the idea being that more serious crimes are more appropriately handled by the Tribunal itself.<sup>159</sup> Once it has determined a case is appropriate for referral, the referral bench assesses where the case ought to be referred. Under Rule 11 *bis*(A)(iii), the Tribunal can transfer a case to, *inter alia*, a state that “[has] jurisdiction and [is] willing and adequately prepared to accept such a case.”<sup>160</sup> Although 11 *bis* permits the Tribunal to transfer cases to states where the accused committed crimes or was found, even if (A)(iii) is not satisfied, in practice the referral bench regards due process as a basic component of the test for whether a case will be transferred to a particular state. In the words of Susan Somers, a former ICTY prosecutor, “the Bench must be satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.”<sup>161</sup> Because in any 11 *bis* proceeding the domestic legal system will not have initiated proceedings against the accused, the ICTY’s analysis is inherently prospective. As must the ICC in the complementarity context, the Tribunal must assess the capacity of the domestic state and makes predictive judgments about what it may or may not do with respect to the accused’s trial.

Most 11 *bis* decisions follow a fairly set pattern with respect to due process. In *Mejakić*, an influential referral decision, the panel identified a list of factors critical to due process.<sup>162</sup> These included a presumption of innocence, an impartial tribunal, a right to legal

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157. See *id.*; William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT’L L. 279, 326–27 (2008).

158. ICTY Rules of Procedure and Evidence, *supra* note 153.

159. See *id.*

160. *Id.* As other commentators have noted, this language bears a striking resemblance to Article 17 of the Rome Statute and, indeed, was likely influenced by the Rome Statute, given that it was added to the ICTY Statute in 2004. See Bekou, *supra* note 156, at 758–59.

161. Somers, *supra* note 154, at 183; see also Rocío Digón, Recent Development, *The Stankovic Decisions of the International Criminal Tribunal for the Former Yugoslavia*, 31 YALE J. INT’L L. 281, 282 (2006) (“The Referral Bench will authorize a Rule 11 *bis* transfer only if it has received assurances that ‘the accused will receive a fair trial and that the death penalty will not be imposed or carried out . . . .’” (citation omitted)).

162. See Prosecutor v. Mejakić, Gruban, Fuštar & Knežević, Case No. IT-02-65-PT, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, ¶ 68 (Int’l Crim. Trib. for the Former Yugoslavia July 20, 2005) [hereinafter *Mejakić Referral Decision*] (stating eleven factors that should be considered requirements for a fair trial).

counsel, a right to call and examine witnesses, and a right not to be compelled to self-incriminate.<sup>163</sup> In most cases, the panel recalls these factors, then cross-references them against the criminal code of the country to which the accused is to be transferred and determines if there are any significant gaps.<sup>164</sup> The panel typically does not engage in extensive analysis of whether these guarantees actually are implemented in the state's criminal justice system or of whether they are likely to be extended to the accused. The vast majority of 11 *bis* decisions to date have found the state being considered for trying the accused to be an acceptable forum. However, the Tribunal typically orders the Prosecutor to monitor and report back on the domestic proceedings and it reserves the right to revoke the order and bring the case back to the ICTY.<sup>165</sup>

The ICTY's experience with 11 *bis* holds potentially important lessons for the ICC. First, the leaders of the ICC should consider appointing a special standing panel to hear complementarity challenges. Like the ICTY's referral bench, this panel should be composed of a select group of ICC judges that does not change regularly. From an epistemological/accuracy standpoint, the advantages of this arrangement are obvious. A group of judges that consistently hears admissibility challenges will have a better sense of what sort of evidence is probative of a serious due process concern (or a serious shielding concern), and its Article 17 jurisprudence is likely to be more consistent than that of the regular Pre-Trial Chamber.<sup>166</sup>

163. *See id.*

164. *See, e.g.,* Prosecutor v. Kovačević, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11*bis*, ¶ 68 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 17, 2006) (listing "the requirements of a fair criminal trial"); Prosecutor v. Janković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *Bis*, ¶ 62 (Int'l Crim. Trib. for the Former Yugoslavia July 22, 2005) (listing "the requirement[s] of a fair criminal trial"); Prosecutor v. Rašević & Todović, Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11 *Bis* with Confidential Annexes I and II, ¶ 72 (Int'l Crim. Trib. for the Former Yugoslavia July 8, 2005) (same); Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *Bis*, ¶ 55 (Int'l Crim. Trib. for the Former Yugoslavia May 17, 2005) (same); *see also, e.g.,* Somers, *supra* note 154, at 182 (footnote omitted) (quoting Mejakić Referral Decision, *supra* note 162, ¶ 43) ("The Referral Bench must be satisfied that 'if the case were to be referred to Bosnia and Herzegovina, there would exist an adequate legal framework which not only criminalizes the alleged conduct of the Accused, but which also provides for appropriate punishment.'").

165. *See* Somers, *supra* note 154, at 182–83.

166. It is often argued by public and administrative law scholars that, in the adjudicative context, decision-makers who make the same kinds of decisions with a high frequency are often more competent in making those decisions than generalists who make the kind of decision in question at a lower frequency. *See* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 330 (1991) (concluding that "more accurate decisions should result" from the fact that "specialized judges can become expert in the substantive and procedural issues surrounding particular programs"); Richard L. Revesz, *Specialized Courts and the Administrative*

A specialized complementarity panel could also increase the legitimacy of complementarity decisions amongst states parties—particularly states that have or are considering making complementarity challenges. Increased consistency, which would likely come from a standing panel, would likely decrease perceptions of bias.<sup>167</sup>

Second, the ICC might benefit from employing a formalized observer system, similar to that used by the ICTY after referral cases. As discussed in Part III.C, part of what likely is driving the ICC's predictive jurisprudence under Article 17 is the fact that it is very difficult for the Court to revisit complementarity decisions once they have been made.<sup>168</sup> Were the ICC to adopt a system where the Prosecutor (or some other organ of the Court) was obligated to send representatives to observe and report on domestic proceedings *after* a complementarity decision has been made, it might take some pressure off of the Pre-Trial Chamber to make precise judgments about whether domestic proceedings will be both legitimate and sufficiently fair to the accused. If the Prosecutor uncovered evidence that the domestic proceeding was straying outside acceptable bounds, the Court could reopen admissibility proceedings. Though the Rome Statute does not provide for such a system, the ICTY Statute did not stipulate an observer system, and the system created in that tribunal was never held impermissible. Moreover, given its longstanding emphasis on “positive complementarity,”<sup>169</sup> performing such an activity would not be too far outside the core competency of the OTP.

Implementing a system of OPT oversight of domestic prosecutions would require doctrinal innovation, but the Rome Statute likely could support such a move. As discussed in Part III.C, the Rome Statute Article 19 permits subsequent challenges to complementarity only in “exceptional circumstances” (without defining the meaning of that term). To properly implement an 11 *bis*

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*Lawmaking System*, 138 U. PA. L. REV. 1111, 1117 (1990) (suggesting that “specialized courts are more likely to make correct decisions in complex areas”).

167. The relationship between consistency of decision making and perceptions of bias is again frequently noted in public law scholarship. See, e.g., Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1000 (2005) (noting that consistency is “fundamental to the notions of prompt administrative order, rationality in administrative decisionmaking, and impartiality in adjudicative proceedings”).

168. See *supra* Part III.C.

169. The ICC and scholars of the Court have long emphasized the Court's important role in encouragement of domestic prosecutions (although the OTP has at times been hesitant to become involved in direct capacity building). See OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, PROSECUTORIAL STRATEGY 2009-2012 5 (2010), <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> [<http://perma.cc/Y8BN-X9FU>] (archived Jan. 15, 2015) (footnote omitted) (emphasizing that the OTP “will encourage genuine national proceedings where possible, including in situation countries, including in situation countries, relying on its various networks of cooperation”); Burke-White, *supra* note 131, at 67–68 (arguing that the ICC should actively assist domestic states in undertaking domestic prosecutions of individuals accused of international crimes).

style model of continuing evaluation of state behavior after a successful complementarity challenge, the Court would need to define this term broadly such that due process concerns expressed by ICC monitors could be enough to trigger a subsequent complementarity challenge. The Appeals Chamber in *Senussi* seemed to support such a development, noting that the failure of a state to appoint a lawyer for the accused “may be a basis for the Prosecutor to seek, pursuant to Article 19(10) of the Statute, a review of the decision.”<sup>170</sup> Additionally, the Court may need to develop standards that clarify the OTP’s institutional role when observing domestic prosecutions (perhaps clarifying that the OTP in this context has a responsibility to provide objective information to the Court, even if the Office holds a specific position on whether domestic prosecution of the case at issue should be allowed).

### B. *International Economic Law and Variable Standards of Review*

If the ICC adopts an 11 *bis*-style system—wherein it presupposes a state’s ability to try the accused but retains the ability to reinstitute an ICC case should the domestic effort falter—it will need additional principles to guide its initial grant of deference to states. How much initial leeway should the ICC grant to prosecuting states, both with respect to the baseline legal due process standards they must meet and as to how states’ factual claims should be evaluated in complementarity litigation? Other branches of international law, particularly international economic law, have much guidance to offer in these areas.

International economic law has developed a range of doctrines that allow tribunals to defer to the judgments of domestic courts in certain circumstances but not others. Standards of deference are perhaps best developed in international trade law and the jurisprudence of the World Trade Organization (WTO) Appellate Body (AB). The WTO hears cases brought by states against other states alleging violations of international trade law. Frequently, cases heard by the WTO and the AB may involve the permissibility of a regulatory action on the part of one state alleged to give it an unfair trade advantage vis à vis the other state: for example, whether a particular tariff or subsidy is permissible under international trade law. The standard of review in most WTO disputes is governed officially by Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes,<sup>171</sup> which provides that “a panel should make an objective assessment of the matter before it,

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170. Judgment on Appeal of Al-Senussi, *supra* note 88, ¶ 201.

171. General Agreement on Tariffs and Trade art. 11, Apr. 15, 1994, 1867 U.N.T.S. 187.

including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.”<sup>172</sup> This text, like many international legal texts dealing with standards of review, is ambiguous. Does an “objective assessment” necessarily imply a *de novo* assessment, or does it leave room for deference to certain state determinations of fact or, perhaps, law?

Since the founding of the WTO, the AB has elaborated a jurisprudence that affords deference to states, but only in certain situations that accord with the broader goals of the underlying legal instruments the AB interprets. Dean Andrew Guzman has characterized the AB’s jurisprudence on standards of review/deference as follows: the AB “must balance the advantages that the domestic government has [in procuring information relevant to the tribunal] against concerns about sham use of the [relevant agreement] to achieve protectionism.”<sup>173</sup> Guzman’s fear of the “sham use” of trade agreements is telling; to the extent that his characterization of AB jurisprudence is normative, it is motivated in part by a desire to protect the legitimacy of the WTO dispute resolution mechanism (along with a reciprocal desire to maximize the accuracy of WTO judgments).

Guzman and other scholars have noted that the amount of deference state litigants receive in WTO litigation varies depending on the situation. The WTO tends to give little to no deference on pure issues of law,<sup>174</sup> the meaning of “objective evidence,”<sup>175</sup> and on procedural analysis of state decision making (whether the state considered “all relevant factors” in making a decision, for example).<sup>176</sup> However, the AB tends to give substantial deference to the conclusions reached by states in narrow or technical areas of fact.<sup>177</sup> For example, in a 2001 case, the WTO was tasked with assessing whether there was sufficient evidence to conclude there was a risk to human health (the existence of which would have justified state regulatory action designed to mitigate health risk, at issue in the case).<sup>178</sup> Although the state defendant’s scientific evidence suggesting there was a health risk appeared to be representative of a minority of

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172. *Id.*

173. Andrew T. Guzman, *Determining the Appropriate Standard of Review in WTO Disputes*, 42 CORNELL INT’L L.J. 45, 68 (2009).

174. *See id.* at 58–60 (“The WTO itself is the key source of expertise with respect to pure questions of law.”).

175. *Id.* at 62–64.

176. *Id.* at 60–62.

177. *See id.* at 70; *see also* Valentina Vadi & Lukasz Gruszczynski, *Standards of Review in International Investment Law and Arbitration: Multilevel Governance and the Commonwealth*, 16 J. INT’L ECON. L. 613, 629 (2013).

178. *See* Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.1888, W/T/DS135/R (Apr. 5, 2001); Vadi & Gruszczynski, *supra* note 177.

the scientific community, the panel accepted the evidence as sufficient.<sup>179</sup> In Guzman's account, a deferential standard for such evidence makes sense because the relative capacity of the state to engage in sophisticated scientific analysis is comparatively high vis à vis the WTO.<sup>180</sup>

The jurisprudence on deference in international investment law is less refined than in the trade context but reflects similar concerns about institutional capacity. Frequently, when investors sue states under bilateral investment treaties (BITs), arbitral tribunals are forced to evaluate the legitimacy of decisions that were the product of state regulatory, legislative proceedings. In cases involving denial of justice claims, they may even sit as quasi-appellate bodies evaluating the legitimacy of state judicial proceedings.<sup>181</sup> Yet neither the ICSID Convention nor most BITs specify the kind of standard of review that tribunals should apply. In recent years, a large number of scholars have filled this gap by arguing that tribunals should apply deferential standards of review in situations where the competency of the state is high as compared to the tribunal, or in situations where particular sovereign interests are involved.<sup>182</sup> Though this academic common wisdom has not entered fully into the doctrine, ICSID tribunals have evinced a willingness to defer when confronted with an issue where the state clearly has a higher capacity than the tribunal. For example, in *Chemtura Corp. v. Canada*, the tribunal noted when determining the standard of review that it should not "second-guess

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179. See Vadi & Gruszczynski, *supra* note 177.

180. See Guzman, *supra* note 173, at 69 ("WTO Panels and the AB are quite ill equipped to engage in review of scientific judgments by member states."). Factual questions that turn on sovereign policy choices receive similar deference. For example, state determinations of unacceptable risk (say, to human health) are evaluated deferentially because a "determination of the appropriate level of protection . . . is a prerogative of the [state]." *Id.* at 70–71.

181. See, e.g., *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), <http://www.state.gov/documents/organization/22094.pdf> [<http://perma.cc/FPG5-HUBW>] (archived Feb. 7, 2015) (evaluating a denial of justice claim in which a Canadian investor alleged mistreatment at the hands of Mississippi state courts).

182. See, e.g., Stephan W. Schill, *Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review through Comparative Public Law* 15–16 (Soc'y of Int'l & Econ. Law Working Paper No. 2012/33) ("[B]oth the public international roots and the domestic public law function should shape the criteria influencing how much deference investment treaty tribunals should accord to acts of host states within a separation of powers framework"); William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor State Arbitrations*, 35 YALE J. INT'L L. 283, 286 (2010) (proposing a change in standard of review that "will be, at times, more deferential to states' public law regulatory choices").

the correctness of the science-based decision-making of highly specialized national regulatory agencies.”<sup>183</sup>

Although none of the doctrines described in this subpart involve explicitly predictive analysis, the development of standards of review in private international law is highly relevant to ICC’s work on complementarity. If the ICC is to refer to due process standards when evaluating complementarity, it could both increase the epistemological accuracy of its decision making and increase legitimacy among states parties by varying the amount of deference it grants to states challenging complementarity. The guiding principle in international economic law—that the international tribunal should exercise more deference when evaluating an area of particular state competence—can be transplanted to the due process/complementarity context. For example, when evaluating state claims that the state is providing a defendant with due process, the ICC could and should adopt looser standards of review when the legal question at issue is dependent on the unique context of the state’s judicial system. Consider, for instance, a situation in which the state has failed to provide the defendant with a lawyer. If the state justifies this outcome by arguing that defendants in its judicial system do not need lawyers because the state uses an inquisitorial—rather than an adversarial—system of adjudication, this argument should perhaps be evaluated with some degree of deference because the state is uniquely positioned to evaluate the needs of defendants in its judicial system.<sup>184</sup> But if the state’s argument were based on a lack of capacity (as was the case in the Libya litigation), deference would not be warranted. The use of this kind of deference could also help blunt criticism from some states that the Court is insufficiently respectful of sovereign attempts to manage their internal affairs (a criticism

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183. *Chemtura Corp. v. Canada*, UNCITRAL, Award, ¶ 134 (Aug. 2, 2010), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/chemtura-14.pdf> [<http://perma.cc/ZYC7-UPYV>] (archived Feb. 7, 2015). Similarly, tribunals suggested a stronger willingness to apply a deferential standard when confronted with a state decision that was obviously the product of a comparatively thorough decision making process. See *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, ¶ 529 (Nov. 12, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf> [<http://perma.cc/P6WU-2V9J>] (archived Jan. 15, 2015) (providing a measure of deference to the respondent state after noting that the claimant’s arguments “were entertained by four levels of courts and [that] the Claimant had several opportunities to submit legal arguments”); *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 264 (Mar. 17, 2006), available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1149](http://www.pca-cpa.org/showpage.asp?pag_id=1149) [<http://perma.cc/GHQ8-LQUU>] (archived Jan. 15, 2015) (“The context within which an impugned measure is adopted and applied is critical to the determination of its validity.”).

184. Obviously, this sort of deference would have limits and it could not be allowed to develop into a system where states make arguments in bad faith designed to yield a deferential standard of review. Given the highly public nature of ICC challenges, however, it seems likely that the Court would be able to weed out such challenges.

that would likely increase in volume if the ICC ever explicitly incorporated human rights norms into its complementarity jurisprudence).

### *C. International Human Rights Tribunals and the Uses of Proportionality*

Finally, if the ICC is to engage in analysis of the due process protections of domestic legal systems, it should look for guidance to the courts that routinely adjudicate questions of whether a domestic legal system measures up to international standards. Such decisions are most commonly made by regional human rights tribunals, such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights. These courts do not typically engage in predictive analysis of the sort that may be necessitated by the Rome Statute, but more than any other judicial body they are tasked with analyzing domestic legal structures in the context of broad international norms. To the extent that substantive standards of international due process exist, it is because of the jurisprudence of human rights courts. Given this role, human rights tribunals have developed sophisticated doctrines that give content to international due process norms and balance states' legitimate sovereign interests against nearly universal individual rights. A full explanation of what the ICC can learn from human rights jurisprudence is beyond the scope of this Article. Thus, the aim of this subpart is again demonstrative: to show one way Article 17 determinations could gain content from human rights jurisprudence and suggest avenues for future research. Also, before continuing, it is worth noting that under current ICC doctrine, explicit importation of human rights norms is largely forbidden. The suggestions that follow are thus more long-term recommendations for how the ICC's doctrine should evolve.

Many of the most contentious cases brought before regional human rights bodies involve the permissibility of state restrictions on rights enumerated by treaty. For example, can the right to Freedom of Assembly and Association guaranteed by Article 11 of the European Convention on Human Rights<sup>185</sup> be burdened by a restriction on rallies by racist groups?<sup>186</sup> Because the guarantees in human rights instruments are typically phrased in universalist terms,<sup>187</sup> the challenge for human rights tribunals lies in conducting

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185. See European Convention on Human Rights art. 11, Nov. 5, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] ("Everyone has the right to freedom of peaceful assembly and to freedom of association with others.").

186. See *Vona v. Hungary*, App. No. 35943/10, Judgment, Eur. Ct. H.R. (July 9, 2013).

187. See, e.g., International Covenant on Civil and Political Rights art. 12, Mar. 23, 1976, 999 U.N.T.S. 171 ("Everyone lawfully within the territory of a State shall,

a limitations analysis—that is, finding a way to balance a state’s legitimate sovereign prerogative to enact policies to benefit the country as a whole against the value of the individual right at issue. Many courts and tribunals conduct this sort of analysis with reference to the principle of proportionality. In a proportionality-centric analysis, the Court looks at the underlying purpose of the state action and assesses whether the resulting burden on the right at issue is proportionate to that purpose.<sup>188</sup> According to Professor T. Jeremy Gunn, courts engaging in proportionality analysis typically use a structured inquiry: the court examines the objective of the challenged state action and the seriousness of the underlying motivation, the effects of the action on the right at issue, and, finally, the significance of the right being limited before reaching a decision.<sup>189</sup> The result is a flexible standard that grants states more leeway to limit rights when they are facing emergencies or other exigencies. Proportionality-style analysis is common in the jurisprudence of the ECtHR, the European Court of Justice,<sup>190</sup> and various domestic constitutional courts, and analogs exist in U.S. public law.<sup>191</sup>

Much has been written about the benefits, drawbacks, and development of proportionality. In particular, scholars have tried to

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within that territory, have the right to liberty of movement and freedom to choose his residence.”); ECHR, *supra* note 185, arts. 5, 9 (providing that “[e]veryone has the right to liberty and security of person” and that “[e]veryone has the right to freedom of thought, conscience and religion”).

188. See, e.g., *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, Judgment, Eur. Ct. H.R., ¶ 49 (Sept. 20, 1994) (“[I]t may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed be proportionate to the legitimate aim pursued.”); *Juridicial Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R., ¶ 119 (Sept. 17, 2003), available at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf) [<http://perma.cc/58N4-CG5B>] (archived Jan. 15, 2015) (“[T]he state may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, *proportionate* and does not harm human rights.”) (emphasis added).

189. See T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT’L L. REV. 465, 487–94 (2005).

190. See *id.* 465–66.

191. U.S. public law is generally considered more resistant to proportionality analysis than the law of many other countries. However, various areas of U.S. law incorporate proportionality principles. See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (establishing that in determining whether a litigant has been afforded procedural due process, the court must look to “the private interest that will be affected by the official action . . . the risk of an erroneous deprivation of such interest through the procedures used . . . and finally, the government’s interest, including the function involved and the fiscal and administrative burdens”); see also E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW* 5 (2009) (“The Supreme Court has recently identified several areas of economic and social regulation that require heightened scrutiny, and the Court has explicitly invoked proportionality principles. These areas include the use of punitive damages, land-use permit conditions, civil forfeitures, and criminal punishment.”).

account for proportionality's rapid expansion starting in the mid-twentieth century. What advantages are driving courts' decisions to adopt the doctrine? One answer sometimes put forward is that the structure of the proportionality inquiry tracks many of the disputes that arise in public law—both national and transnational.

As Professors Alec Stone Sweet and Jud Mathews have explained, the classic conflict in public law jurisprudence is “one between right X and a government action designed to facilitate the development or enjoyment of right Y.”<sup>192</sup> A formalized balancing framework, in this account, is the best way to fairly resolve these disputes.<sup>193</sup> One might also think that proportionality serves an expressive function, separate from its utility as a way of correctly resolving conflicts. If, in fact, most public law conflicts involve a balancing of Right X against Right Y, proportionality analysis may be attractive because it allows the court—which ultimately must decide in favor of one of the two rights—to nonetheless acknowledge the moral force of the right that must be abridged. Though such an acknowledgment may come as little solace to the party on the losing side of the case being decided, it may be important to other stakeholders who value the losing right, both as an affirmation that the right remains legally relevant and as a statement of the court's commitment to reconciling competing values.

Notice that these advantages of proportionality are reciprocal to the criticisms leveled at the ICC in the complementarity context. Proportionality is a device that, at least arguably, can improve the accuracy of decisions and help placate parties on the losing side of controversial decisions; critics of the due process theory assert that the ICC lacks the ability to enforce international norms accurately and that attempting to do so would hurt the court's legitimacy.<sup>194</sup> The absence of any kind of proportionality-based logic from the Article 17 inquiry is thus striking. When due process norms are at stake, the unwillingness inquiry has much in common with the sort of competing rights cases adjudicated by human rights tribunals. Take the Libya situation as an example. When Saif Al-Islam and Abdullah Al-Senussi opposed Libya's complementarity claims on due process grounds, they were in a sense seeking to have their rights vindicated

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192. See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 91 (2008); see also Soering v. United Kingdom, App. No. 14038/88, Judgment, Eur. Ct. H.R., ¶ 89 (July 7, 1989) (“[I]nherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.”).

193. See Stone Sweet & Mathews, *supra* note 192, at 91–92 (“Apart from adopting a formal balancing framework such as PA, we do not see how a court could position itself better to deal with such cases.”).

194. See *supra* text accompanying notes 148–51.

under international human rights law. However, the international rights to which Gaddafi and Senussi laid claim only have legal content insofar as they can be balanced against Libya's sovereign prerogative—that is, Libya's need to provide an adjudicatory system to Gaddafi and Senussi that accounts for limited resources and the need to provide critical government services to Libya's population.

Perhaps it is this lack of acknowledgment of the tradeoffs that must be made that makes the *Gaddafi* and *Senussi* opinions so unsettling to read. As discussed in Part III.B, it is apparent from both *Gaddafi* and *Senussi* that the Court was concerned with due process concerns and factored them into its decision in some capacity. Yet none of the Court's opinions went so far as to account openly for countervailing considerations: Libya's limited resources and, perhaps, its desire to subject Gaddafi and Senussi to trials that would be useful to the post-conflict reconciliation process. As a result, the decisions made by the ICC feel incomplete. In both cases, it is unclear what substantive standard the court used to determine that the ICC case against Gaddafi was admissible and the case against Senussi was not—or, indirectly, that Gaddafi's rights had been impermissibly limited and Senussi's had not. In future admissibility challenges, the use of proportionality doctrine might help alleviate this tension. In cases where the ICC rejects states' complementarity challenges, explicit acknowledgment of the sovereign rights being limited might make the decision seem more legitimate to states parties.<sup>195</sup> Use of

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195. Admittedly, there is an argument that the kind of process-oriented legalization for which this Article advocates could hinder, rather than bolster legitimacy. Perhaps, rather than acting as a salve for losing states, an ICC opinion that systematically explained why a state's commitment to due process protections was insufficient for it to try a notorious war criminal could actually inflame tensions between that state and the ICC. If one accepts that argument over the one laid out by this Article, then perhaps the lack of doctrinal rigor in the Libya decisions and their future progeny is a cost that must be borne for the Court to preserve its legitimacy with states parties.

The dichotomy between such a position and the one for which this Article advocates is an example of a much larger normative schism in the law regarding the value of institutionalization. Compare ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* (2002) (arguing that *because* there is a high likelihood the U.S. government will torture terrorism suspects, the law should sanction and regulate torture), with Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1542–45 (2004) (arguing that even if U.S. officials are likely to torture terrorism suspects, torture should not be institutionalized, in part, because the result could be legitimization); compare also *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting) (arguing that executive detention of Japanese Americans during wartime should not be given constitutional imprimatur, even if “[a] military commander may overstep the bounds of constitutionality”), with *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that detainees at Guantanamo Bay, Cuba, must be given the opportunity to challenge their designation as enemy combatants). Although this Article cannot definitively address this criticism, it favors doctrinal clarity and open discussion in ICC opinions of the concerns that animate the Court's decisions. Institutionalization and procedural fairness are recurrent value throughout public international law and are thought to contribute to international law's force and

proportionality doctrine would also give the ICC the doctrinal justification to adopt a flexible attitude toward admissibility challenges that would acknowledge differences in circumstances between states.<sup>196</sup>

## V. CONCLUSION

The ICC's complementarity jurisprudence remains a work in progress. Although the Gaddafi and Senussi decisions will likely prove helpful in clarifying the role of due process considerations in the complementarity analysis, the Court has yet to provide definitive statements on the role of international norms and the kinds of factors it should consider when evaluating challenges to the admissibility of ICC cases. It is possible that a significant amount of time will pass before the questions discussed in this Article are settled. After all, the issue of overzealous domestic prosecutions that present due process concerns has not, to date, arisen consistently in ICC cases. That said, given the emphasis both inside the ICC and beyond on domestic state prosecution of heinous international crimes, the issue of overzealous state prosecutions and complementarity seems almost certain to arise again. Thus, the questions asked in this Article will continue to remain relevant for scholars and policymakers alike.

Because this Article was largely an exercise in reading between the lines of recent decisions to make predictions about how the ICC will evolve, the ultimate validity of its conclusions remains to be seen. Though, in my view, the best way of understanding the Libya decisions is that they signal the rise of predictive analysis, it is possible that the decisions ultimately will not be influential because of the unique political considerations associated with the ICC's work in Libya. Nonetheless, the hope is that this Article has accomplished two important tasks that will remain relevant regardless of the ultimate disposition of due process and complementarity. First, it has shown the importance of considering extra-doctrinal factors when assessing the ICC jurisprudence on complementarity. Because of the theoretical richness of the complementarity question, it is easy to become lost in the intricacies of the doctrine and neglect the most

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effectiveness. *See, e.g.*, THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) (arguing that states are most likely to obey international law when they perceive it as legitimate, which is more likely when the law is coherent and created through proper procedures). Rejecting these values in the hopes of protecting a few states parties from embarrassment thus seems short-sighted and could make it more difficult for the Court develop a reputation as a high-quality international legal institution.

196. For example, a state seeking to prosecute an ICC defendant as part of a concerted strategy of post-conflict reconciliation might be entitled to comparatively more leeway with respect to international due process norms.

important predictive question: given all the institutional forces at work, what is the most likely way that actors *within* the ICC will resolve the key doctrinal problems? Second, this Article has endeavored to show that the ICC has much to gain by reaching across jurisdictional and doctrinal lines and learning from other legal systems—both in the context of complementarity and beyond. The project of international criminal courts is so unique in the history of international law and criminal justice that one can be tempted to view these courts as singular, articulating a new jurisprudence from the four corners of their governing statutes. But, particularly in areas like complementarity that are not strictly tied to international criminal law, the ICC stands to benefit greatly from engaging with the broader “community of courts,”<sup>197</sup> attempting to resolve analogous issues. In the complementarity context at least, the result likely would be a stronger, more sustainable doctrine.

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197. I borrow this term from Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003).