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IBA International Criminal Court and International Criminal Law Programme

Report on 'Fair Trials and Complementarity: An Experts' Roundtable Discussion addressing Practice, Challenges and Future Perspectives'

September 2017

Introduction

On 6 July 2017, the International Bar Association (IBA) Hague Office organised ‘Fair Trials and Complementarity: An Experts’ Roundtable Discussion addressing Practice, Challenges and Future Perspectives’ (the ‘Experts’ Roundtable’). The event was attended by 100 delegates, including judges, senior officials and staff of international criminal courts and tribunals, diplomats, civil society and academics. The Experts’ Roundtable began with introductory remarks by Dr Mark Ellis, IBA Executive Director, and Ms Fatou Bensouda, Chief Prosecutor of the International Criminal Court (ICC or ‘Court’). These introductory remarks were followed by a keynote address from Judge Howard Morrison of the ICC Appeals Chamber, and remarks and discussion from two panels of experts.

The first panel, moderated by IBA ICC & ICL Programme Director, Ms Aurélie Roche-Mair, discussed fair trials in the context of domestic prosecutions for ICC crimes. Dr Yvonne McDermott Rees (Senior Lecturer, Bangor University) addressed how minimum guarantees of fairness and human rights frameworks are incorporated at international and domestic levels. Professor Jennifer Trahan (New York University) discussed the role of the ICC as a standard-setting institution. Ms Marieke Wierda (Rule of Law Coordinator, Dutch Ministry of Foreign Affairs) discussed ‘positive complementarity’ in the context of rule of law support and outlined some of the challenges for strengthening domestic legal systems. Finally, Mr David Hooper QC (Counsel for Germain Katanga, ICC) addressed the extent to which the ICC considered the Democratic Republic of the Congo’s (DRC) capacity to meet fair trial requirements, both when the ICC considered the admissibility of Mr Germain Katanga’s case prior to trial, and again when assessing the DRC’s plans to try Mr Katanga following his ICC conviction.

The second panel, moderated by Professor Carsten Stahn (Leiden University), focused on the ICC’s interactions with Libya. Ms Elham Saudi (Director, Lawyers for Justice in Libya) outlined challenges in Libya deriving from lack of security, political instability, weak rule of law and a culture of impunity. Ms Madeleine Schwarz (Trial Attorney, ICC Office of the Prosecutor (OTP)) discussed the steps that the OTP has taken according to its policies and mandate in Libya, where it has both ongoing investigations and outstanding arrest warrants. Ellis discussed the IBA’s monitoring of the Libya cases and argued that new facts require a reopening of the *Al-Senussi* case by the OTP, while Professor Kevin Jon Heller (University of Amsterdam) underscored the importance of adhering to the ICC’s founding treaty, arguing that the Rome Statute does not allow the ICC to try cases on the sole basis that a domestic trial does not meet international standards of fairness.

This report summarises and highlights key themes arising from the Experts’ Roundtable¹. Themes addressed include the OTP’s complementarity mandate and working methods; the potential and limitations for international criminal courts and tribunals to influence national justice systems; interpretations of complementarity, including considerations of fairness, in the ICC’s legal framework; and specific issues raised by the Libya example. The report concludes with some future considerations for fair trials and complementarity.

¹ The IBA extends its sincere thanks to Judge Howard Morrison, Prosecutor Fatou Bensouda and all panellists for their contributions to the Experts’ Roundtable. Except as otherwise noted, the summaries in this report reflect the IBA’s interpretation of panellists’ presentations and interventions, and any errors are the IBA’s own. For the full verbatim presentations of the panels, see the videos available at www.ibanet.org/ICC_ICL_Programme/ICL-Fair-Trials.aspx.

I. Keynote address by Judge Howard Morrison

‘Fairness is a fundamental concept widely understood from an early age. That may beg the question as to what is fairness? The foundational ideas we can shape in various ways. For me, central to those ideas must be a demand to avoid all bias in our valuations, taking note of the fundamental interests and concerns of others and in particular the need to avoid being influenced by our respective vested interests and personal priorities, eccentricities or prejudices. Perhaps, in other words, to see justice as fairness.’²

(Judge Howard Morrison, ICC Appeals Chamber)

Judge Morrison framed the discussion in the keynote address, setting out fundamental considerations for fair proceedings and outlining the judicial perspective on interpreting complementarity in the Rome Statute. As a starting point, Judge Morrison called attention to the basic fair trial rights as codified in the International Covenant on Civil and Political Rights (ICCPR), the statutes of international courts and tribunals, and domestic legislation. These include ‘the presumption of innocence, the proof of guilt beyond reasonable doubt, the burden of proof lying with the prosecution, the right to silence, to call witnesses, to challenge evidence, the right to adequate representation including proper legal aid and, vitally, an impartial judiciary and all the other well-established fair process safeguards’. However, Judge Morrison noted that ‘the safeguards are at risk unless the trial court matrix within which they are to be applied is of itself vested with the overall concept of fairness in its structure and its staffing’. Judge Morrison also stated that humans as a species are ‘instinctively fair’.

Judge Morrison outlined the concept of complementarity, with particular attention to the chamber’s role in interpreting the relevant provisions. While the word ‘complementarity’ does not appear in the Rome Statute, a number of provisions address the complementary nature of the ICC’s relationship to domestic jurisdictions, and set out procedures and standards for addressing jurisdictional issues and ruling on admissibility of cases.³ Judge Morrison cautioned against relying on a ‘slogan version’ of complementarity – that is, reducing the analysis to whether the state is ‘unwilling or unable’ – in favour of understanding the multistep analysis that must, in fact, take place. He emphasised that it is only if the national case sufficiently mirrors the ICC case that the genuineness of the proceedings is assessed.

Judge Morrison noted that positive complementarity is used to refer to a range of activities from encouraging national prosecutions to capacity building. Judge Morrison stated that such activities should be encouraged, ‘as with all things, invoking proper training and relevant prior experience’. In conclusion, Judge Morrison remarked that ‘great legal challenges for both international criminal law and international humanitarian law lie on the close horizon... To maintain an international rule of law we need to be constructing new international legal architecture to cope rationally with these serious issues’. Judge Morrison called upon the legal community, in meeting these challenges, to ‘go forth and be fair’.

² Keynote address of Judge Morrison at ‘Fair Trials and Complementarity: An Experts’ Roundtable Discussion addressing Practice, Challenges and Future Perspectives’, IBA, 6 July 2017, on file with the IBA. Unless otherwise indicated, quoted material in this section is taken from the keynote address.

³ ICC Rome Statute Arts 17–20; Art 53.

II. The OTP's complementarity mandate

*'To contribute towards creating a culture of accountability for the world's most serious crimes, the Rome Statute created an interdependent, mutually reinforcing system of justice with a permanent and independent International Criminal Court, complementary to national criminal jurisdictions.'*⁴

(ICC Chief Prosecutor Fatou Bensouda)

Under the system of 'complementarity', states bear the primary responsibility to investigate and prosecute atrocity crimes, while the ICC intervenes 'only if and when national authorities are inactive or otherwise unwilling or unable to genuinely deal with these crimes'. In her remarks, Prosecutor Bensouda highlighted two dimensions of complementarity: the admissibility analysis, when a chamber assesses if a state is unable or unwilling to conduct genuine national proceedings; and 'positive complementarity', entailing 'collaboration between the ICC, national jurisdictions, States Parties and others in ending impunity'. The Prosecutor called positive complementarity a 'key principle' underlying the prosecutorial strategy of the OTP.

At the preliminary examination phase, the OTP must assess whether there is a reasonable basis to open an investigation into a situation, taking into account the criteria set out in Article 17 of the Rome Statute.⁵ Prosecutor Bensouda stated that this assessment continues and is kept under review against possible new developments. Article 19(10) of the Rome Statute allows the Prosecutor to request the Court to review a decision that has found a case inadmissible under Article 17 of the Rome Statute. Any such request 'must be based on an analysis of the specific facts of the case and in the particular context of the State that has jurisdiction over the case. It must be decided on a case-by-case basis.' In this regard, the Prosecutor stated that she 'must be fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible', and that any such new facts must also be relevant to the factors set out in Article 17.

Prosecutor Bensouda made reference to the high threshold set by the Appeals Chamber in the *Al-Senussi* case for finding a case admissible. According to the Appeals Chamber, due process violations in a domestic trial must be 'so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be "inconsistent with an intent to bring the person to justice"'.⁶ While to date the prosecution has not filed an Article 19(10) request in *Al-Senussi* or any other case, Prosecutor Bensouda provided important information about how her office would assess taking this step. The Prosecutor stated:

'The answer to the question of what guides the Office's analysis in an Article 19(10) review concerning an Article 17(2) (c) situation is, considering all the circumstances and relevant factors, and having regard to principles of due process recognised by international law; were the domestic proceedings not conducted independently or impartially and in a manner inconsistent with

4 Remarks of ICC Chief Prosecutor Bensouda at 'Fair Trials and Complementarity: An Experts' Roundtable Discussion addressing Practice, Challenges and Future Perspectives', IBA, 6 July 2017, on file with the IBA. Unless otherwise indicated, quoted material in this section is taken from the Prosecutor's remarks.

5 See ICC OTP, Policy Paper on Preliminary Examinations, November 2013, www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf accessed 19 September 2017.

6 ICC, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-565, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 titled 'Decision on the admissibility of the case against Abdullah Al-Senussi', 24 July 2014, para 3 ('Al-Senussi Appeals Chamber Judgment').

an intent to bring the person to justice. What this might entail in terms of specific due process concerns or possible failures in meeting international standards and recognised norms will always have to be assessed on a case-by-case basis, taking into account the relevant laws and procedures in the State concerned and the facts of the specific situation, bearing in mind of course that the Court is not a human rights judicial body, as such, but has a specific subject matter jurisdiction.’

Prosecutor Bensouda also spoke about the role of the ICC as a standard-setting institution and potential catalyst to domestic proceedings through positive complementarity. Noting again the primacy of domestic jurisdictions, the Prosecutor emphasised the importance of the preliminary examination phase in which the initial analysis of domestic proceedings takes place. The Prosecutor stated that domestic proceedings are the preferred venue, both saving resources for the ICC and bringing justice closer to affected populations. In this regard, the OTP engages with states as part of its assessment of national proceedings, with the goal that the state will assume its own responsibilities for investigation and prosecution. Guinea was cited as a positive example, where the OTP worked with international and domestic actors during the preliminary examination phase to encourage national efforts.

Prosecutor Bensouda identified a number of concrete actions that her office may take. For example, the OTP may share experiences and lessons learned, including sharing operational information with other complementary actors, including rule of law actors. The OTP may also cooperate with domestic jurisdictions pursuant to Article 93(10) of the Rome Statute, subject to security and other considerations. In this regard, the Prosecutor noted her office’s cooperation with the Ugandan authorities for the prosecution of Lord’s Resistance Army (LRA) actors not wanted by the ICC, and with a number of states towards investigating and prosecuting alleged crimes by armed groups in the Kivu provinces, DRC. The Prosecutor noted that such actions contribute ‘to ensuring greater harmonisation and more collaborative efforts to close the impunity gap’.

III. Standards of fairness in the Rome Statute and the ICC as a standard-setting institution

Building on Judge Morrison’s introduction to fairness as a core tenet of international justice, panellists went on to explore what the concept means in practice, and how it is relevant to the ICC’s complementarity and admissibility determinations. McDermott Rees emphasised the importance of fairness in maintaining the legitimacy of the ICC. Trahan challenged the ICC’s failure to clearly outlaw the death penalty within its own legal framework and noted the problematic standard this sets with respect to domestic jurisdictions. Hooper described how the ICC assessed the DRC’s ability to give his client a fair trial as part of its admissibility and post-conviction assessments of that legal system. What emerged was a lack of consistency in practice, where clear standards of fairness that are applied at the ICC may not be fully enforced or enforceable in light of domestic circumstances. Panellists explored the tension between the ICC’s ‘complementary’ relationship to domestic legal systems, with the reality of the very different treatment and outcomes that defendants, in particular, may receive in state courts. Over the course of the Experts’ Roundtable, panellists returned to the question of how involved the ICC can and should be in seeking to move domestic proceedings towards international standards of fairness.

ICC standards of fairness and the relevance of human rights standards

McDermott Rees described fairness as an overarching concept, and called attention to its role in both decreasing the likelihood of wrongful convictions and reinforcing the legitimacy of an institution.⁷ In this regard, McDermott Rees referenced not only the right of the accused to a fair trial but also the principles of fairness, including impartiality, equality, determinacy and consistency. She noted that the terms used in the ICCPR, reflected in the statutes of the international tribunals, indicate that fairness requires more than the minimum guarantees, which themselves reflect larger principles.

The role of the ICC as a standard-setting institution was emphasised by a number of panellists. As McDermott Rees noted, international tribunals bear an even greater responsibility because of the influence they may have on the national systems. For example, the United States looked to some aspects of the International Criminal Tribunal for the former Yugoslavia (ICTY) procedure for precedents for trying Guantanamo Bay detainees and, in particular, sought to allow anonymous witnesses on this basis. McDermott Rees made the point that, once the derogation from the norm is allowed at the international level, it can be used to justify the same standard domestically, even if it was an exceptional practice at the relevant international tribunal. Trahan reinforced this, stating that, in terms of fair trial issues, the ICC is not only ruling on the cases at hand and exemplifying best practices, but is indicating the expected trial standards to the national judiciary.

Trahan specifically addressed this standard-setting role in respect of the death penalty, an issue that has arisen at both the ICC and International Criminal Tribunal for Rwanda (ICTR) when considering admitting or transferring cases. As further discussed below, according to ICTR Rule 11 *bis*, a case may not be transferred unless there are assurances that the death penalty will not be imposed or carried out and, in 2007, Rwanda abolished the death penalty rendering that particular issue moot. However, as Trahan explained, a plain reading of the Rome Statute allows the ICC to find inadmissible or transfer a case to a state that has the death penalty. Trahan noted that the *travaux préparatoires* of the Rome Statute confirmed that the ICC Statute would not have a legal bearing on national legislations and practices with regard to the death penalty.⁸ This was in direct response to states that wished to keep the death penalty and were petitioning to have the death penalty included in the ICC Statute. Trahan noted that Article 80 of the Rome Statute explicitly provides that the penalties in the Statute do not affect the application by states of penalties prescribed by their national law.

Trahan stated that it was problematic that the ICC did not set a standard on the death penalty, and noted that this position is inconsistent with human rights jurisprudence,⁹ and that it is also inconsistent with the practice of the majority of ICC States Parties, four-fifths of which have abolished the death penalty. Trahan cited Article 21 (3) of the Rome Statute, which requires the ICC to interpret the treaty consistent with internationally recognised human rights. She recommended that the ICC adopt a policy that prohibits either transferring a case to or finding a case inadmissible in relation to a state that has the death penalty, unless there are diplomatic assurances that the death penalty will not be applied.

⁷ See also, Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press 2016).

⁸ See further Jennifer Trahan, 'The International Criminal Court's Libya case(s)—The Importance of the Court Being Consistent with International Human Rights, and Negotiating Diplomatic Assurances of Non-Use of the Death Penalty' (2017) 17 Int'l Crim Law Rev 1, forthcoming.

⁹ Citing for instance, the jurisprudence of the European Court of Human Rights and of many national jurisdictions that prohibits extraditing a person to a state where they may face the death penalty.

Trahan raised a related concern that particularly applies to trials of high-level accused. While the Rome Statute addresses states being unwilling or unable to hold trials, in a third scenario, they are ‘all too willing’ to investigate, try and convict, in particular when it comes to senior figures who served in or were linked to the previous regime. Trahan cautioned against this ‘rush to justice’, stating that these are the cases that need to be handled most carefully and vigilantly, and to avoid taking actions under political pressure. Trahan stated that the higher-level cases are most significant for the national system to show that it respects the rule of law which, in turn, can set both the tone and a standard for fair trials of lower-level cases.

Fair trial considerations in the ICC’s assessment of domestic trials

The ICC may be called upon to assess a domestic proceeding in a number of contexts. However, current practice shows that fair trial considerations are often considered as falling outside the Court’s analysis, or may possibly be considered within broader criteria, although there is not much guidance as to how this would be done. As explained by Hooper, his client Mr Katanga challenged the admissibility of his case at the ICC under Article 19 of the Rome Statute on the basis that the DRC had earlier charges filed against him.¹⁰ Mr Katanga also sought the Court’s intervention with respect to his arrest by the DRC, after his ICC conviction, while he was serving his ICC sentence in the DRC. Article 108 of the Rome Statute requires the ICC to approve a state’s prosecution or extradition of someone serving an ICC sentence in that state. Mr Katanga petitioned the ICC Presidency to bar proceedings before the DRC *Haute Cour Militaire* under Article 108.¹¹

In both instances, Mr Katanga raised considerations of fairness that reflected the specific issues raised by the stage and context of the respective proceedings. Prior to the ICC trial, Mr Katanga argued, among other things, that the criteria for assessing admissibility did not give sufficient weight to the consequences of an international trial on the individual and, during the Article 108 proceedings, Mr Katanga focused on issues relating to the DRC military court. While Articles 19 and 108 call for analysis according to different criteria within the Rome Statute, it is interesting to take note of the weight given to the state’s wishes and representations in both ICC rulings on Mr Katanga’s requests, as well as the Court’s narrow rulings with respect to fair trial considerations.

In his admissibility challenge, Mr Katanga argued that a domestic jurisdiction that had been at one time able and willing to prosecute should be allowed to proceed with the prosecution under the principles of complementarity. In particular, he noted that the DRC had shown the intention to prosecute Mr Katanga for similar offences to the charges at the ICC, satisfying that requirement for complementarity. However, the Appeals Chamber found that it was determinative that the DRC had indicated that it preferred the case to be transferred to the ICC.¹² In making this decision, the Court had before it a number of issues relating to fairness raised by Mr Katanga, including the difficulty of investigating and obtaining witnesses from The Hague, as well as the personal consequences of

10 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-949, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2) (a) of the Statute, 11 March 2009, paras 21–26 and 51–53; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1279, Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber ‘Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire’, 8 July 2009, paras 72, 76–79 and 82–86.

11 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3635, Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo, 22 January 2016.

12 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 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, 25 September 2009, para 82.

moving him from the DRC to the Netherlands.¹³ The Appeals Chamber specifically rejected due process considerations in the context of the admissibility challenge, stating that it was ‘a limited procedure’ and ‘not the mechanism under which to raise alleged violations of the rights of the accused in the course of the prosecutorial process’.¹⁴ The Appeals Chamber did suggest that due process violations ‘relevant to the criteria of article 17 of the Statute’ could be considered, without further guidance on what that might mean. In his request to appeal the Presidency’s Article 108 decision post-ICC conviction, Mr Katanga raised a number of fair trial considerations, including the excessive delay in bringing charges, lack of the right to appeal in the *Haute Cour Militaire* and possibility of the death penalty being imposed. He also raised issues concerning the absence of legal aid, lack of adequate facilities to prepare the defence and with bringing witnesses 2,000km to Kinshasa to testify.¹⁵ As Hooper noted, there is no guidance or criteria set out in Article 108, although commentators on the Rome Statute agree that it is intended to protect the person serving a sentence.¹⁶ Hooper also emphasised that, under Article 21 (3) of the Rome Statute, the ICC is bound to apply and interpret law consistently with internationally recognised human rights.

In its decision, the Presidency declined to enforce Article 108, stating that ‘the approval of the prosecution, punishment or extradition of a sentenced person should only be denied when it undermines fundamental principles or procedures of the Rome Statute or otherwise affects the integrity of the Court’.¹⁷ The Presidency underlined that the DRC had emphasised that Mr Katanga’s trial would be conducted in accordance with the rights of the defence recognised by the DRC Constitution, and that the DRC was party to relevant international instruments recognising minimum guarantees in relation to a fair trial.

Mr Katanga petitioned the Appeals Chamber and was declined on the basis of there being no procedure in the Rome Statute for appealing decisions of the Presidency. The Appeals Chamber did note, however, that significant issues were at stake, ‘namely the upholding of certain fundamental principles or procedures of the Statute and otherwise of the integrity of the Court, requiring considerations relevant to e.g. *ne bis in idem*, the possible imposition of the death penalty and the possibility of holding a fair trial’. Noting also that, ‘where such issues are addressed in similar or comparable proceedings, an appeals mechanism is often in place’, the Appeals Chamber flagged the lack of the right to appeal under Article 108 as one that merited review by the Assembly of States Parties.¹⁸ Absent the right to appeal, however, these significant issues currently remain unaddressed.

13 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-949, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2) (a) of the Statute, 11 March 2009, paras 24 and 25.

14 ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 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, 25 September 2009, para 113: ‘Unless alleged prejudices and violations are relevant to the criteria of article 17 of the Statute, they cannot render a case inadmissible.’

15 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3635, Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo, 22 January 2016, para 13; ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3662, Further observations following the defence mission to Kinshasa, 26 February 2016, paras 22–23 and 47.

16 See, eg, William A Schabas, ‘Article 108 Limitation on the prosecution or punishment of other offences’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Court – A Commentary*, Triffterer/Ambos (3rd edn, CH Beck Hart Nomos 2016), p 2199, stating ‘article 108 of the Rome Statute is formulated as an individual right that protects a person whose sentence is being or has been served from prosecution within the enforcement State or extradition to a third State’.

17 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3679, Decision pursuant to article 108(1) of the Rome Statute, 7 April 2016, para 31.

18 ICC, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3697, Decision on the admissibility of Mr Katanga’s appeal against the Decision pursuant to article 108(1) of the Rome Statute, 9 June 2016, para 16.

IV. The potential and limitations for international criminal courts to influence national justice systems

The dynamics between international and domestic systems were examined from a number of perspectives, taking into account the experience of other international criminal tribunals, rule of law assistance and the ICC. McDermott Rees described how fair trial standards were taken into account at the ad hoc tribunals when transferring cases to domestic jurisdictions. Wierda noted multiple factors that may influence the success of post-conflict accountability processes, and Saudi described the numerous actors and shifting political contexts that the ICC and other actors must contend with in seeking to restore accountability and rule of law in the Libyan context.

While questions remain about the extent to which international standards of fairness can be fully met at the domestic level, in particular in a post-conflict context, formalised interactions with international courts and tribunals can both set standards and may also serve as leverage to increase political will to meet those standards. Emphasis was placed on the significance of the choice of ‘state’ actor or faction that the international community or ICC engages with, and the terms of any agreements that they might conclude. It was also clear that the existence of a domestic legal framework that meets international standards of fairness may not result in fair proceedings if the rights are not enforced. Panellists underscored the complexity of post-conflict legal contexts, and the need for monitoring and support from international actors.

Transferring cases from international to domestic courts: ICTY and ICTR Rule 11 bis

The ICTY and ICTR differed from the ICC in that they had primacy over domestic courts.¹⁹ These institutions were not obliged to conduct a complementarity analysis in the same way as the ICC and, as institutions created and backed by the authority of the United Nations Security Council, could request deferral of state investigations to make way for international prosecution.²⁰ However, the ICTY and ICTR also transferred cases to domestic courts to reduce their workloads in the preparation for their closure, and to support accountability processes in the countries affected by the conflict. Under ICTY and ICTR Rules of Procedure and Evidence (RPE) Rules 11 *bis*, judges could refer cases to the authorities of a state either in whose territory the crime was committed, in which the accused was arrested, or which had jurisdiction and was ‘willing and adequately prepared to accept such a case’.²¹ In light of the tribunals’ mandates to try those most responsible, cases transferred to domestic jurisdictions largely involved lower-level perpetrators. ICTY Rule 11 *bis* specifically directed the referral bench to assess the gravity of the crimes charged and the level of responsibility of the accused prior to transferring a case.²²

McDermott Rees pointed out that, under Rule 11 *bis*, the ICTR referral bench had to be satisfied that the accused would receive a fair trial and that the death penalty would not be imposed or carried out.²³ ICTY jurisprudence sets out specific factors for assessing fairness in domestic proceedings,²⁴

19 ICTY Statute Article 9(2); ICTR Statute Article 8(2).

20 ICTY Statute Article 9(2); ICTR Statute Article 8(2).

21 ICTY RPE Rule 11 *bis*.

22 ICTY RPE Rule 11 *bis* (C).

23 ICTR RPE Rule 11 *bis* (B); ICTR RPE Rule 11 *bis* (C).

24 ICTY Manual of Developed Practices, p 169, citing ICTY, *Prosecutor v Radovan Stanković*, Case No IT096-23/2-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, Referral, 17 May 2005 (Partly Confidential and *Ex Parte*), para 55.

which were mostly satisfied by the ‘relevant legal instruments’ being in place.²⁵ In making referrals, the tribunals could also try to address fair trial concerns that were raised. For example, to respect the right to be tried without undue delay, the ICTY could allow the case to proceed from the point at which the ICTY proceedings left off.²⁶

McDermott Rees noted that the fairness requirements for transferring cases could lead to a strengthening of domestic laws and procedures. For example, while Rwanda was eager to conduct domestic trials, the ICTR Rule 11 *bis* has been cited as among the reasons that Rwanda abolished the death penalty in 2007. Rwanda also took steps to address detention issues, such as prison conditions and the use of solitary confinement. McDermott Rees noted criticisms that Rwanda was being held to fair trial standards that were too high but that, in the end, Rwanda was able to meet at least the threshold standards required to receive ICTR cases.

ICTY Rule 11 *bis* allows the Prosecutor to send observers to monitor proceedings, as does ICTR Rule 11 *bis*, which further provides that the trial chamber may order the Registrar to monitor proceedings.²⁷ Both the ICTY and ICTR allow the tribunals to revoke the referral at any time prior to the domestic court issuing a judgment on the guilt or innocence of the accused.²⁸ The ICTR monitored cases that were sent back to Rwanda and, with the closure of the ICTR, the UN Mechanism for International Criminal Tribunals (MICT) has taken over the monitoring of cases. McDermott Rees noted that the MICT has, in at least one instance, left the door open to revoke the transfer of a case if standards of fairness are not met, also ordering specific monitoring of fair trial issues raised by the defendant.²⁹ The importance of monitoring was cited by a number of panellists and is discussed further below.

Rule of law assistance and support for post-conflict accountability

Wierda emphasised parallels between the goals of the rule of law and international criminal justice communities, namely the internalisation of Rome Statute norms through the change of substantive and procedural laws. Internalising Rome Statute norms allows states to go beyond complementarity to proactively investigate and prosecute, and also leads to fairer proceedings.

In practice, Wierda cautioned that positive complementarity is elusive. She pointed to some positive examples of international support for domestic accountability processes, such as the recently constituted Special Criminal Court in the Central African Republic. At the same time, particularly at the preliminary examination stage, the dynamics around admissibility are not always positive and can lead to competition for cases and tensions between the ICC and governments as, for example, in Libya. Wierda also pointed out that the ICC and states tend to have parallel weaknesses, for example, both the ICC and Kenya have problems protecting witnesses in the Kenya Situation, and both the ICC and Uganda are unable to arrest the remaining LRA suspects.

25 ICTY Manual of Developed Practices, p 169, citing ICTY, *Prosecutor v Radovan Stanković*, Case No IT096-23/2-PT, Decision on Referral of Case Pursuant to Rule 11 *bis*, Referral, 17 May 2005 (Partly Confidential and *Ex Parte*), para 28.

26 See, eg, ICTY, *Prosecutor v Gojko Janković*, Case No IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *bis*, 22 July 2005, para 89.

27 ICTY RPE Rule 11 *bis* (D) (iv); ICTR Rule 11 *bis* (D) (iv).

28 ICTY RPE Rule 11 *bis* (F); ICTR RPE Rule 11 *bis* (F).

29 Citing *Prosecutor v Jean Uwinkindi*, Decision on requests for revocation of an order referring a case to the Republic of Rwanda, MICT-12-25-RI4 3, 26 April 2017. While Mr Uwinkindi's request for revocation was rejected on the basis of actions by the Rwandan authorities to remedy his complaints, the MICT orders specific attention to the fair trial concerns raised (conditions of detention, ability to communicate in confidence with counsel) in future monitoring and reporting to the MICT.

Wierda noted a number of challenges applicable to both the rule of law and international criminal justice approaches that may lead to international actors being unable to undertake the ‘heavy lifting’ of rule of law assistance. For example, limited resources are a challenge for both the ICC and development agencies. State-building projects and development agencies have also taken a more narrow and thematic approach, and are now seeking to address specific problems, such as gender-based and domestic violence. In this regard, supporting specialised capacities within courts and prosecutors’ offices can be promising. Wierda noted, however, that reforms take time, and that it is therefore important to be modest in expectations.

Additional challenges may arise when states do investigate and prosecute ICC crimes. Among others, Wierda noted lack of security, political instability, inadequate or conflicting legislation, lack of resources and the need for political will. She provided a number of examples from recent experiences of domestic prosecutions. In Uganda, for instance, the *Kwoyelo* trial has been delayed for years, in part by the presence of amnesty laws and lack of clarity about their applicability and due to adding charges in the case.

In the end, however, Wierda emphasised that national systems are the best place to find permanent solutions to impunity and therefore the best place to focus efforts. She also underscored the role of the UN in supporting national systems, along with other international actors, as part of a long-term process of engagement that, among other things, encourages the adoption of international standards and accepting international assistance. In this regard, Wierda encouraged more integration and collaboration between rule of law and international criminal law practitioners.

The Libyan context

Speaking specifically about the Libyan context, Saudi provided important information for understanding the operational challenges in Libya faced by international actors, including the ICC. Saudi focused on three main areas: the security and political situation; the law and its application; and the flourishing of a culture of impunity inherited from the previous regime. Saudi explained that, at this time, Libya has three competing governing bodies, all of which have issues with their own legality and legitimacy. These governing bodies are headed by militias who hold the actual control of the situation on the ground, and whose decisions can change by the day or week. In this regard, Saudi emphasised that, when an international body or state engages with a government entity, the choice of counterpart is highly significant; an issue that is relevant to the ICC’s conclusion of a memorandum of understanding (MoU) on burden sharing with the Government of National Accord (GNA).³⁰

Saudi explained that the militias’ control extends to the legal sector, leading to inconsistency in how proceedings are conducted and to a lack of due process. For example, militias control access to counsel for detainees. Judges, lawyers and prosecutors have been subject to intimidation, abduction

³⁰ This MoU does not appear to be publicly available, but was referenced by the ICC Prosecutor in her briefing to the UN Security Council on 14 November 2013. Under the terms of the MoU, the ICC Prosecutor ‘will prioritise its investigation and prosecution of those who are outside the territory of Libya and who are thus largely inaccessible to the Libyan authorities, [and] the Government of Libya will prioritise investigations of those suspects who are within Libyan territory’. The MoU also provides that the ICC OTP ‘and the Government of Libya have also committed to supporting each other’s investigations and prosecutions through the exchange of information, subject to confidentiality and protection obligations’, while specifying that ‘this agreement does not relinquish the ICC or the Libyan courts of their respective jurisdiction, nor does it apply and/or affect the ongoing judicial proceedings in either the *Saif Al-Islam Gaddafi* or the *Al Senussi* cases’. See ICC Prosecutor Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), 14 November 2013, www.icc-cpi.int/legalAidConsultations?name=prosecutorunscnov2013 accessed 19 September 2017.

and murder. A number of panellists discussed the Libyan trial of 37 former regime members, including Mr Abdullah Al-Senussi.³¹ While Saudi highlighted that the due process violations in part arose due to militia interference in the legal system, Ellis and Trahan both raised concerns about the derogation from international standards of fairness. As Wierda noted, the government's position was that the applicable standards of fairness for domestic proceedings should be derived in comparison to the Libyan justice system prior to the revolution, as opposed to international standards. In this regard, even if the Libyan trials fell short of international standards, the government's position was that they were adequate.

Saudi finally emphasised the challenges that can arise from problematic or inadequate legislation. She noted that the current laws in Libya do not include many of the Rome Statute crimes, and that due process has been eroded since the revolution. A number of problems were created by Law 38 (2012), which created a blanket 'pre-emptive' amnesty, covering anyone who acted to help the revolution, and undermining accountability for acts perpetrated against former regime actors.³² Law 38 also poses particular problems for due process, as it limits the need for judicial review and makes it legal to detain someone for up to two months.³³ The risks of arbitrary detention may be compounded when, as Wierda noted, the justice system is having to cope with 7,000 individuals suspected of assisting the Gaddafi regime, overwhelming the national courts and creating risks for lower-level perpetrators, who may be held for a long period of time without trial while the courts focus on higher-level perpetrators.

V. Interpreting the legal framework for admissibility and due process violations

The legal framework for admissibility decisions was discussed chiefly in the context of the Libya Situation, and with reference to two decisions by the ICC Appeals Chamber, which affirmed Pre-Trial Chamber decisions finding that one case, against Mr Saif al-Islam Gaddafi, was admissible at the ICC, while another, against Mr Al-Senussi, was inadmissible.³⁴ One of the factors that the Appeals Chamber considered was the extent to which due process violations should be considered in making the admissibility determination.

In the *Al-Senussi* case, the Appeals Chamber found that the admissibility determination does not involve an assessment of whether the due process rights of a suspect have been breached in the context of assessing whether the proceedings were conducted with an intent to bring the person to justice.³⁵ The Appeals Chamber did, however, find that 'there may be circumstances, depending

31 For an in-depth review of this trial, see Dr Mark S Ellis, 'Trial of the Libyan regime: An investigation into international fair trial standards', IBA, November 2015; Mark Ellis, 'Beyond a Flawed Trial: ICC Failures to Ensure International Standards of Fairness in the Trials of Former Libyan Regime Members', *Am U Int'l L Rev*, forthcoming; UNSMIL, 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', 21 February 2017; and Trahan at fn 8 supra.

32 See 'Law No (38) of 2012 on some procedures concerning the transitional phase' ('Law 38'), <http://security-legislation.ly/node/31621> accessed 19 September 2017. Law 38, Art 4 states: 'There is no penalty for necessities of the 17 February Revolution in terms of military, security or civil acts carried out by revolutionaries to save or protect the revolution.' See also, Lawyers for Justice in Libya, 'LFJL strongly condemns new laws breaching human rights and undermining the rule of law' 7 May 2012, www.libyanjustice.org/news/news/post/23-lfjl-strongly-condemns-new-laws-breaching-human-rights-and-undermining-the-rule-of-law accessed 19 September 2017.

33 Law 38, Art 11.

34 ICC, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-344-Red, Public redacted-Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013; ICC, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-547-Red, 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', 21 May 2014; ICC, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013; Al-Senussi Appeals Chamber Judgment, fn 6 supra.

35 Al-Senussi Appeals Chamber Judgment, para 230; Art 17(2)(c).

on the facts of the individual case, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be “inconsistent with an intent to bring that person to justice”³⁶.

Panellists debated whether the Appeals Chamber had set the wrong standard in respect of due process violations in light of the subsequent international condemnation of Libyan trial proceedings, and in light of the drafting history of the Rome Statute. Panellists also discussed additional facts coming out of Libya, in particular as reported by the UN Support Mission in Libya (UNSMIL), and how the ICC should react to these findings. Decisions on admissibility take into account the circumstances existing at the time of the admissibility proceedings.³⁷ As noted above, according to Article 19(10) of the Rome Statute, ‘the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17’. However, the range of activities described by the OTP in Libya made clear that this case stands among a number of other priorities in the Libya investigation. Panellists also raised difficult questions about how and whether the ICC should engage with legal processes that fail to meet international fair trial standards.

The ICC’s Libya investigation

On behalf of the OTP, Schwarz recalled the facts of the ICC’s Libya investigation and described the activities that the OTP is pursuing in Libya. Following a Security Council referral in February 2011,³⁸ the OTP opened an investigation and issued three warrants of arrest: against Mr Saif al-Islam Gaddafi, Mr Al-Senussi and Mr Muammar Gaddafi, whose case was closed after he was killed in October 2011. In May 2012, the Libyan government challenged the admissibility of the case against Mr Saif al-Islam Gaddafi who was, at the time, held in detention by an armed group in Zintan. The Trial Chamber found that the case was admissible and, in May 2014, the Appeals Chamber of the ICC confirmed the Trial Chamber decision on the grounds that it was not the same case as the ICC charges, without going on to examine issues of due process or the government’s ability to apprehend Mr Gaddafi. Mr Gaddafi was tried by Libya *in absentia* and sentenced to death.

Schwarz emphasised that Mr Gaddafi’s case remains admissible at the ICC, and there is an obligation to surrender him should he be brought into the custody of the Libyan government. The ICC Prosecutor has sought his surrender a number of times, and has sought assurances that he will not be executed following the verdict of the trial *in absentia*. The Pre-Trial Chamber has also made a finding of non-cooperation against Libya for failing to arrest and transfer Mr Gaddafi to the ICC.³⁹ Schwarz additionally noted that the Prosecutor has sought to request his transfer directly from the Zintan militia; however, the Pre-Trial Chamber denied this request, finding that the OTP was

³⁶ Al-Senussi Appeals Chamber Judgment, para 230.

³⁷ Al-Senussi Appeals Chamber Judgment, para 181.

³⁸ For the ICC Prosecutor’s reports to the Security Council pursuant to Resolution 1970, see www.icc-cpi.int/about/otp/Pages/otp-reports.aspx accessed 19 September 2017.

³⁹ ICC, *The Prosecutor v Saif Al-Islam Gaddafi*, ICC-01/11-01/11-577, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, 10 December 2014, para 34.

obliged to make any requests through the internationally recognised government.⁴⁰ Schwarz noted that, although there are competing governments, the Prosecutor has moved forward dealing with the internationally recognised GNA.⁴¹ The ICC practice, in this regard, can be challenging, taking into account the difficulties Saudi pointed out for having straightforward engagement with any ‘government’ actor, and in light of the amount of control held by militias.

The admissibility of Mr Al-Senussi’s case was also challenged by the Libyan government in April 2013. The Pre-Trial Chamber declared the case inadmissible on the grounds that domestic proceedings were already being conducted and that Libya was not unable or unwilling to conduct these proceedings.⁴² The Appeals Chamber confirmed the decision in 2014.

Schwarz noted that the OTP had recently made public a fourth arrest warrant in the Libya Situation, against Mr Al-Tuhamy Mohamed Khaled for alleged crimes committed during the 2011 revolution. She also described the OTP’s ongoing investigation into the Libya Situation, noting that the Security Council’s referral has no end date, and that the OTP is currently examining a number of potential crimes, including those recently committed in the Benghazi region,⁴³ and crimes committed in the context of trafficking migrants. In this regard, Schwarz emphasised the active approach the OTP maintains towards a number of suspects and priorities in Libya.

Admissibility and due process violations

Ellis noted the fruitful and open exchange that the IBA has had with the OTP with respect to the IBA’s monitoring and reporting on the ICC Libya cases. Ellis respectfully disagreed with the very high standard for due process violations applied by the Appeals Chamber in making their determination about Mr Al-Senussi’s case. Ellis noted that, in his exchanges with the OTP, the OTP had cited the Appeals Chamber’s ruling and distinguished the Prosecutor’s role as not primarily to determine if human rights law or domestic law was violated, but instead to determine if the state was willing genuinely to investigate or prosecute. Thus, he argued that the Appeals Chamber decision had set a standard that diminished the importance of due process in the complementarity analysis to the detriment of the ICC. The Appeals Chamber decision in *Al-Senussi* also indicated that the Court’s primary focus was not whether rights were violated, but whether proceedings were conducted to evade or shield the suspect from justice. However, Ellis noted that the Appeals Chamber did not ignore the situation of due process violations – even with the high threshold of ‘egregious violations’, the Appeals Chamber opened that door, albeit without any discussion about how to interpret this standard.

On the other hand, Heller strongly disagreed with interpreting Article 17 to include due process considerations. Stating that ‘we must combat the impunity with the Rome Statute that we have’, Heller noted that a plain reading of Article 17 does not include the failure of national prosecutions to meet international standards of fairness as a ground for admissibility. He noted that the exclusion

40 ICC, *The Prosecutor v Saif Al-Islam Gaddafi*, ICC-01/11-01/11-634-Red, Decision on the Prosecutor’s ‘Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-‘Ajami AL-‘ATIRI, Commander of the Abu-Bakr Al Siddiq Battalion in Zintan, Libya’, 21 November 2016, paras 15–16.

41 See ‘Thirteenth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1970 (2011)’, 8 May 2017, para 4.

42 ICC, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, para 311.

43 On 15 August 2017, an ICC arrest warrant was issued for Mahmoud Mustafa Busayf Al-Werfalli for crimes committed in 2016 and 2017. This was the first public ICC arrest warrant for crimes in Libya that took place post-2014.

of due process considerations was reinforced by looking at the drafting history, where it was clear that such a provision had been proposed and rejected.⁴⁴ As such, Heller argued the states rejected the proposal that the ICC concern itself with human rights. Heller emphasised that the Rome Statute should be interpreted according to the Vienna Convention, and not treated as a set of guidelines. In this regard, if a provision, including Article 17, does not work, then it should be amended. Under the current framework, the door is closed to due process considerations, even if one is politically sympathetic to the need to respect due process rights.

In this regard, Heller noted that states that have not ratified the Rome Statute may look at interpretations that go beyond the drafters' intent as harming the legitimacy of the institution. Overly broad interpretations of the Rome Statute, for example, taking a hard line against the death penalty when the Rome Statute does not do so, may alienate key states that are particularly desired to join the ICC, including those that have the death penalty domestically, such as China, India and the US. Heller cautioned against scholars seeking to make the ICC a human rights court against the intention of the drafters, thus harming the legitimacy and long-term viability of the ICC. At the same time, Heller challenged the Pre-Trial Chamber's accepting of unsubstantiated claims regarding Mr Al-Senussi's situation, for example, lack of access to counsel, noting that the ICC received no evidence to support Libya's arguments that it was justified by security concerns, that the situation would improve and that Mr Al-Senussi would eventually be provided with a lawyer.⁴⁵ The role of the ICC and state in ascertaining the reality of the domestic proceedings highlights again the importance of monitoring.

Articulating criteria for Rome Statute Article 19(10)

Addressing the question of whether new facts have arisen that could prompt the Prosecutor to reopen the case under Article 19(10), Ellis noted that, at the time of both the Pre-Trial and Appeals Chamber decisions, the Court had knowledge of concerns with the Libyan trial, including fair trial concerns. Ellis joined other panellists in emphasising the importance of monitoring domestic proceedings. The IBA undertook a major review of the Libyan trial because of the importance of domestic prosecutions and because the organisation saw a need for objective monitoring.⁴⁶ The IBA report sought to note, in an objective and balanced way, taking into account international standards of fairness, where the Libyan proceedings had been successful as, for example, in the role of the judges.⁴⁷ However, the IBA found that the overall process was dysfunctional and ineffective.

Ellis recalled Article 17(2)(c), which provides that the criteria for determining 'unwillingness' includes if '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'. Ellis argued this provides evidence that the drafters recognised international human rights standards and due process guarantees. In light of the IBA's findings and the later UNSMIL report, Ellis stated that the number of due process rights that were

⁴⁴ Al-Senussi Appeals Chamber Judgment, para 224.

⁴⁵ See ICC, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, paras 302–310.

⁴⁶ See Dr Mark S Ellis, 'Trial of the Libyan regime: An investigation into international fair trial standards', IBA, November 2015; Mark Ellis, 'Beyond a Flawed Trial: ICC Failures to Ensure International Standards of Fairness in the Trials of Former Libyan Regime Members', *Am U Int'l L Rev*, forthcoming.

⁴⁷ Dr Mark S Ellis, 'Trial of the Libyan regime: An investigation into international fair trial standards', IBA, November 2015, pp 26–27, 41–42, 54–55.

violated or did not meet international standards was striking. In this regard, Trahan had also noted UNSMIL's finding that the Libyan proceedings violated core due process norms.⁴⁸

This raised the important question of what new facts would meet the requirements of Article 19(10). Ellis stated concerns that, in light of the facts reported by the UNSMIL and the IBA, the OTP risks being seen as purposefully disregarding these facts and standing by an earlier decision that can no longer be justified. Ellis called a decision not to act to reopen the case in light of these facts 'untenable'.

Ellis stated his strong support for positive complementarity, both as capacity building and encouraging domestic prosecutions. In the Libya Situation, however, Ellis argued that the OTP's position, as represented by the previous and current Prosecutors, as well as in OTP Policy Papers, overwhelmingly favoured domestic prosecution.⁴⁹ Ellis noted the additional complication for the ICC that Libyan officials made clear statements, including to the IBA, that Libya had no intention of sending any of the suspects to The Hague. Within the notion of positive complementarity, the OTP seemed focused on catalysing domestic prosecutions rather than seeking to uphold international standards of fairness at the domestic level. But, the ICC's endorsement of positive complementarity did not seem to envision domestic trials of an irregular or dysfunctional nature where the accused might suffer significant due process violations. In this regard, Ellis argued that the Court's role in supporting the principles of international justice requires it to both support complementarity and domestic prosecutions, but also to be able to admit when it has wrongly credited a domestic system with the ability to try cases. This would be the stronger position, and would build the credibility of the ICC and international justice.

VI. Future considerations for fair trials and complementarity

During the Experts' Roundtable discussion, panellists drew on examples to illustrate a number of tensions between international norms and post-conflict realities, and between the mandates of international courts, including the ICC, to both prosecute directly, as well as support and engage domestic legal systems. Panellists described competing aims even within the Rome Statute, the provisions of which call for holding accountable those most responsible for serious crimes while, at the same time, providing for the sovereignty of domestic courts to prosecute the same crimes should the state be willing and able to do so. The meaning and threshold of 'unwilling and unable' remains a context-specific analysis based on the jurisprudence developed to date. It was clear, however, that the ICC's and, in particular, the OTP's engagement with states to ascertain willingness and ability to prosecute can yield positive results in enhancing domestic proceedings and political will to prosecute, but must also be treated with some caution lest the ICC be seen to legitimise proceedings that fall far below international standards of fairness. Generally, panellists called on the ICC to engage more, including through active and on-the-ground monitoring of domestic proceedings.

Panellists also underscored the very real predicament of limited resources, which forces both the ICC and states to make choices about how best to use those resources. At the same time, building on the keynote address, panellists emphasised the importance of the ICC's position as a standard-

48 UNSMIL, 'Report on the Trial of 37 Former Members of the Qadhafi Regime (Case 630/2012)', 21 February 2017, pp 22–47.

49 Mark Ellis, 'Beyond a Flawed Trial: ICC Failures to Ensure International Standards of Fairness in the Trials of Former Libyan Regime Members', *Am U Int'l L Rev*, forthcoming.

setting institution that must uphold the highest standards of fairness. In this regard, considerations of fairness as applied at the ICC should go beyond minimum guarantees, and be systematically taken into account in the complementarity assessment and in other contacts with states. Fairness was described by many as being at the heart of international criminal justice and, therefore, something that should not be diluted even when faced with competing priorities. The focus then was on reasonable and accessible measures, both provided for within the Rome Statute and in areas such as monitoring, outreach and positive complementarity, that can support the ICC to achieve these goals.

The Experts' Roundtable also raised a number of points that require further examination.

Strengthening the ICC's monitoring of domestic proceedings following a finding of inadmissibility

There is a clear contrast between the ICTY and ICTR approaches in which the international tribunal has primacy over domestic jurisdictions, and the ICC's complementarity and admissibility processes. Under the Rule 11 *bis* frameworks, monitoring the quality, including the fairness, of domestic proceedings is a clear requirement and an obligation on the tribunal. The ability to request regular reports can reinforce standards of fairness with respect to domestic proceedings, and has also allowed the international tribunal to retain some control over the process and the accused. On the other hand, under the ICC's complementarity framework, the ability to reassess admissibility requires the initiative of the Prosecutor under Article 19(10) of the Rome Statute. However, the OTP's standards and procedures under Article 19(10) seem to be relatively unarticulated and determined on a case-by-case basis. This could be contrasted with the OTP's clear reporting on its monitoring of situations under preliminary examination. The ICC, at least where admissibility is concerned, appears to take an 'all or nothing' approach in which it does not itself actively monitor or get involved with cases that have been found to be inadmissible. However, as a number of panellists described, active involvement including, but not limited to, monitoring has the potential to increase the adherence of domestic courts to international standards. In this regard, the IBA encourages further discussion on ways to effectively monitor domestic proceedings following a finding of inadmissibility.

Clarifying the standards and procedures for an admissibility review under Article 19(10) of the Rome Statute

A number of panellists raised the question of what specifically would constitute 'new facts' for the purposes of Article 19(10). In this regard, it is important to ensure that standards are clear and consistent within the Rome Statute and, in particular, take into account Articles 17(2)(c) and 21(3). Panellists particularly emphasised Article 21(3), which states that the Court must apply and interpret law 'consistent with internationally recognised human rights', which would include taking into account international due process standards. Additionally, it was strongly argued that the *Al-Senussi* case was due for review under Article 19(10) based on new facts that have arisen, including those stated in the IBA and UNSMIL reports. In light of the lack of public information available about the OTP's Article 19(10) determinations, the IBA recommends additional transparency and reporting on this issue in the context of the OTP's regular reporting on cases and situations, including the Libya Situation.

Using the ICC's leverage and resources to encourage international standards of fairness in state proceedings

A number of speakers drew attention to the context of the ICC's interactions with states, which take place through multiple points of contact over a period of time. The Rome Statute places the ICC in a position of some leverage with states because whether the ICC takes jurisdiction depends in part on the state's actions to investigate or prosecute. Some panellists critiqued the ICC for appearing to be at times all too ready to accept what the state proposes, for example, to accept state assurances without further monitoring, accept representations without underlying evidence, or take cases when a state does not wish to prosecute them. Consistent with the ICC's underlying object, however, and with the notion of positive complementarity, the ICC should be using its leverage where possible to push for the state to apply international standards. This may also include paying particular attention to the drafting of domestic legislation and the possible outcomes and impact of legislation, and providing drafting support where possible. As a number of panellists noted, the existence and quality of legislation has a big impact, and both the ICC and States Parties are in a position to have relevant expertise and provide support for drafting of quality legislation.

Strengthening contacts with civil society in support of improving national systems

The transparency and access to information from the OTP about its actions and investigations in a situation was identified as a particular need for civil society. Panellists emphasised the importance of the Prosecutor engaging with civil society and not only receiving, but also providing, information to non-governmental organisations which, in turn, keep victims, suspects and the general population informed. From the perspective of civil society in Libya, there is frustration with the level of engagement of the Prosecutor with civil society. Also with reference to the Libya Situation, it was noted that leaving international due process standards outside the admissibility determination creates challenges for activists who are advocating for improving their own national systems. In this regard, while the OTP may rely on civil society contacts for information and monitoring, it was clear that there is a desire and need for a more comprehensive investment from the OTP and the ICC generally.



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