Criminal Law Forum (2006)
DOI 10.1007/s10609-006-9019-0
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THE SHADOW SIDE OF COMPLEMENTARITY: THE EFFECT OF ARTICLE 17 OF THE ROME STATUTE ON NATIONAL DUE PROCESS

When Luis Moreno-Ocampo was sworn in as the Chief Prosecutor of the International Criminal Court ('ICC'), he commented that 'the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success'.[1] He was referring, of course, to the Rome Statute's complementarity principle, which permits the Court to exercise its jurisdiction over a serious international crime only if no State is willing and able to prosecute the crime itself.[2] If States somehow prove willing and able to prosecute every act of genocide, every war crime, and every crime against humanity – an unlikely possibility, to be sure – the Court will be obsolete before it hears its first case.

There is, however, a shadow side of complementarity, one that should temper our enthusiasm for the withering away of the Court: its effect on the likelihood that defendants will receive due process

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Thanks are due to Roger S. Clark, Mark Drumbl, Allison Marston Danner, Treasa Dunworth, Neil Boister, Caroline Foster, Jenia Iontcheva Turner, Scott Optican, and Paul Heald for their helpful comments. I would also like to thank Jessica Lawrence for her superb research, editing, and insight; this essay could not have been written without her.

[1] Statement by Luis Moreno-Ocampo, June 16, 2003, Ceremony for the Solemn Undertaking of the Chief Prosecutor, *quoted in* ICC OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE (2003), http://www.icc-cpi.int/library/organs/otp/complementarity.pdf [hereinafter 'Informal Expert Paper'].

[2] Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), art. 17 [hereinafter 'Rome Statute'].

in national proceedings. The ICC is a model of due process, guaranteeing defendants all of the procedural protections required by the International Covenant on Civil and Political Rights ('ICCPR').[3] Most national criminal-justice systems, by contrast, are far less even-handed – particularly those in States that have experienced atrocities serious enough to draw the Court's interest. The Specialised Courts in which Sudan intends to prosecute those responsible for the atrocities in Darfur, for example, routinely sentence unrepresented defendants to death after secret trials involving confessions obtained through torture.[4] Complementarity is thus a double-edged sword. On the one hand, ICC deferrals will reflect the willingness of States to take the lead in bringing the perpetrators of serious international crimes to justice. On the other hand, those deferrals will expose perpetrators to national judicial systems that are far less likely than the ICC to provide them with due process, increasing the probability of wrongful convictions.

International criminal law scholars have generally failed to appreciate the magnitude of this problem. Indeed, the prevailing scholarly consensus is that the problem doesn't exist, because a State's failure to guarantee a defendant due process makes a case admissible under article 17. In this view, the solution to the Sudan dilemma – and others like it – is self-evident: the Court can simply investigate and prosecute the persons responsible for the Darfur atrocities itself, on the ground that the procedural failings of the Specialised Courts make Sudan 'unwilling or unable' to do so. After all, the Court has the final say regarding admissibility.[5]

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[3] *See* Albin Eser, 'For Universal Jurisdiction: Against Fletcher's Antagonism', 39 TULSA L. REV. 955, 963 (2004).

[4] *See* U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, SUDAN (2005), http://www.state.gov/g/drl/rls/hrrpt/2005/61594.htm [hereinafter 'Country Report on Sudan']. Sudan has said that it intends to prosecute the Darfur *génocidaires* in its new Special Criminal Court on the Events on Darfur (SCCED). *See* HUMAN RIGHTS WATCH, LACK OF CONVICTION: THE SPECIAL CRIMINAL COURT ON THE EVENTS ON DARFUR 1 (2006). As Human Rights Watch notes, though, to date only the Specialised Courts have heard cases involving Darfur. *Id.* at 7–8.

[5] *See* Rome Statute, *supra* note 2, art. 19(1) ('The Court shall satisfy itself that it has jurisdiction in any case brought before it'.).

Although this interpretation of complementarity – what I will call the 'due process thesis' – is seductive, it is also incorrect. Properly understood, article 17 permits the Court to find a State 'unwilling or unable' only if its legal proceedings are designed to make a defendant *more difficult* to convict. If its legal proceedings are designed to make the defendant *easier* to convict, the provision requires the Court to defer to the State no matter how unfair those proceedings may be.

I. ARTICLE 17'S COMPLEMENTARITY REGIME

Article 1 of the Rome Statute provides that the ICC's jurisdiction 'shall be complementary to national criminal jurisdictions'.[6] Article 17(1), in turn, specifies the four situations in which the Court must defer to a national proceeding, along with their exceptions:

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> (d) The case is not of sufficient gravity to justify further action by the Court.[7]

The question we must answer is this: is a case admissible under article 17 if the Court determines that the State asserting jurisdiction over it will not provide the defendant with due process?

The overwhelming consensus among international criminal law scholars is that the answer is 'yes'. Indeed, I have not found a single scholar writing in English who does not accept the due process thesis. The following statement is emblematic:

> If States 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, States will have to adhere to standards of

[6] *Id.*, art. 1.
[7] *Id.*, art. 17(1).

due process found in international human rights instruments, particularly as they relate to the rights of defendants.[8]

In defense of the due process thesis, scholars generally argue that the prospect of an unfair national proceeding renders a State 'unwilling' to investigate or prosecute. Some focus on article 17(2)(c)'s 'independently or impartially' language.[9] Bassiouni, for example, says that '[t]he Court will determine that a State is unwilling to genuinely investigate or prosecute if... the proceedings are not conducted independently or impartially'.[10] Others point to

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[8] 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 LAW, 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 be relying on their usual criminal procedures, provided that those procedures are effective and respect basic human rights standards'.); Eser, *supra* note 3, at 960 ('I have sincere doubts whether the Rome Statute may fairly be interpreted as intentionally sacrificing the rights of the accused for preventing impunity at any cost'.); Jann K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 J. INT'L CRIM. JUST. 86, 112 ('[T]he legality and legitimacy of implementation require States to pay due consideration to... the rights of due process'.).

[9] Art. 17(2) provides in full: "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:
(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."

[10] M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 518 (2003); *see also* Ellis, *supra* note 8, at 236 ('A case will fall under the jurisdiction of the ICC because of the unwillingness of a State to prosecute or investigate when it is found that... [t]he proceedings are not independent and impartial'.); Oscar Solera, 'Complementary Jurisdiction and International Criminal Justice', 84 INTL. REV. RED CROSS 145, 166 (2002) (noting that one type of 'State conduct that may lead the Court to rule that a State is unwilling to prosecute' is 'when the competent domestic court is not independent or impartial').

the chapeau of article 17(2), which says that unwillingness should be determined with 'regard to the principles of due process recognized by international law'. Carsten Stahn, for example, argues that 'the reference suggests that even alternative forms of justice must guarantee basic fair trial rights to the accused in the procedure'.[11] And still others cite both the chapeau and Article 17(2)(c).[12]

Scholars have also argued that that a State is 'unable' to investigate or prosecute if it does not guarantee the defendant due process.[13] This is the position taken by the authors of the Informal Expert Paper that the Office of the Prosecutor commissioned on complementarity. According to the report, the Court should take into account a State's '[l]egal regime of due process standards, rights of accused, [and] procedures' when determining whether it is able to investigate and prosecute.[14]

Finally, although no scholar has done so explicitly, one could argue that article 17(1)'s genuineness language supports the due process thesis. Subparagraph (a) makes a case admissible if the State is unwilling or unable to 'genuinely' investigate or prosecute, and subparagraph (b) makes a case admissible if the State has decided not to prosecute because it is unwilling or unable to 'genuinely' do so. It is possible that a national investigation or prosecution qualifies as genuine only if it provides the defendant with due process.

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[11] Carsten Stahn, 'Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court', 3 J. INT'L CRIM. JUST. 695, 713 (2005).

[12] Dawn Yamane Hewett, 'Sudan's Courts and Complementarity in the Face of Darfur', 31 YALE J. INT'L L. 276, 278 (2006) (arguing that 'a State may be considered "unwilling" to prosecute, even if domestic trials are taking place... if the proceedings were not independent or impartial; or if the proceedings failed to accord with international due process norms'.).

[13] Article 17(3) provides in full: "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

[14] INFORMAL EXPERT PAPER, *supra* note 1, at 28; *cf. id.* at 8–9 ('Of course, although the ICC is not a 'human rights court', human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely'.).

II. CRITIQUING THE DUE PROCESS THESIS

Although I will suggest later that the Rome Statute should be amended to embrace the due process thesis, article 17's text, context, purpose, and history – the basic principles of treaty interpretation[15] – all clearly indicate that a State's failure to guarantee a defendant due process is not currently a ground for admissibility.

2.1. *Text*

The starting point for interpreting a treaty is the ordinary meaning of its text.[16] Unfortunately, the ordinary meaning of article 17 specifically contradicts the due process thesis.

2.1.1. Independence and Impartiality

As noted above, most proponents of the due process thesis point to article 17(2)(c)'s requirement that a national proceeding be conducted independently and impartially. At first blush, that requirement does, in fact, seem to support the due process thesis: we would not describe a proceeding that violates due process in order to make the defendant easier to convict as either 'independent' or 'impartial'. Indeed, the ICCPR specifically guarantees the defendant's right to an 'independent and impartial tribunal established by law'.[17]

The question, though, is not whether the due process thesis is compatible with subparagraph (c)'s 'independently or impartially' language, but whether it's compatible with subparagraph (c) as a whole. And here the thesis encounters an insuperable obstacle: namely, the fact that a case is admissible under article 17(2)(c) only if a national proceeding lacks independence or impartiality *and* is

[15] *See id.* at 26; Gerhard Werle, Principles of International Criminal Law 54–55 (2005).

[16] Vienna Convention on the Law of Treaties, art. 31(1), 1155 U.N.T.S. 331 (May 23, 1969) [hereinafter 'Vienna Convention'].

[17] International Covenant on Civil and Political Rights, art. 14(1), 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976).

'being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'. The two requirements are conjunctive ('and'), not disjunctive ('or') – which means that both requirements must be satisfied for a case to be admissible.[18]

The presence of the 'and' in subparagraph (c) is fatal to the due process thesis, because it indicates that the subparagraph is unidirectional, applying only to a national proceeding that is designed to make the defendant more difficult to convict.[19] It cannot apply to a national proceeding that is designed to make the defendant *easier* to convict,[20] because such a proceeding, though unfair, is simply not inconsistent with the intent to bring the defendant to justice[21] – an expression that is synonymous with the intent to obtain a conviction

[18] Perhaps not surprisingly, proponents of this version of the due process thesis simply ignore the 'bring the person concerned to justice' language. The earlier quote from Bassiouni is an example. For others, see Solera, *supra* note 10, at 166 ('The Statute foresees three types of State conduct that may lead the Court to rule that a State is unwilling to prosecute... [including] when the competent domestic court is not independent or impartial'.); Ellis, *supra* note 8, at 236 ('A case will fall under the jurisdiction of the ICC because of the unwillingness of a state to prosecute or investigate when it is found that... [t]he proceedings are not independent and impartial'.).

[19] Where, for example, the prosecution intentionally fails to protect its witnesses from intimidation or downplays inculpatory evidence. *See* Informal Expert Paper, *supra* note 1, at 31. For other legal mechanisms that are designed to make a defendant more difficult to convict, see *id*. at 28–31.

[20] Where, for example, he is denied counsel or the prosecution is not required to prove his guilt beyond a reasonable doubt, as in Sudan's Specialised Courts. *See* Country Report On Sudan, *supra* note 4, 'Trial Procedures'.

[21] *Cf*. John T. Holmes, 'Complementarity: National Courts Versus the ICC', *in* I The Rome Statute of the International Criminal Court: A Commentary 667, 675 (Antonio Cassese et al. eds., 2002) ('The concept of shielding is itself quite broad and an argument could be made that the other criteria, unjustified delay and independence and impartiality, are simply corollaries of the concept'.).

in both ordinary ICC parlance[22] and in international law generally.[23]

2.1.2. 'Principles of Due Process'

Basing the due process thesis on the 'principles of due process recognized by international law' language in the chapeau of article 17(2) faces a similar problem. The argument depends on the idea that the chapeau and the three subparagraphs are disjunctive – that the Court can find a State unwilling if the national proceeding *either* satisfies one of the three subparagraphs *or* violates international due process. But that is an incorrect reading of article 17. '[H]aving regard to the principles of due process recognized by international law' is a subordinate clause; 'the Court shall consider whether... one or more of the following exist' is an independent clause. According to traditional rules of grammar, subordinate clauses depend on independent clauses for their meaning[24] – which means that the chapeau is not separate from the three subparagraphs, but simply explains how the Court should determine whether one or more of the paragraphs are satisfied (namely, with regard to the principles of international due process). In other words, the chapeau and the three subparagraphs are actually conjunctive: the Court can only find a State unwilling if the national

[22] *See, e.g.*, Overview, Rome Statute of the International Criminal Court, http://www.un.org/law/icc/general/overview.htm ('The guarantee that at least some perpetrators of war crimes or genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end'.); ICC Facts, http://www.un.org/News/facts/iccfact.htm ('The scope, scale, and hateful nature of atrocities that have taken place during the last 20 years in many parts of the world gave impetus to creating a permanent mechanism to bring to justice the perpetrators of such crimes'.).

[23] *See, e.g.*, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, art. 14, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975) ('All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control'.); S.C. Res. 1456, U.N. SCOR, 58th Sess., 4688th mtg. U.N. Doc. S/RES/1456 (2003) ('States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute'.).

[24] *See* E.L. CALLIHAN, GRAMMAR FOR JOURNALISTS 21 (3rd ed. 1979).

proceeding *both* violates international due process and satisfies one of the three conditions specified in article 17(2).[25] The second requirement, however, is fatal to the due process thesis. Violations of due process that make the defendant easier to convict do not satisfy subparagraph (c), for all the reasons discussed above.[26] And they cannot satisfy either subparagraph (a) or subparagraph (b), because those subparagraphs specifically equate unwillingness with proceedings undertaken to 'shield the person concerned from justice' and delays inconsistent with the desire 'to bring the person concerned to justice,' respectively.[27]

2.1.3. Inability

Basing the due process thesis on the concept of 'inability' finds little textual support in article 17(3). To determine whether a State is unable to investigate or prosecute, the Court must consider 'whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the

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[25] The drafting history of article 17(2) makes this clear. The 'principles of due process' clause was specifically added to ensure that the Court would use objective criteria to determine whether one of the three subparagraphs applied. *See* John T. Holmes, 'The Principle of Complementarity', *in* The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 41, 53 (Roy S. Lee ed., 1999). The conjunctive nature of the chapeau and Article 17 also rules out defending the due process thesis with Rule 51, which provides that, in order to determine unwillingness, 'the Court may consider, *inter alia*, information that the State... may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct'. ICC Rules of Procedure and Evidence, Rule 51, UN doc. PCNICC/2000/1/Add.1 (2000). The Rules of Procedure are subordinate to the Rome Statute 'in all cases'; they do not expand or supplement the rights and obligations created by the latter. *Id.*, Explanatory Note, para. 1. Insofar as Article 17 is unidirectional, then, Rule 51 must be, as well – which means that the Rule only permits the Court to consider information provided by a State that indicates the State is not acting 'in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'.

[26] The text of article 20(3), which parallels the text of article 17(2)(c), supports this conclusion. Article 20(3) provides, in relevant part, that the Court cannot re-try a person 'unless the proceedings in the other court... *were not conducted independently or impartially in accordance with the norms of due process recognized by international law* and were conducted in a manner which... was inconsistent with an intent to bring the person concerned to justice' (emphasis added).

[27] *See* Rome Statute, *supra* note 2, art. 17(a),(b).

necessary evidence and testimony or otherwise unable to carry out its proceedings'.[28] It is difficult to argue that we would ordinarily describe a functioning national judicial system that lacks certain due process protections as one that has 'collapsed' or become 'unavailable'. To the contrary, the ordinary meaning of those terms – and 'inability' generally – seems to embrace only (relatively) objective criteria such as a political situation that makes holding trials impossible or a debilitating lack of judges, prosecutors, and other court personnel. Indeed, the Informal Expert Paper suggests exactly that.[29]

Moreover, even if the ordinary meaning of 'collapse' or 'unavailability' did include situations in which a State refused to provide a defendant with due process, the grammatical structure of article 17(3) would still rule out the possibility of defending the due process thesis with reference to inability. '[D]ue to a total or substantial collapse or unavailability of its national judicial system' is a subordinate clause whose meaning depends on the independent clause '[i]n order to determine inability in a particular case, the Court shall consider whether... the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'. The Court can only find inability, therefore, if 'collapse or unavailability' causes a State to be 'unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'. That limitation is critical, because it means that only one kind of collapse or unavailability satisfies article 17(3): namely, the kind that prevents a State from *effectively* investigating or prosecuting the accused. Collapse or unavailability that prevents the State from *fairly* investigating or prosecuting him or her doesn't qualify.

To be sure, article 17(3) does not unequivocally contradict the due process thesis. Some textual ambiguity remains regarding the paragraph's 'otherwise unable to carry out its proceedings' language. As we will see, though, that provision was specifically designed to function as a catch-all, permitting the Court to find inability when a State cannot effectively investigate or prosecute the defendant for reasons other than the ones specifically mentioned in the provision. It was not intended to require national due process.

[28] *Id.*, art. 17(3).

[29] *See* Informal Expert Paper, *supra* note 1, at 15 (suggesting criteria for 'inability').

2.1.4. Genuineness

Finally, the presence of 'genuinely' in article 17(1) does not support the due process thesis. For this version of the thesis to be correct, genuineness would have to function as an independent requirement of article 17, because neither willingness nor ability requires a State to provide a defendant with due process. The text of article 17 makes clear, however, that the genuineness requirement is not only part of the willingness and ability requirements, but is actually subordinate to them: 'genuinely' is simply an adverb that explains what kind of investigation or prosecution a State must be willing and able to conduct in order to make a case inadmissible – namely, a genuine investigation or prosecution.[30]

It could still be argued, of course, that requiring States to conduct genuine investigations and prosecutions, as opposed to investigations and prosecutions of any kind, indicates that the drafters intended to make the absence of national due process cognizable under article 17(1). Indeed, the Oxford English Dictionary defines 'genuine', in part, as 'not sham or feigned'[31] – a definition that would seem to be satisfied by an investigation or prosecution that was designed to convict the defendant.

This argument, however, is ultimately unconvincing. Given that paragraphs 2 and 3 specifically define unwillingness and inability in relation to a national proceeding designed to make a defendant more difficult to convict, it defies common sense to believe that the drafters would have fundamentally expanded the reach of those requirements by inserting a single adverb into paragraph 1. On the contrary, it seems far more reasonable to assume that, had the drafters intended 'genuinely' to require States to provide defendants with due process, they would have said so explicitly: by including disingenuousness in the list of factors that permit the Court to intervene in a national proceeding and using a separate paragraph to explain how the Court should determine disingenuousness in a particular case. After all, that is what the drafters did with unwillingness and inability. The fact that they didn't thus provides strong circumstantial evidence that a State investigation or prosecution can be genuine even in the absence of due process.

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[30] *ID*. at 8.

[31] The drafters, in fact, relied on the OED definition. *See* Holmes, *Principle of Complementarity*, *supra* note 19, at 50 n.14.

2.2. *Context*

The conflict between article 17 and the due process thesis becomes even clearer when, in keeping with the principle of integration,[32] we examine article 17 in the context of the Rome Statute as a whole. Put simply, nothing in the Rome Statute suggests that article 17 requires States to guarantee defendants due process.

2.2.1. Article 19

Article 19 permits a defendant to challenge 'the admissibility of a case on the grounds referred to in article 17'. Notably, the provision does not allow a defendant to challenge a determination that his or her case is *inadmissible*. Yet that is exactly what we would expect the Article to do if the due process thesis was correct. A defendant faced with the prospect of an unfair national proceeding would *want* the ICC to intervene, given the comprehensive due process protections provided by the Rome Statute. As written, however, article 19 provides that defendant with no recourse: if the Court decides that his or her case is inadmissible – for whatever reason – he or she is simply out of luck.

Differently put, if article 17 made the unfairness of a national proceeding a ground for admissibility, we would expect article 19 to permit a defendant to challenge a decision by the Court to defer to that proceeding. Why would the Rome Statute give a defendant the right to national due process but deny him or her the means to enforce that right? As Anthony Woodiwiss has pointed out, the nature of rights requires both.[33]

2.2.2. Article 13

A similar problem arises when we consider the due process thesis in the context of article 13. Article 17 only comes into play after the Court has initially assumed jurisdiction over a case, whether through State referral, referral by the Security Council, or the Prosecutor's decision *proprio motu*.[34] Notice what is absent from that list: referral by the defendant himself or herself. Nothing in the provision permits a defendant facing an unfair trial to ask the Court to hear his or her case. That absence is irrational if one of the goals of complementarity is to ensure that national proceedings provide defendants with due

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[32] Ian Brownlie, Principles of Public International Law 604 (6th ed. 2003).

[33] *See* Anthony Woodiwiss, Human Rights xi (2005).

[34] Rome Statute, *supra* note 2, art. 13.

process. Again, absent an institutional mechanism with which to enforce it, the right to due process has no meaning.

2.2.3. Article 14

Given that Article 13 does not allow a defendant to refer his or her case to the Court, it is reasonable to assume that, if the due process thesis was correct, the Rome Statute would at least permit a State Party to refer a case on due process grounds. The State intent on trying a defendant unfairly would obviously have no call to make such a referral, but another State, one more committed to the ideals of international criminal justice, might.

The plain language of article 14, however, does not permit a State party to refer a case to the Court out of due process concerns. According to the provision, a State may only refer 'a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed,' and may only refer such a situation 'for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes'.[35] Violations of national due process are regrettable, but they are not criminal under the Rome Statute.[36]

2.2.4. Article 15

It is tempting to argue that a defendant could bring due process concerns to the Court's attention via article 15, which permits the Prosecutor to request 'additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate'.[37] That argument, however, is ultimately unpersuasive. To begin with, it is unlikely that a defendant qualifies as a 'reliable source' for purposes of the provision, given the evident motive of all defendants to misrepresent the nature of the legal proceedings against them. Moreover, even if a defendant does qualify as a reliable source, article

[35] *Id.*, art. 14(1).

[36] With the exception of article 8(2)(c)(iv) of the Rome Statute, which criminalizes the 'passing of sentences and carrying out of executions without previous judgment by a regularly constituted court'. That provision, however, does not help a defendant facing an unfair trial: if proven, a violation of article 8(2)(c)(iv) would result in the judge at the defendant's trial being indicted for a war crime after the trial was completed; it would not make the defendant's case admissible before or during the trial. *See* text accompanying notes 72–73 *infra*.

[37] Rome Statute, *supra* note 2, art. 15.

15 only allows the Prosecutor to request additional information that helps establish the seriousness of 'crimes within the jurisdiction of the Court'.[38] As with article 14, information that establishes the absence of national due process doesn't qualify.

2.2.5. Article 20

Finally, the due process thesis is also incompatible with article 20, the *ne bis in idem* provision. The text of article 20(3) parallels the language of article 17(2)(c):

> No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court... were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

If the 'independently or impartially' language in Article 17 made the unfairness of a national investigation or prosecution a ground for admissibility, the presence of the same language in article 20 would make the unfairness of a completed national trial a ground for a new trial by the ICC. But that doesn't make any sense. If the defendant was somehow *acquitted* after an unfair national trial, the Court would only have reason to try him or her a second time if it believed that he or she was actually guilty – which seems unlikely (otherwise, why would he or she have been acquitted in the first place?). And if the defendant was *convicted* after an unfair national trial, the appropriate remedy would be for the Court to nullify the national conviction, not to try him or her a second time. Nothing in article 20, however, suggests that the Court has such appellate power.[39]

In light of its ordinary meaning, then, the only logical interpretation of article 20 is that it functions unidirectionally: the Court can re-try a defendant previously convicted or acquitted in a national proceeding only if that proceeding was not independent or impartial *and* its lack of independence or impartiality made the defendant

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[38] *Id.*, art. 15(1).

[39] *Cf.* Holmes, *National Courts*, *supra* note 21, at 672 (noting that 'delegations were mindful that the ICC was not envisaged as an appellate body to review decisions of domestic courts').

more difficult to convict.[40] Indeed, a unidirectional interpretation of Article 20 is clearly supported by its drafting history – its predecessor, article 42 of the International Law Commission ('ILC') draft statute, was specifically *bidirectional*, permitting retrial if 'the proceedings in the other court were not impartial or independent *or* were designed to shield the accused from international criminal responsibility'.[41] As discussed below, it is unlikely that the change from the International Law Commission's 'or' to the Rome Statute's 'and' was accidental.

2.2.6. Other Relevant Provisions

Though not directly related to article 17, other provisions in the Rome Statute provide additional circumstantial evidence against the due process thesis.

Article 54(1) provides, in relevant part, that '[t]he Prosecutor shall... [f]ully respect the rights of persons arising under this Statute'. The provision, however, applies only to Court-initiated investigations; it does not apply to investigations initiated by States.

Article 55(2) requires national authorities to respect a suspect's due process rights during questioning, but that provision only applies when the Court has requested the interrogation under Part 9 of the Rome Statute. If the national authorities question the suspect of their own accord, article 55 doesn't apply.

Article 59(2) requires the competent authority in a custodial State to determine whether an arrested suspect's rights have been respected – but only 'in accordance with the laws of that State'. The suspect is thus entitled only to the due process protections offered by the custodial State, even if those protections fall below the international minimum.

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[40] *See* Immi Tallgren, 'Article 20: Ne bis in idem', in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 419, 432 (Otto Triffterer ed., 1999) ('The indications of lack of independence or impartiality have to be cumulative with the rest of the subparagraph'.). I use the expression 'more difficult to convict' in a broad sense, to include situations in which the defendant was convicted of charges that are less serious than the charges he would have faced if the State had genuinely intended to bring him to justice.

[41] Report of the International Law Commission on the Work of its Forty-Sixth Session: Draft Statute for an International Criminal Court, art. 42, U.N. GAOR, 49th Sess., Supp. No. 10, annex, U.N. Doc. A/49/10 (1994).

Article 87(4) permits the Court, in relation to a request for State Party cooperation, to take 'such measures... as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses, and their families'. Ensuring the well-being of the defendant is notably absent.

Article 99(1) not only provides that requests for cooperation 'shall be executed in accordance with the relevant procedure under the law of the requested State,' it also expressly permits States to deny requests that are 'prohibited by such law'.

2.3. *Object and Purpose*

Examining Article 17 in light of the 'object and purpose' of the Rome Statute confirms that the provision cannot be interpreted to make the absence of national due process a ground for admissibility.[42] As Amnesty International notes:

> The overall object and purpose of the Rome Statute is to ensure that those responsible for the worst possible crimes are brought to justice in all cases, primarily by states, but, under the underlying principle of complementarity, if they prove unable or unwilling to do so, by the International Criminal Court as a last resort.[43]

Amnesty's interpretation is sound, given the Preamble's insistence that the Court was established 'to put an end to impunity for the perpetrators of' serious international crimes.[44] Moreover, by emphasizing the principle of complementarity, it also accurately reflects the Preamble's assertion that the 'effective prosecution' of

[42] Anthony Aust, Modern Treaty Law and Practice 188 (2000) ('[I]n practice, having regard to the object and purpose is more for the purpose of confirming an interpretation'.).

[43] Amnesty International, 'International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes', IOR 40/025/2002. (Sept. 2, 2002); see also M. Cherif Bassiouni, The Statute of the International Criminal Court: A Documentary History 1–2 (M. Cherif Bassiouni ed. 1998); Angela R. Kircher, 'Attack on the International Criminal Court: A Policy of Impunity', 13 Mich. St. J. Int'l L. 263, 275–276 (2003).

[44] Rome Statute, *supra* note 2, Preamble para. 5. '[U]nder Article 31 of the 1969 Vienna Convention... a preamble to a treaty is considered an integral part of a treaty for the purposes of interpretation and application'. Sharon A. Williams, 'Article 17: Admissibility', in *Commentary on the Rome Statute*, *supra* note 40, at 386.

such crimes 'must be ensured by taking measures at the national level and by enhancing international cooperation'.[45]

Notice, though, what is absent from the Rome Statute's object and purpose: namely, any concern for the rights of defendants, in national proceedings or otherwise. That is not an issue in ICC trials, because Articles 63–70 clearly and unambiguously provide defendants with the full panoply of due process rights. But it *is* an issue for defendants tried in national proceedings, because – as discussed above – there is nothing in the text of article 17 that supports the due process thesis, especially when that provision is viewed in the context of the Rome Statute as a whole.

To be sure, requiring national proceedings to provide defendants due process is not *inconsistent* with the object and purpose of the Rome Statute, in the manner of an unacceptable reservation to a treaty.[46] Indeed, I argue below that article 17 should make the absence of due process a ground for admissibility. Nevertheless, the narrow purpose of the Rome Statute – ending impunity – reinforces the view that article 17 cannot be read to embrace the due process thesis.

2.4. *Preparatory Work*

Under normal principles of treaty interpretation, there is no need to refer to preparatory work if textual interpretation leads to an unambiguous and reasonable result.[47] Such is the case here: not only does the text of Article 17 clearly indicate that the absence of national due process is not a ground for admissibility, there is nothing unreasonable about that result in light of the object and purpose of the Rome Statute. Nevertheless, it is still worth examining the Statute's preparatory work in some detail, because it confirms that the interpretation of article 17 offered by the due process thesis is incorrect.

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[45] Rome Statute, *supra* note 2, at Preamble para. 4.

[46] Brownlie, *supra* note 32, at 585.

[47] *See* Vienna Convention, *supra* note 16, art. 32 ('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'.).

2.4.1. Unwillingness

The contentious drafting history of article 17(2) dramatically contradicts the due process thesis. During the negotiations, Italy proposed a definition of unwillingness that would have specifically made the absence of national due process a ground for admissibility:

> In deciding on issues of admissibility under this article, the Court shall consider whether... (ii) the said investigations or proceedings have been or are impartial or independent, or were or are designed to shield the accused from international criminal responsibility, *or were or are conducted with full respect for the fundamental rights of the accused.*[48]

Because 'many delegations believed that procedural fairness should not be a ground for defining complementarity,'[49] Italy's proposal was defeated. In the view of the delegations, the purpose of paragraph 2 'was to preclude the possibility of sham trials aimed at shielding perpetrators'[50] – and nothing more.

2.4.2. Inability

Concern for the rights of defendants was also notably absent from the (far less contentious) negotiations concerning the definition of inability. Early drafts of article 17(3) did not even contain the 'or otherwise unable to carry out its proceedings' provision – the only provision, as noted earlier, that could possibility support the due process thesis. A finding of inability was limited to situations in which a State was unable to obtain the accused or the key evidence against him or her as a result of a total or partial collapse of its judicial system,[51] an explicitly unidirectional formulation. The addition of the 'otherwise unable' criterion, moreover, was added to ensure that the 'accused' and 'evidence' criteria would not prevent the Court from finding a State unable to bring the person concerned to justice on different grounds; it was not added to protect the defendant's right to due process.[52] Indeed, the Italian proposal was originally offered as an inability criterion under paragraph 3, but the delegates rejected it

[48] Draft Proposal by Italy, 44, UN Doc. A/AC.249/1997/WG.3/IP.4 (Aug. 5, 1997).

[49] Holmes, *Principle of Complementarity*, *supra* note 25, at 50.

[50] *Id.*

[51] *Id.* at 49. 'Situations such as Somalia, lacking a central government, or a state of chaos due to a civil war or natural disasters, or any other event which leads to public disorder were contemplated'. Williams, *supra* note 44, at 394.

[52] *See* Holmes, *Principle of Complementarity*, *supra* note 25, at 49.

and moved it for re-consideration to paragraph 2 – where it was ultimately rejected again.

2.4.3. Genuineness

Finally, the preparatory work indicates that article 17(1)'s use of the term 'genuinely' does not support the due process thesis. As the Informal Expert Paper points out, '[i]t was extremely important to many States that proceedings *cannot* be found 'non-genuine' simply because of a comparative lack of resources or because of a lack of full compliance with all human rights standards'.[53] Indeed, although the debates over the proper adverb were very contentious, *none* of the conflict focused on whether one should be chosen that would manifest the need for States to provide defendants with due process. Many delegations preferred the ILC's 'effectively' – a term that exhibits concern with a State's ability to obtain convictions, not its willingness to protect defendants.[54] Even that term, however, proved too invasive for many delegations, who worried that it might permit the Court to intervene in a national proceeding whenever it believed it could do a better (more 'effective') job of investigating and prosecuting the defendant.[55]

III. IMPLICATIONS OF REJECTING THE DUE PROCESS THESIS

The due process thesis, in short, is contradicted by the text, context, purpose, and history of article 17. Properly understood, article 17 permits the Court to find a State 'unwilling or unable' only if its legal proceedings are designed to make the defendant more difficult to convict. If its legal proceedings are designed to make the defendant easier to convict, the provision requires the Court to defer to the State matter how unfair those proceedings may be.

The situation in the Sudan is an excellent example of this 'shadow side' of complementarity. The International Commission of Inquiry on Darfur ('the Inquiry') expressly cited concerns that Sudan's Specialised Courts would not provide defendants with due process as

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[53] Informal Expert Paper, *supra* note 1, at 8 (emphasis added).

[54] Holmes, *National Courts*, *supra* note 21, at 674.

[55] *Id.* 'An example cited during the negotiations was that the Court should not assume jurisdiction simply because the national authorities were proceeding more slowly... than other States or the Court itself in handling similar cases'. *Id.*

one of the grounds for referring the situation in Sudan to the ICC.[56] The Inquiry's concerns are well-founded, as evidenced by its description of one Specialised Court trial:

> On 12 January 2005, the Commission observed one session in a trial of a group of 28 individuals from Darfur. They included a number of air force pilots who had refused to participate in bombing areas in Darfur. Although the session was tense, the Commission was told that it was the first time that the trial had been conducted in accordance with the regular proceedings. In previous sessions, even questions on legal issues by the defence were refused. The defence team was dismissed by the court at one stage. During that period, witnesses were examined and confessions against the defendants were obtained. When a witness changed his statement during the trial session following the intervention of defence lawyers, the court started perjury proceedings against him. He collapsed in the court.[57]

Nor is that all. The Specialised Courts do not exclude confessions obtained through torture or duress[58]; trials are often held in secret[59]; defendants are regularly denied the right to counsel completely or are required to be represented by 'friends,' not lawyers[60]; and the presumption of innocence is regularly ignored.[61]

Not surprisingly, Sudan disagrees with this negative assessment of its Specialised Courts. It has repeatedly insisted that the courts are a genuine substitute for the ICC and thus make the Darfur cases inadmissible under article 17.[62]

In cases involving high-ranking government officials, military commanders, and members of the pro-government Janjaweed militias, Sudan's position is obviously indefensible: even if the government was interested in prosecuting such individuals, which it

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[56] International Commission of Inquiry on Darfur, Report to the United Nations Secretary-General, para. 648, UN Doc. S/2006/60 (Jan. 31, 2005) [hereinafter 'Sudan Report'] ('[T]he Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor'.).

[57] *Id.* at para. 439.

[58] *Id.* at para. 445.

[59] Country Report on Sudan, *supra* note 4, 'Trial Procedures'.

[60] *Id.*

[61] *Id.*

[62] Hewett, *supra* note 12, at 277.

clearly is not,[63] the notorious subservience of the Sudanese judiciary to the government and military[64] and the limitations of Sudanese criminal law – the absence of command responsibility[65] and the existence of numerous immunities[66] in particular – would easily allow the Court to find Sudan unwilling or unable to genuinely do so.

The situation is more complicated, however, in cases involving defendants whom the Sudanese government doesn't want to protect, such as scapegoated low-level government officials and soldiers,[67] as well as members of rebel groups like the Sudan Liberation Army and the Justice for Equality Movement.[68] Such defendants are unlikely to receive due process, as the trial of the reluctant air force pilots demonstrates. Nevertheless, because the Specialised Courts violate international due process in order to make those defendants *easier*, not *more difficult*, to convict, nothing in article 17 would permit the Court to find the cases admissible. Sudan is more than willing and able to investigate and prosecute rebels and scapegoats – it just has no intention of protecting their rights while doing so.

This depressing analysis, moreover, is not affected by the selective prosecution that is clearly at work in the Specialised Courts. It is tempting to argue that the Court could find Sudan – or any State with a similar prosecution pattern – 'unwilling or unable' to prosecute if it targets only low-level government perpetrators or high-level members of rebel groups, ignoring the high-level government perpetrators who

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[63] *See* Human Rights Watch, *supra* note 4, at 10 (noting that both the Specialised Courts and the SCCED 'are prosecuting ordinary crimes that happened to occur during the war rather than violations of international humanitarian law or crimes against humanity').

[64] *See* Country Report on Sudan, *supra* note 4, 'Denial of a Fair Public Trial'. As the Informal Expert Paper notes, '[c]ommonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution, or adjudication... constitutes circumstantial evidence for an inference of non-genuineness'. Informal Expert Paper, *supra* note 1, at 29.

[65] *See* Human Rights Watch, *supra* note 4, at 17–18.

[66] *Id.* at 18–20.

[67] A Specialised Court sentenced two low-level soldiers to death in November, 2005, for torturing and murdering a civilian suspected of being a rebel. *See* Darfur Court Sentences Two Soldiers to Death, IOL, Nov. 17, 2005, http://www.int.iol.co.za/index.php?set_id = 1&click_id = 136&art_id = qw1132229163180B235. No information about the procedures used during the trial is available.

[68] Both groups are suspected of having committed war crimes against civilians, including murder and pillage. *See* Sudan Report, *supra* note 56, at para. 639.

may well be equally, if not more, responsible for atrocities.[69] The Court could then assume jurisdiction over the politically motivated cases, which are the most likely to involve unfair trials.

Unfortunately, the selective prosecution argument is irreconcilable with article 17. The text of all three paragraphs indicates that, in resolving a challenge to admissibility, the Court must determine the State's willingness and to prosecute in relation to *that specific case*, not in relation to the larger legal and political situation of which the case is a part.[70] Paragraph 1(a), for example, permits the Court to admit a case when the State is 'unwilling or unable genuinely to carry out *the* investigation or prosecution'. Similarly, paragraph 2(c) limits unwillingness to where '*the* proceedings were not or are not being conducted independently or impartially'. And finally, paragraph 3 defines inability as a situation in which a State is 'unable to obtain *the* accused or *the* necessary evidence and testimony or is otherwise unable to carry out its proceedings'. In each case, the object of consideration is singular, not plural.[71]

Finally – and here, too, the Sudan situation is relevant – it is worth noting that the unidirectionality of article 17 places it in ironic tension with article 8(2)(c)(iv) of the Rome Statute, the 'passing of sentences and carrying out of executions without previous judgment by a regularly constituted court'. Under article 8(2)(c)(iv), a judge commits a war crime if, during an internal armed conflict,[72] he or she imposes sentence on a civilian or someone *hors de combat* after a trial that he or she knows 'did not afford the essential guarantees of independence and impartiality' or 'did not afford all other judicial guarantees

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[69] *Cf*. Hewett, *supra* note 12, at 281 ('If, as the prosecutions [in Darfur] continue, there is a pattern of indictments for only... low-level perpetrators, the ICC would have ample grounds for prosecution'.).

[70] *See, e.g.*, Informal Expert Paper, *supra* note 1, at 11 (noting that the 'admissibility assessment is not intended to 'judge' a national legal system as a whole, but simply to assess the handling of the matter in question').

[71] To be sure, 'its proceedings' could refer to a State's judicial system as a whole. Given that the other conditions are expressly singular, however, the better interpretation is that 'its' refers to the State's proceedings in the specific case under review.

[72] A similar provision applies in international armed conflicts. *See* Rome Statute, *supra* note 2, art. 8(2)(a)(vi).

generally recognized as indispensable under international law'.[73] The ICC would have jurisdiction over that judge pursuant to article 5 – and could find the case admissible under article 17 if the State of the judge's nationality attempted to shield him or her from criminal responsibility. Ironically, though, the Court could *not* intervene on behalf of the defendant who was sentenced after the unfair trial, because – again – article 17 does not make the absence of national due process a ground for admissibility. The defendant and the judge would simply serve out their sentences at the same time.

IV. WHITHER NATIONAL DUE PROCESS?

George Fletcher has argued that 'the long-range value of the ICC is that it will teach countries of the world how to do justice as they seek to apply repressive measures in the name of social protection'.[74] For trials held at the Hague, the Court will do exactly that; compared to other international tribunals – past and present – the Rome Statute provides defendants with the most comprehensive set of due process protections ever promulgated.[75]

The principle of complementarity, however, fundamentally undermines the Court's ability to 'set a model for the world of how a criminal court should function'.[76] Because the absence of due process is not a ground for admissibility, article 17 unintentionally sends a very different message to the world about how national judicial systems should do justice: namely, that although it is unacceptable for a State to use legal proceedings that are designed to make the (alleged) perpetrators of serious international crimes more difficult to convict, it is perfectly acceptable – though certainly not encouraged – for a

[73] Report of the Preparatory Commission for the International Criminal Court. Addendum, Elements of Crimes. UN Doc. PCNICC/2000/1 (2000), art. 8(2)(c)(iv), at 14. Although no tribunal has interpreted this provision or one similar, it seems clear that the 'indispensable' guarantees are those found in the International Covenant on Civil and Political Rights. *See* KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 410 (2003).

[74] George P. Fletcher & Jens David Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 J. INT'L CRIM. JUST. 539, 540 (2005).

[75] *See*, e.g., H.R. Comm. Intl. Rel., H.R. 4654, American Servicemembers' Protection Act, 106th Cong. (July 25, 2000) (testimony of Monroe Leigh, American Bar Association).

[76] Fletcher & Ohlins, *supra* note 74, at 540.

State to use legal proceedings that are designed to make those (alleged) perpetrators *easier* to convict.

Indeed, for all of the Rome Statute's advances, article 17 actually represents a step *backward* from the International Criminal Tribunal for the Former Yugoslavia ('ICTY'). The Security Council established the Tribunal in part because it was concerned that national courts in the region would not be able to satisfy the demands of international due process.[77] That concern is reflected in Rule 9 of the Rules of Procedure and Evidence of the ICTY, which explicitly permits the Tribunal to assert its primacy '[w]here it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State... there is a lack of impartiality or independence, *or* the investigations or proceedings are designed to shield the accused from international criminal responsibility'.[78]

The ICC would be much stronger if article 17 did, in fact, make the absence of national due process a ground for admissibility. But how? Could the Court require States to provide due process to defendants? Or will reform have to wait until 2009, when State parties can propose amendments to the Rome Statute?[79]

Although a Court-initiated solution would be preferable, nothing in the Rome Statute seems to justify reading the due process thesis into article 17.[80] We have already seen that the text of article 17 does not support the thesis. The only other possible textual source is article 21(3), which provides that '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'. It is tempting to argue that article 21(3) amends article 17 *sub silentio* to require States to provide defendants

[77] *See* Mark A. Drumbl, 'Terrorist Crime, Taliban Guilt, Western Victims, and International Law', 31 DENV. J. INT'L L. 69, 74 (2002).

[78] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 9, UN Doc. IT/32/Rev.20 (2001) (emphasis added).

[79] Rome Statute, *supra* note 2, art. 123; *see also id*., art. 121 ('After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto'.).

[80] This is not to say that the Court won't do so, anyway. I am certain that the ICC's judges will find it difficult to resist intervening in national trials that are fundamentally unfair, given their potential to undermine the legitimacy of international criminal law. My argument is simply that, if interpreted as its drafters intended, Article 17 does not permit intervention in such circumstances.

due process, which is clearly an internationally-recognized human right.[81] That argument, however, is ultimately unpersuasive: although the text of article 21(3) is capable of supporting such an interpretation, the fact that there was 'virtual unanimity' among the delegations that the provision should be included in the Rome Statute[82] seems to rule out allowing it to trump the far more specific provisions of article 17. As we have seen, many delegations specifically objected to making due process a ground for admissibility.

We are left, then, with the difficult task of amending article 17 to recognize the due process thesis. At least two changes would be necessary. Most obviously, the criteria in article 17(2)(c) should be made disjunctive instead of conjunctive, along the lines of Rule 9 of the ICTY Rules of Procedure. The subparagraph would then allow the Court to find unwillingness if '[t]he proceedings were not or are not being conducted independently or impartially, *or* they were or are being conducted in a manner which... is inconsistent with an intent to bring the person concerned to justice'.

Equally important, however, article 14 should be amended to permit a defendant[83] to refer his or her case to the Court on the ground that the national proceeding will not provide him or her with due process. In the absence of such a provision, defendants would be at the mercy of the Prosecutor to investigate their cases *proprio motu* – which would be unlikely in all but the most notorious cases, given the limited resources of the Office of the Prosecutor.[84]

Finally, there is the difficult question of article 20(3). An argument can be made that the paragraph should be amended to specifically authorize the Court to vacate a national conviction that resulted from a trial that was 'not conducted independently or impartially in accordance with the norms of due process'. Doing so, however, would literally turn the ICC into a court of appeal – something many

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[81] One scholar, in fact, has made a similar argument regarding the Rome Statute's failure to protect the right to privacy. *See* George E. Edwards, 'International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy', 26 YALE J. INT'L L. 323 (2001).

[82] *See* Margaret McAuliffe deGuzman, 'Article 21: Applicable Law', in COMMENTARY ON THE ROME STATUTE, *supra* note 40, at 445.

[83] Understood broadly, to include 'a person for whom a warrant of arrest has been issued or a summons to appear has been issued under article 58'. *See* Rome Statute, *supra* note 2, art. 19(2)(a).

[84] *See* INFORMAL EXPERT PAPER, *supra* note 1, at 3. This change would also require amending Article 13(a) to authorize the Court to exercise its jurisdiction after a referral by either a State Party or a defendant.

delegations went to great lengths to avoid.[85] Fortunately, such a radical change is unnecessary: if article 14 were amended in the manner suggested above, it would give a defendant the right to ask the Court to intervene in a case *before* a State invested the time and resources in trying him or her – and the defendant could justly be held to have waived any right of referral if he or she did not.

Many States, of course, can be expected to resist amending article 17 to make the absence of national due process a ground for admissibility; witness the unhappy fate of the Italian proposal. Their resistance would be understandable: 'the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards'.[86] Some compromise, however, seems possible. Extending the concept of 'unwillingness' to include due process considerations would not necessarily require States to incorporate each and every provision of the ICCPR into their domestic law. A subset of the most important provisions might suffice to satisfy article 17, if the delegations felt that a purely objective approach to due process was necessary.[87] Or, if an objective approach seemed too restrictive, the Court could be given the authority to determine unwillingness on a case-by-case basis, asking whether the national proceedings were fair under the totality of the circumstances.

As these tentative suggestions indicate, there is room to debate how a due process requirement could best be incorporated into article 17. What should be beyond debate, however, is the *need* for such a requirement; as Fletcher says, 'the demands of fairness are constitutive of the rule of law itself, and insofar as international criminal law seeks to extend the rule of law to atrocity and crimes against humanity, it too must remain faithful to the demands of fairness'.[88] Indeed, if the ICC simply turns a blind eye to unfair national trials – the inevitable effect of article 17 as written – it will simply permit States to replace one kind of impunity with another.

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[85] *See, e.g.*, Holmes, *National Courts*, *supra* note 21, at 673 (noting that, in drafting Article 17, 'delegations were mindful that the ICC was not envisaged as an appellate body to review decisions of domestic courts').

[86] Informal Expert Paper, *supra* note 1, at 15.

[87] *Cf.* Holmes, *National Courts*, *supra* note 21, at 673–74 (noting that, to avoid turning the ICC into a court of appeals, many delegations believed that 'the criteria permitting ICC intervention should be as objective as possible').

[88] Fletcher & Ohlins, *supra* note 74, at 541.