

2017

The Merits or the Messenger: Complementarity and the Referral Process in the ICC's Application of Article 17

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Recommended Citation

Crow, Kevin (2017) "The Merits or the Messenger: Complementarity and the Referral Process in the ICC's Application of Article 17," *Florida State University Journal of Transnational Law & Policy*. Vol. 26: Iss. 1, Article 2.

Available at: <https://ir.law.fsu.edu/jtlp/vol26/iss1/2>

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**THE MERITS OR THE MESSENGER?:
COMPLEMENTARITY AND THE REFERRAL
PROCESS IN THE ICC'S APPLICATION OF ARTICLE 17**

KEVIN CROW*

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I. INTRODUCTION

Should the complementary jurisdiction of an international criminal case be decided upon the merits of the admissibility claim alone, or should the differing referral processes at the International Criminal Court (“ICC”) have some bearing on admissibility? This article will demonstrate that the consideration of the merits of a claim before the ICC can procedurally differ depending upon the “messenger”—i.e., the source of the referral—and, indeed, the differing degrees of discretion accorded to ICC Chambers through differing referral mechanisms can be decisive in determining complementary jurisdiction, at least when cases are referred by the UN Security Council. To demonstrate this point, this article examines the legal reasoning in and connection between three exemplary cases: *Prosecutor v. Bemba*,¹ *Prosecutor v. Kosgey*,² and *The Situation in the Libyan Arab Jamahiriya*,³

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1. *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo ¶ 50 (June 15, 2009).

2. *Prosecutor v. Kosgey*, ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

with particular attention paid to the Libyan case. Each case deals with the ICC's application of the principle of complementarity, as triggered by Article 17—i.e., the jurisdictional relationship between the ICC and the domestic courts of the countries where the alleged crimes occurred. Each case also has a different referral “messenger,” and in the Libyan case, that messenger is the Security Council.⁴

In the sections that follow, this article will examine the ICC's interpretation of Article 17 of the Rome Statute of the International Criminal Court⁵ (Rome Statute) and other Articles of that Statute, framed in consideration of the referral processes by which each of the three chosen case studies was initiated. This article will begin with a brief review of the relevant law and academic literature. It will then review the application of Article 17 in each of the three cases mentioned above. Finally, it will conclude with a discussion on whether the ICC has correctly applied Article 17 in light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), which codify standards for the interpretation of treaties under international law,⁶ and consider what effect, if any, a given referral process has upon the ICC's interpretation of Article 17.

II. REFERRALS, ADMISSIBILITY, AND DUE PROCESS

The complementary jurisdiction of the ICC grants the court authority to hear a case only if the case is not being or has not been genuinely investigated and tried by any state.⁷ Article 17 of the Rome Statute “envisages two basic scenarios in which” a case may reach the ICC.⁸ First, where a case is referred and “no relevant domestic proceedings have been initiated, and second[], where relevant domestic proceedings have been initiated but a state is unwilling or unable to conduct them ‘genuinely.’”⁹ If a case matches one of these scenarios, it can be referred to the ICC in one

3. Situation in the Libyan Arab Jamahiriya, ICC-01/11-12, Decision on the “Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi” (June 27, 2011).

4. *Id.*

5. Rome Statute of the International Criminal Court, art. 17, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

6. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

7. GÖRAN SLUITER, ET AL, INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES, 123 (Oxford University Press 2013).

8. *Id.*

9. *Id.*

of three ways. First, states party to the Rome Statute or states otherwise subject to the ICC's jurisdiction may self-refer cases to the ICC.¹⁰ Second, the UN Security Council can compel non-party states to cooperate with the ICC as a measure to restore international peace under Chapter VII of the UN Charter.¹¹ Finally, and rather controversially,¹² an ICC Prosecutor may initiate an investigation *proprio motu*—i.e., by the Prosecutor's own motion.¹³ In such an instance, the Prosecutor does not need to wait for a charge to be brought by a member state, an accusing state, or the Security Council; the Prosecutor may *proprio motu* instigate an investigation or look into charges brought by individuals or NGOs.¹⁴

The earliest decision under consideration in this article, *Prosecutor v. Bemba*,¹⁵ came down from the ICC's Appellate Chamber in 2009, and affirmed the Bemba Trial Chamber finding that Article 17(1)(b) of the Rome Statute¹⁶ requires the Chamber to accept *prima facie* the validity and effect of decisions from domestic courts regarding a given accused unless there is compelling evidence that it should do otherwise.¹⁷ The other two decisions, *Prosecutor v. Kosgey*¹⁸ and *Situation in the Libyan Arab Jamahiriya*¹⁹ (hereinafter "*Gaddafi*"), came down from Pre-Trial Chambers I and II in 2011. All three cases dealt to varying degrees with the interplay between Article 17 and Article 19 of the Rome Statute; Article 19 deals specifically with challenges to the

10. *How the Court Works*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cci.int/about/how-the-court-works> (see subsection "Jurisdiction" for relevant information) (last accessed February 6, 2017).

11. *Id.*; see also Rome Statute, *supra* note 5, art. 13(b).

12. See, e.g., Cassandra Jeu, *A Successful, Permanent International Criminal Court . . . "Isn't it Pretty to Think So?"*, 26 HOUSTON J. INT'L L. 411 (2004).

13. Rome Statute, *supra* note 5, arts. 13(c), 15(a) ("The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.").

14. Rome Statute, *supra* note 5, art. 15. *Proprio motu* (or *motu proprio*) is defined as "of one's own accord." GABRIEL G. ADELEYE & KOFI ACQUAH-DADZIE, WORLD DICTIONARY OF FOREIGN EXPRESSIONS 252 (Thomas J. Sienkewicz & James T. McDonough, Jr., eds., 1999).

15. *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 50 (June 15, 2009).

16. See Rome Statute, *supra* note 5, art. 17(1)(b); *supra* text accompanying note 1.

17. *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009).

18. *Prosecutor v. Kosgey*, ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

19. *Situation in the Libyan Arab Jamahiriya*, ICC-01/11, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi" (June 27, 2011).

jurisdiction of the ICC or the admissibility of a case.²⁰ Further, *Gaddafi* dealt with Article 17's relativity to an arrest warrant application determination under Article 58 of the Rome Statute.²¹ All three cases illustrate the difficulties the ICC Chambers encounter in determining the scope of the principle of complementarity granted by Article 17 of the Rome Statute.

Article 17(1) and Article 17(2) of the Rome Statute are closely intertwined, and Articles 19 and 58 are linked to Article 17 through the wording of the Statute. Article 17(1)(a) and Article 17(1)(b) both allow for the court to admit cases in situations in which a state is "unwilling or unable" to carry out an investigation or prosecution.²² Article 17(2) sets out the process for determining "unwillingness," requiring the ICC to consider principles of due process recognized by international law (giving rise to the so-called "due process thesis" briefly referenced in the next paragraph).²³ Article 19 sets out rules for the ICC when dealing with challenges to admissibility under Article 17, and grants the Court an option to challenge the admissibility of a case by its own motion—i.e., *proprio motu*.²⁴ Finally, Article 19 specifies that the ICC may hear challenges to admissibility on Article 17 grounds or challenges to jurisdiction made by accused or other persons under Article 58, which governs the issuance of arrest warrants and summons to appear before the court.²⁵

In determining the scope and nature of Article 17, the majority of scholars argue in favor of the so-called "due process thesis," namely, that the ICC has jurisdiction where a state cannot guarantee a defendant due process as defined by international norms.²⁶ Other scholars note that "arguments that are at least

20. Rome Statute, *supra* note 5, art. 19.

21. *See id.* art. 58; *see also id.* art. 17(1)(a).

22. *Id.* art. 17(1)(a)–(b).

23. *Id.* art. 17(2); *see infra* note 25 and accompanying text.

24. *Id.* art. 19.

25. *Id.* art. 58.

26. "[The overwhelming consensus among international criminal law scholars is that] . . . a case [is] admissible under Article 17 if the Court determines that the State asserting jurisdiction over it will not provide the defendant with due process[.]" 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). "If [S]tates desire to retain control over prosecuting nationals charged with crimes under the ICC Statute, they must ensure that their own judicial systems meet international standards. At a minimum, [S]tates will have to adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights of defendants." Mark S. Ellis, *The International Criminal Court and its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 241 (2002); *see also* Darryl Robinson, *The Rome Statute and its Impact on National Laws*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1849, 1866 (Antonio Cassese et al. eds., 2002) ("It is expected that the ICC will show considerable deference to national procedural approaches. Thus, most States will

plausible can be made [both for and against the due process thesis], so the Court could defensibly take [another] interpretation.”²⁷ Here, I wish to depart from the majority in presenting the thesis that the ICC’s interpretation of the scope of admissibility under Article 17 is at least partially influenced by the source of the referral initiating a given case before the ICC, and that the ICC can sidestep the question of domestic due process depending on the “messenger” or the referral. To illustrate this point, the following sections will examine the background and the application of Article 17 in each of the three case studies chosen for this article: *Bemba*, *Kosgey*, and *Gaddafi*.

III. APPLICATIONS OF ARTICLE 17 IN *BEMBA*, *KOSGEY*, AND *GADDAFI*

A. *Self-Referral: Article 17 in Bemba*

Bemba was a case self-referred by a state: the Central African Republic (CAR).²⁸ The defendant was the vice president of the Democratic Republic of Congo (DRC) and was alleged to be a military commander of the Mouvement pour la Libération du Congo (MLC), which carried out attacks against the CAR population during the period from October 26, 2002 to March 15, 2003.²⁹ The attacks by the MLC were allegedly carried out to assist Ange-Felix Patassé (Patassé), the former President of the CAR, who sought to launch a counter-offensive against dissident forces seeking to unseat him from power.³⁰ *Bemba* argued that the proceedings against himself and Patassé were politically motivated and subject to the political influence of the President of the DRC, Joseph Kabila.³¹

From June 2003 to September 2004, the public prosecutor of the Tribunal de Grande Instance in the CAR conducted a criminal investigation into events occurring in the CAR between October 2002 and March 2003, and a total of 203 statements were taken

be relying on their usual criminal procedures, provided that those procedures are effective and respect basic human rights standards.”)

27. Darryl Robinson, *Three Theories of Complementarity: Charge, Sentence, or Process?*, 53 HARV. INT’L L.J. 165, 175 (2012), http://www.harvardilj.org/wp-content/uploads/2012/04/HILJ-Online_53_Robinson1.pdf.

28. Prosecutor v. Bemba, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009).

29. *Id.* ¶ 240.

30. *Id.*

31. *Id.* ¶ 150.

from victims during the course of the investigation.³² On September 5, 2003, Bemba was charged with using troops to undermine the security of the CAR and with aiding and abetting murder, rape, and pillage.³³ The proceedings against Bemba were joined with those already on foot against Patassé and others.

In September 2004, the proceedings against Bemba were dismissed by the Senior Investigating Judge on two grounds: that Bemba enjoyed diplomatic immunity from prosecution given his role as the Vice-President of the DRC and that there was insufficient incriminating evidence to show that Bemba aided and abetted the crimes (Dismissal Order).³⁴ The Dismissal Order was wholly in Bemba's favor.³⁵ The proceedings against Patassé were referred to the Cour Criminelle of the CAR for trial.³⁶

A number of proceedings followed the Dismissal Order. In September 2004, the deputy prosecutor, acting on behalf of the Ministère Public, appealed the Dismissal Order.³⁷ Concurrently, the 1st Advocate-General applied to the Bangui Court of Appeal to commit all the accused, including Bemba, for trial.³⁸ The public prosecutor of the Bangui Court of Appeal also filed a request to transfer the trial against Patassé and others, including Bemba, to the ICC.³⁹ This was accompanied by a request from the President of the CAR to the Bangui Court of Appeal to sever the proceedings and refer the war crimes of rape, murder, destruction of property, and pillaging committed on CAR territory to the ICC during 2002 pursuant to Article 14 of the Rome Statute on the basis that the ICC had means of investigation that were not available to the CAR.⁴⁰

The Bangui Court of Appeal partially upheld the appeal of the public prosecutor, finding that war crimes committed in 2002 were within the ICC's jurisdiction. It ordered the severance of the case

32. Prosecutor v. Bemba, ICC-01/05-01/08, Decision on the Admissibility and Abuse of Process Challenges, ¶ 79 (June 24, 2010).

33. Prosecutor v. Bemba, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 72 (June 15, 2009).

34. Prosecutor v. Bemba, ICC-01/05-01/08, Decision on the Admissibility and Abuse of Process Challenges, ¶ 6 (June 24, 2010).

35. *Id.* ¶ 221.

36. *Id.* ¶ 6.

37. *Id.* ¶ 7.

38. *Id.* ¶ 8.

39. *Id.* ¶ 9.

40. *Id.* ¶ 12.

against Patassé, Bemba and others for these crimes, directing the prosecution to submit the matter to the competent authority for referral to the ICC.⁴¹

The second Advocate-General appealed the decision of the Bangui Court of Appeal.⁴² The Cour de Cassation issued its judgment on April 11, 2006, upholding the appeal judgment of the Bangui Court of Appeal, varying the Dismissal Order made by the Senior Investigating Judge, and directing the national prosecutor to seize the ICC of the proceedings against Patassé, Bemba, and others.⁴³ The Cour de Cassation observed that there was no doubt that the CAR judicial system was genuinely unable to investigate and prosecute the relevant crimes.⁴⁴ The Court also noted that by reversing the lower court's decision and instructing the prosecution to refer the matter to the ICC, the Bangui Court of Appeal had applied the law "in due fashion."⁴⁵

Against this procedural backdrop, there were four grounds of appeal in *Bemba*, and three of them hinged on Article 17 arguments.⁴⁶ The Appeals Chamber in *Bemba* reaffirmed its previous reading of Article 17, specifically reviewing the circumstances under which a Chamber is required to review the "unwillingness" determinants under Article 17(2) and those under which a Chamber can end its query after an analysis of Article 17(1).⁴⁷ In doing so, the Appeals Chamber relied heavily on its previous decision in *Katanga*,⁴⁸ which stated the following:

[I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and

41. *Id.*

42. *Id.* ¶ 13.

43. *Id.* ¶ 15.

44. *Id.* ¶ 228.

45. *Id.*

46. *Id.*

47. *Id.*

48. Prosecutor v. Katanga, 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, ¶ 78 (Sept. 25, 2009).

(b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.⁴⁹

The Appeals Chamber also previously declined to consider a ground of appeal relating to “unwillingness” when it did not find that the “initial questions” of Article 17(1)(b) of the Statute were answered in the affirmative:

[T]he question of unwillingness or inability does not arise in the present case, because, at the time of the admissibility challenge, there were no domestic investigations or prosecutions against the Appellant; nor did the Congolese authorities, after investigation, decide not to prosecute him. For that reason, the Appeals Chamber sees no need to address the Appellant’s arguments under [those grounds] of appeal.⁵⁰

The Appeals Chamber found that there was nothing to indicate that the Trial Chamber erred in its determination that there was no decision not to prosecute within the meaning of Article 17(1)(b) of the Statute.⁵¹ In the view of the Appeals Chamber, the Trial Chamber correctly relied on the judgments of the Court of Appeal of Bangui and the Court of Cassation as indicating *prima facie* the current status of the judicial proceedings in the case of *Etat Centrafricain v. Ange-Félix Patassé*.⁵² Again, the Appeals Chamber cited the language of *Katanga*:

If the decision of a State to close an investigation because of the suspect’s surrender to the Court were considered to be a ‘decision not to prosecute’, the peculiar, if not absurd, result would be that *because* of the surrender of a suspect to the Court, the case would become inadmissible. In such scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute. Thus, a ‘decision not to prosecute’ in terms of article 17(1)(b) of the Statute does

49. *Id.*

50. *Id.* ¶ 97.

51. *Id.*

52. See Prosecutor v. Bemba, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, Annex A (June 15, 2009).

not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC.⁵³

Accordingly, the Appeals Chamber in the *Bemba* case reasoned that because Bemba did not provide sufficient evidence to demonstrate that the Trial Chamber's decision to reject his Request was an error, and because the Appeals Chamber concluded that the Trial Chamber did not err in deciding that there had not been a decision to prosecute Bemba, the Appeals Chamber did not need to analyze the merits on any other ground of appeal.⁵⁴ The Chamber took the Court's referral to the ICC as indicating *prima facie* the status of the case against Bemba.⁵⁵

*B. Prosecutor Referral Proprio Motu:
Article 17 in Kosgey*

Kosgey was a case initiated proprio motu by the ICC prosecutor.⁵⁶ *Kosgey* resulted from the period of concerted violence, which allegedly targeted the civilian population and in particular specific ethnic groups who were perceived as supporters of the Party of National Unity, following the announcement of the Kenyan presidential election in December 2007.⁵⁷ Ruto and Kosgey were alleged to have organized and coordinated the attacks against the civilian population in the Rift Valley.⁵⁸ Sang was alleged to have fanned the violence through his influence as a radio broadcaster.⁵⁹ Charges against Kosgey were eventually dropped in January 2012.⁶⁰

53. Prosecutor v. Bemba, ICC-01/05-01/08, Decision on the Admissibility and Abuse of Process Challenges, ¶ 240 (June 24, 2010) (citing Prosecutor v. Katanga, 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, ¶ 83 (Sept. 25, 2009)).

54. Prosecutor v. Bemba, ICC-01/05-01/08 OA 2, Judgment on the Appeal of the Prosecutor Against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa," ¶¶ 59–62 (Dec. 2, 2009).

55. *Id.*

56. Prosecutor v. Kosgey, ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

57. *Id.*; See also *Case Information Sheet: Situation in the Republic of Kenya*, INT'L CRIM. CT. *2 (Sept. 18, 2013) <http://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf>.

58. *Case Information Sheet: Situation in the Republic of Kenya*, INT'L CRIM. CT. *2 (Sept. 18, 2013) <http://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf>.

59. *Id.*

60. *Id.* at *3.

The legal issue for the Pre-Trial Chamber's determination was whether the admissibility test in Article 17 of the Rome Statute was met. The Chamber noted there were two limbs to the test: (i) complementarity, as outlined in article 17(1)(a)-(c) of the Rome Statute; and (ii) gravity, as outlined in article 17(1)(d) of the Rome Statute.⁶¹ Given the fact that the Government did not contest the gravity limb, the sole question for the Pre-Trial Chamber's determination was whether the complementarity principle was satisfied, that is, whether there were ongoing domestic proceedings.⁶²

The Pre-Trial Chamber made preliminary remarks regarding the concept of complementarity under the Rome Statute, which established the context for the decision.⁶³ The Chamber noted that States have both the right and duty to exercise their criminal jurisdiction over persons allegedly responsible for committing crimes that fall within the ICC's jurisdiction.⁶⁴ As mentioned above, the complementarity concept seeks to "strik[e] a balance between safeguarding the primacy of domestic proceedings" and achieving the goal of ending impunity.⁶⁵ The argument goes like this: where a State does not investigate, the ICC must be able to intervene.⁶⁶

The Pre-Trial Chamber confirmed that the complementarity limb of the admissibility test involves a twofold analysis: (i) establishing "whether there are ongoing investigations or prosecutions, or [] whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned[.]" and afterward, (ii) examining the question of the State's unwillingness and inability to prosecute.⁶⁷ By that formulation, the fact of a State's inaction is alone sufficient to render the case admissible.⁶⁸

The Kenyan Government submitted that it was, at the time of the application, investigating crimes arising out of the post-election violence.⁶⁹ Whilst its investigations did not cover the

61. Prosecutor v. Kosgey, ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 47 (May 30, 2011).

62. *Id.*

63. *Id.* ¶ 43–44.

64. *Id.* ¶ 44.

65. *Id.*

66. *Id.*

67. *Id.* ¶ 48 (citing Prosecutor v. Katanga, ICC-01/04-01/07-1497, 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, ¶ 78 (Sept. 25, 2009)).

68. *Id.*

69. *Id.* ¶ 50.

suspects, the Government submitted its investigation of the “case” covered the same conduct with which the ICC was investigating the suspects and was investigating individuals at the same level as the suspects, arguing that this was sufficient for the purposes of Article 17(1) of the Rome Statute.⁷⁰ The Pre-Trial Chamber rejected this submission, noting that the admissibility determination must consider whether the national proceedings relate to the same persons who are subject to the ICC proceedings.⁷¹ The Pre-Trial Chamber confirmed this was consistent with the decision of Pre-Trial Chamber I in *Lubanga*.⁷²

The Pre-Trial Chamber noted that the Government’s insistence on the “same conduct” cast doubt on the Government’s will to actually investigate the three suspects subject to the ICC proceedings.⁷³ In any event, the Pre-Trial Chamber considered that the material submitted by the Government indicated there were no national investigations against the suspects.⁷⁴ The Pre-Trial Chamber was also concerned by the Government’s submission that it would provide a progress report to the ICC regarding “prospective investigations to be carried out” and “how they extend up to the highest levels,” building on “investigation and prosecution of lower level perpetrators to reach up to those at the highest levels who may have been responsible.”⁷⁵ The Chamber noted these statements clearly indicated that there had not yet been any investigations of perpetrators at the highest level of hierarchy, which contradicted the Government’s own submitted standard of investigating individuals at the “same level” as the suspects.⁷⁶

The Pre-Trial Chamber noted that the Government heavily relied on material evidencing legal and judicial reforms in Kenya and promises for future investigative activities. The Government was not able to submit any detailed report on the alleged ongoing

70. *Id.* ¶ 53.

71. *Id.* ¶ 54.

72. *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, ¶¶ 31, 37–39 (Feb. 24, 2006) (the Chamber stated that a determination of inadmissibility in a “case” required “that national proceedings encompass both the person and the conduct which is the subject of the case before the Court”).

73. *Prosecutor v. Kosgey*, ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 60 (May 30, 2011).

74. *Id.*

75. *Id.* ¶ 61.

76. *Id.* ¶ 62.

investigations.⁷⁷ On review of the materials presented by the Government, the Pre-Trial Chamber concluded they fell short of evincing any concrete investigation into the conduct of the suspects.⁷⁸ The Pre-Trial Chamber's views were compounded by the fact that the Government did not provide the Chamber with information as to the conduct, crimes or incidents which were being investigated domestically.⁷⁹

Thus, given the lack of convincing evidence that the State in this case intended to pursue criminal proceedings against the defendants identified by the ICC, the proprio motu referral of the Prosecutor went forward. The existing domestic proceedings were adjudged to be insufficient, or at least unconvincing.

*C. U.N. Security Council Referral:
Article 17 in Gaddafi*

The reasoning of the Pre-Trial Chamber in *Gaddafi* offers a recent and detailed illustration of the applications of several Rome Statute Articles, after a referral from the U.N. Security Council, to the question of complementarity. The accused (Suspects) in *Gaddafi* were Muammar Mohammed Abu Minyar Gaddafi (Gaddafi), Saif Al-Islam Gaddafi (Saif Al-Islam) and Abdullah Al-Senussi (Al-Senussi).⁸⁰ Gaddafi, now deceased, was the acting head of state during the events at issue, and held the title "Leader of the Revolution."⁸¹ Saif Al-Islam was acting as the de facto Prime Minister.⁸² Al-Senussi was a Colonel in the Libyan Armed Forces, head of the armed forces in Benghazi and head of Military Intelligence.⁸³

Following the U.N. Security Council's unanimous referral of the situation in Libya to the ICC on February 26, 2011,⁸⁴ the Prosecutor opened a formal investigation on potential crimes

77. *Id.* ¶ 63–64.

78. *Id.* ¶ 65.

79. *Id.* ¶ 69.

80. Prosecutor v. Gaddafi, ICC-01/11, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi" (June 27, 2011).

81. See *Libya, ICC 01/11*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/Pages/situation%20index.aspx (last visited February 19, 2017) (explaining the case against Gaddafi was terminated following his death on 22 November 2011).

82. *Id.*

83. *Id.*

84. S.C. Res. 1970, ¶ 4 (Feb. 26, 2011) ("The Security Council . . . [d]ecides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court.").

committed during the uprising. Although it recognized that Libya was not a party to the Rome Statute and thus not bound by the jurisdiction of the ICC, the Security Council urged Libya to “cooperate fully with . . . the Court and the Prosecutor.”⁸⁵ On May 16, 2011, after only two months of the investigation,⁸⁶ the Prosecutor sought arrest warrants from the Pre-Trial Chamber⁸⁷ for alleged crimes against humanity committed by Muammar Gaddafi, Saif al-Islam Gaddafi, and Abdullah al-Senussi.⁸⁸

Unlike the ad hoc tribunals, but not unlike the domestic criminal procedures of many common law countries, the ICC requires that the Prosecutor submit a request for an arrest warrant before submitting a request for an indictment.⁸⁹ The ICC also requires of the Prosecutor different evidentiary standards during these different stages of the proceedings with regards to the charges: “The drafters of the Statute established three different, progressively higher evidentiary thresholds for each stage of the proceedings The nature of these evidentiary thresholds depends on the different stages of the proceedings and is also consistent with the foreseeable impact of the relevant decisions on the fundamental human rights of the person charged.”⁹⁰ When requesting the issuance of arrests warrant or summons to appear, the Prosecutor must demonstrate reasonable grounds to believe

85. *Id.* ¶ 5.

86. *See, e.g.*, Mark Kersten, *Whither ICC Deterrence in Libya?*, JUST. IN CONFLICT (Mar. 6, 2012), <http://justiceinconflict.org/2012/03/06/whither-icc-deterrence-in-libya/>; *see also*, Mark Kersten, *No Winners in ICC-Libya Standoff*, FOREIGN POL’Y (Oct. 8, 2012), http://mideast.foreignpolicy.com/posts/2012/10/08/no_winners_in_icc_libya_standoff (“With unprecedented speed, the Court opened an investigation in early March and, in June 2011, issued arrest warrants . . .”).

87. *See Judicial Divisions*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/judicial-divisions/Pages/default.aspx> (describing the procedural responsibilities of the Pre-Trial Chamber at the ICC).

88. *Prosecutor v. Gaddafi*, ICC-01/11, Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (May 16, 2011).

89. *See* S.C. Res. 827 (May 25, 1993) (establishing an international tribunal for the prosecution of violations of international humanitarian law in the territory of the former Yugoslavia); S.C. Res. 1966, art. 19, ¶ 1 (Dec. 22, 2010) [hereinafter ICTY Statute]; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, *Rules of Procedure and Evidence*, r. 47, U.N. Doc. IT/32/Rev. 50 (July 8, 2015) [hereinafter ICTY Rules]; S.C. Res. 955, Annex, art. 18, ¶ 1 (Nov. 8, 1994) (establishing the International Criminal Tribunal for the territory of Rwanda) [hereinafter ICTR Statute]; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* r. 47, U.N. Doc. IT/3/Rev.11 (as amended May 13, 2015); S.C. Res. 1757, Annex, art. 18, ¶ 1 (May 30, 2007) [hereinafter STL]; Special Tribunal for Lebanon, *Rules of Procedure and Evidence*, r. 78, STL/BD/2009/01/Rev.8 (Mar. 15, 2016) [hereinafter STL Rules].

90. *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 27 (June 25, 2009).

that the person is criminally responsible for the crimes; in order to have the charges confirmed by the Pre-Trial Chamber, the Prosecutor must present substantial grounds to believe that the person is criminally responsible for the crimes; and finally, to obtain a conviction in the final judgment, the Prosecutor must demonstrate guilt beyond reasonable doubt.⁹¹

In the case of *Gaddafi*, the Pre-Trial Chamber drew heavily on its previous decisions in *Katanga*,⁹² *Al Bashir*,⁹³ and *Lubanga*⁹⁴ to determine whether the Prosecutor had met its burden. Ultimately, it accepted the Prosecutor's application,⁹⁵ finding that there were reasonable grounds to believe that the three men were criminally responsible for one count of murder as a crime against humanity under Article 7(1)(a) of the Rome Statute and one count of persecution as a crime against humanity under Article 7(1)(h).⁹⁶ As such, the Pre-Trial Chamber issued warrants for the arrest of the three men.⁹⁷ However, based upon the scope of the Security Council referral, the warrants issued following the case at hand only cover conduct beginning on February 15, 2011.⁹⁸

While Article 58(1)(b) of the Rome Statute allows the Pre-Trial Chamber to issue arrest warrants instead of summonses to appear,⁹⁹ the Prosecutor chose to employ what might be thought of as the "more intrusive" procedural mechanism (i.e. a summons to

91. *Id.*

92. Prosecutor v. Katanga, ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008).

93. Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (Mar. 4, 2009).

94. Prosecutor v. Lubanga, ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges (Jan. 29 2007).

95. *See generally*, Prosecutor v. Gaddafi, ICC-01/11-12, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi," (June 27, 2011).

96. Rome Statute, *supra* note 5, art. 7(1)(h) ("Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any action referred to in this paragraph or any crime within the jurisdiction of the Court.").

97. *See* Situation in the Libyan Arab Jamahiriya, ICC-01/11-01/11-2, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (June 27, 2011); *see also* Situation in the Libyan Arab Jamahiriya, ICC-01/11-01/11-3, Warrant of Arrest for Saif Al-Islam Gaddafi (June 27, 2011); *see also* Situation in the Libyan Arab Jamahiriya, ICC-01/11-01/11-15, Warrant of Arrest for Abdullah Al-Senussi (June 27, 2011.).

98. *Libya: Q&A on the ICC and Saif al-Islam Gaddafi*, HUM. RTS. WATCH (Jan. 23, 2012, 12:23 PM), <https://www.hrw.org/news/2012/01/23/libya-qa-icc-and-saif-al-islam-gaddafi>.

99. Rome Statute, *supra* note 5, art. 58(1)(b) (authorizing the Court to issue an arrest warrant if it appears necessary: "(i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime . . .").

appear), giving the Libyan government no legal alternative to cooperation with the ICC, as it had in previous cases (and perhaps as a result of previous negative experiences with the “less intrusive” mechanism).¹⁰⁰ Nevertheless, while the Libyan government has in custody one of the three defendants (al-Senussi Gaddafi is dead and Al-Islam was captured), it has refused to recognize the jurisdiction of the ICC and has insisted on trying the defendant in domestic courts. This is likely because Libya can (and has) employ the death penalty upon conviction, whereas the death penalty is not used at the ICC.

In *Gaddafi*, the Pre-Trial Chamber was satisfied that the ICC had jurisdiction over the case against Gaddafi, Saif Al-Islam and Al-Senussi on several grounds. First, as to *ratione temporis*, the Security Council had referred the situation in Libya to the Prosecutor pursuant to Article 13(b) of the Rome Statute,¹⁰¹ for crimes allegedly committed from 15 February 2011 to at least 28 February 2011.¹⁰² As to *ratione materiae*, the alleged criminal conduct amounted to crimes against humanity listed in the Rome Statute.¹⁰³ Finally, as to *ratione loci* and *ratione personae*, the conduct was alleged to have been carried out by Libyan citizens throughout Libya for the relevant period, and the case fell within the ICC’s jurisdiction notwithstanding that it involved the alleged criminal liability of nationals of, and crimes committed in, a State that was not a party to the Rome Statute.¹⁰⁴ The Pre-Trial Chamber noted that the official position of an individual, and the question of whether they were or were not a national of a State

100. See *Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶¶ 227–236 (Mar. 4, 2009); see generally *id.* ¶¶ 209–223. Though the Prosecutor initially alleged that Al Bashir was complicit in genocide as well as war crimes and crimes against humanity, the Pre-Trial Chamber majority found that the totality of the Prosecutor’s evidence failed to establish reasonable grounds to believe the Government of Sudan acted with the requisite specific intent necessary to support a charge of genocide. *Id.* at 205–206; see generally Rome Statute, *supra* note 5, art. 5 (granting the court jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression).

101. Rome Statute, *supra* note, 5, art. 13(b) (“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if . . . A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations . . .”)

102. *Prosecutor v. Gaddafi*, ICC-01/11-12, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi,” ¶ 7 (June 27, 2011).

103. *Id.* ¶ 8.

104. *Id.* ¶ 9; see also *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶¶ 41–45 (March 4, 2009).

which was not a party to the Rome Statute, had no effect on the ICC's jurisdiction.¹⁰⁵

The Pre-Trial Chamber decided not to exercise its discretion pursuant to Article 19(1) to determine, *proprio motu*, the admissibility of the case in accordance with Article 17.¹⁰⁶ Whilst it did not expressly state so, the Pre-Trial Chamber appeared to acknowledge that it would be inappropriate to determine admissibility in circumstances where the arrest warrant application was being conducted on an *ex parte* basis.¹⁰⁷

Thus, in the case of a unanimous Security Council referral, admissibility was assumed and the Article 17 analysis was unnecessary at the Pre-Trial stage. The ICC had only to determine that it had jurisdiction over the defendants, and did not analyze whether, satisfied of its jurisdiction, the case was admissible under Article 17. Nevertheless, Libya is not a party to the Rome Statute and refuses to recognize the authority of the ICC to try the defendant it currently holds; it wishes instead to try the defendant domestically.

IV. DISCUSSION

Articles 31 and 32 of the VCLT provide the governing principles for interpretation of international treaties.¹⁰⁸ Article 31(1) provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁰⁹ When, and only when, the ordinary meaning, object, and purpose are unclear, Article 32 provides that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to

105. Prosecutor v. Gaddafi, ICC-01/11-12, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi,” ¶ 9 (June 27, 2011).

106. *Id.* ¶ 12.

107. *Id.*; see also Situation in the Republic of Kenya, ICC-01/09-42, Decision on the “Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor’s Application under Article 58(7),” ¶ 6 (Feb. 11, 2011); Appeals Chamber Judgment of 13 July 2006, ICC-01/04-169, ¶¶ 52–53.

108. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 74 (2d ed. 2004); ICC OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 26 (2003).

109. Vienna Convention, *supra* note 6, art. 31(1).

Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.¹¹⁰

Thus, where the wording of the statutory provision and its context are not clear, the treaty's object and purpose as well as its preparatory works should be taken into account.

Because there is reasonable disagreement about the precise scope of Article 17, the VCLT requires that an interpretation of Article 17 must take into account the object and purpose of the Rome Statute.¹¹¹ The fifth and ninth paragraphs of the Preamble state the object and purpose is to "put an end to impunity for the perpetrators of . . . the most serious crimes of concern to the international community as a whole."¹¹² In line with this purpose, Article I states that the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in th[e] Statute."¹¹³ From this perspective, "the unfairness of domestic proceedings at the national level is not per se relevant to the purpose of the Court, [except] when such violation of fundamental human rights amounts to one of the crimes [included] in the Statute."¹¹⁴

If Article 17(2)(b) and (c) are read in light of the Statute's stated object and purpose—namely, to end impunity—then the preferred meaning of the expression "intent to bring the person concerned to justice" must be the one referring to the intent to hold somebody accountable.¹¹⁵ As such, the Court would be able to intervene only in cases where the unfairness of the proceedings revealed an intent to prevent a person from being held accountable for crimes contained in the Statute, i.e., when undue delays or partiality would lead to impunity.¹¹⁶

110. *Id.* art. 32.

111. *Id.*

112. Rome Statute, *supra* note 5, pmb1.

113. *Id.* art. 1.

114. Enrique Carnero Rojo, *The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From 'No Peace Without Justice' to 'No Peace With Victor's Justice?'*, 18 LEIDEN J. INT'L L. 829, 838 (2005).

115. Rome Statute, *supra* note 5, art. 17(2)(b) ("In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: . . . 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.") (emphasis added); *id.* art. 17(2)(c) ("In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: . . . 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.") (emphasis added).

116. Enrique Carnero Rojo, *supra* note 113, at 839.

While the *Bemba* and *Kosgey* cases presented situations in which the domestic governments exhibited demonstrably (if debatably) clear intent to prevent certain persons from prosecution for the crimes alleged, *Gaddafi*, a Security Council referral, did not. Indeed, one may argue that, while the Libyan government fully intends to “bring the person concerned to justice,” zealously pursuing the raw objective of holding the accused accountable to the extent that impartiality is compromised.¹¹⁷ Moreover, one may argue, this partiality is highly unlikely to lead to impunity, and therefore, cannot trigger the ICC’s right to intervene: the Libyan courts are neither unwilling nor unable to try the accused.

Consider in further detail the aftermath of *Gaddafi*. The Pre-Trial Chamber in that case allowed the arrest warrant application and ordered the issuance of arrest warrants against the accused in light of the findings that there were reasonable grounds to believe each suspect was criminally responsible for the crimes against humanity of murder and persecution on political grounds in Libya during the relevant period.¹¹⁸ Following that decision, on July 4, 2011, the ICC filed a request¹¹⁹ for Libya to arrest and surrender the accused men in accordance with the directive of U.N. Security Council Resolution 1970.¹²⁰

Gaddafi was killed by Libyan forces on October 20, 2011,¹²¹ causing the ICC to terminate proceedings against him shortly thereafter.¹²² On November 19, 2011, Al-Islam was captured in an attempt to flee to Niger, arrested, and taken to Zintan where he remains in militia custody.¹²³ Just four days later, the Libyan

117. As required by the language of Article 17(2)(b) and (c) of the Rome Statute; *supra* note 5, text accompanying note 114.

118. Prosecutor v. *Gaddafi*, ICC-01/11-12, Decision on the “Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar *Gaddafi*, Saif Al-Islam *Gaddafi* and Abdullah Al-Senussi,” ¶¶ 41–42. (June 27, 2011).

119. Prosecutor v. *Gaddafi*, ICC-01/11-01/11-5, Request to the Libyan Arab Jamahiriya for the Arrest and Surrender of Muammar Mohammed Abu Minyar *Gaddafi*, Saif Al-Islam *Gaddafi* and Abdullah Al-Senussi, ¶¶ 4–5 (July 4, 2011).

120. See S.C. Res. 1970, *supra* note 83 at ¶¶ 4–5 (“[W]hile recognizing that States not party to the Rome Statute have no obligation under the Statute, [the Security Council] urges all States . . . to cooperate fully with the Court and the Prosecutor.”)

121. See Kareem Fahim, Anthony Shadid & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES (Oct. 20, 2011) (discussing the circumstances surrounding the death of Muammar *Gaddafi* and the possibility that anti-regime forces executed him).

122. Prosecutor v. *Gaddafi*, ICC-01/11-01/11-28, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar *Gaddafi*, at 4–5 (Nov. 22, 2011) (terminating the proceedings against Muammar *Gaddafi* based on the changed circumstances due to his death).

123. See Jomana Karadsheh, *Libyans Celebrate Capture of Gadhafi’s Son Saif al-Islam*, CNN (Nov. 19, 2011), <http://www.cnn.com/2011/11/19/world/africa/libya-gadhafi-son/>; see also Mark Kersten, *No Winners in ICC-Libya Standoff*, FOREIGN POLY (Oct. 8, 2012), <http://foreignpolicy.com/2012/10/08/no-winners-in-icc-libya-standoff/>.

Government initiated an investigation into Al-Islam's alleged crimes of corruption and other financial crimes, but not the same crimes of murder and persecution the ICC warrant covered.¹²⁴ Not until January 8, 2012, did the Libyan Prosecutor begin investigating the crimes of murder and rape allegedly committed by Al-Islam during the 2011 Libyan revolution.¹²⁵ On March 17, 2012, Al-Senussi was arrested in Mauritania, leading many to hope that he would be transferred to the ICC.¹²⁶ In addition to the outstanding ICC warrant seeking custody of Al-Senussi,¹²⁷ French then-President Nicolas Sarkozy requested extradition from Mauritania for Al-Senussi based on a conviction and pending life sentence in France.¹²⁸ To compound the matter, Libya demanded that Mauritania hand Al-Senussi over to face trial for his alleged crimes in connection with the 2011 uprising.¹²⁹ Following his arrest, on April 3, 2012, Libyan officials began to investigate Al-Senussi for both financial crimes and crimes against the person under Libyan law.¹³⁰ Despite the competing requests for extradition, Mauritania surrendered Al-Senussi to Libya on September 5, 2012,¹³¹ and in the years since, the Libyan government has ignored the ICC's requests for custody of Al-Senussi.¹³²

Does the ICC have a right to intervene in *Gaddafi*? The domestic criminal proceedings were initiated more than a year

124. See *Prosecutor v. Gaddafi*, ICC-01/11-01/11-130-Red, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ¶ 23 (May 1, 2012). Notably, on December 17, 2011, the investigation was expanded to include allegations surrounding Saif's "crimes against the person." *Id.*

125. *Id.* ¶ 25.

126. *Id.* ¶ 30; *Prosecutor v. Gaddafi*, ICC-01/11-01/11-52, Decision on the Registry-OPCD Visit to Libya (Feb. 3, 2012).

127. Ian Black, *Abdullah al-Senussi: Spy Chief Who Knew Muammar Gaddafi's Secrets*, GUARDIAN (Sept. 5, 2012), <https://www.theguardian.com/world/2012/sep/05/abdullah-al-senussi-libya-secrets> (describing Abdullah al-Senussi as the man rumored to "harbor the darkest secrets of Gaddafi's [regime] . . .").

128. *Gaddafi Spy Chief Abdullah al-Senussi Held in Mauritania*, BBC NEWS (Mar. 17, 2012), <http://www.bbc.com/news/world-africa-17413626> [hereinafter *Al-Senussi Held in Mauritania*]. Al-Senussi had been convicted and sentenced to life imprisonment in France for his involvement in a 1989 attack that killed 170 people on a French plane; if al-Senussi had been extradited to France, it is likely that France would have been obligated to surrender him to the ICC. *Id.*

129. *Id.*

130. *Prosecutor v. Gaddafi*, ICC-01/11-01/11-130-Red, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ¶ 23 (May 1, 2012).

131. See *Mauritania Deports Libya Spy Chief Abdullah al-Senussi*, BBC NEWS (Sept. 5, 2012), <http://www.bbc.com/news/world-africa-19487228>. Mauritania is not a signatory to the Rome Statute and was not obligated to surrender Al-Senussi to the ICC. *Al-Senussi Held in Mauritania*, *supra* note 128.

132. See, e.g., Michele Tedeschini, *Complementarity in Practice: the ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions*, 7 AMSTERDAM L.F. 76 (2015).

after the Security Council's referral, but they were initiated nevertheless.¹³³ There has been no showing in the ICC proceedings that the proceedings in Libyan courts will necessarily lead to impunity—that is, exemption from punishment or loss or escape from fines.¹³⁴ Quite to the contrary, the Libyan courts have exhibited a full willingness to punish the accused in *Gaddafi*, and an ability to implement a punishment more extreme than those permissible under the Rome Statute (i.e., the death penalty).¹³⁵ On the other hand, if the provisions of the statute must be read in light of the “object and purpose” of the statute (ending impunity) as required by the VCLT, the due process thesis cannot stand: while the Libyan courts will not allow impunity, they will likely violate the due process rights of the accused through partiality.

In comparison to the cases above, in which the ICC was required to analyze the admissibility of the case under Article 17, the *ex parte* nature of a warrant request resulting from a Security Council referral appears to hold the Chambers to a lower standard of complementarity. Indeed, because such a referral could only come before the ICC where a party was not a signatory to the Rome Statute, by the reasoning in *Gaddafi*, Article 17 will be passed over any time the Security Council refers a case involving a State that does not wish to adhere to ICC jurisdiction.¹³⁶ The referral is not the cause of Article 17's scope in this instance, but the referral certainly influences how the Chambers treat the Article.¹³⁷ In contrast, cases such as *Bemba*, referred by domestic courts, trigger the ICC to treat the domestic court referral as indicating *prima facie* the status of a case, also sidestepping a thorough complementarity analysis (skipping Article 17(2) entirely).¹³⁸

Curiously, an analysis at the Pre-Trial level in *Gaddafi* like the one that took place in *Kosgey* (referred on the Prosecutor's motion) may have very well revealed diligent proceedings on the part of the Libyan domestic courts, at least applying the same criteria set out in *Kosgey*. Nevertheless, the method by which *Gaddafi* was referred (Security Council unanimous referral) triggered criteria concerning the question of complementarity: while the Pre-Trial Chamber could have addressed Article 17 *proprio motu*, the *ex parte* nature of the referral allowed the Chamber to sidestep a

133. *See supra* Section III.C.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See supra* Sections III.A–C.

138. *See supra* Section III.A.

question that would have almost certainly been raised if Libya had participated in the international proceedings.

V. CONCLUSION

As demonstrated by the cases above, the source from which a case is referred to the ICC can allow the Chambers of the ICC discretion in how and whether to address issues raised under Article 17 of the Rome Statute, rendering an analysis of complementary jurisdiction discretionary rather than mandatory in some cases. To revisit the question posed at the beginning of this article—whether the admissibility of a case be decided upon the merits of the admissibility claim alone, or whether should the source of the case’s referral have some bearing—an analysis of Article 17 in light of the VCLT reveals that the “object and purpose” of the Rome Statute can be compromised when the source of the referral allows the court to sidestep the question of complementarity. Accordingly, further discussion is warranted on whether this discretion, and the means by which it is triggered, truly aligns with the object and purpose of the Rome Statute.

