

ICC INABILITY DETERMINATIONS IN LIGHT OF THE DUJAIL CASE

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The Court will really have to invent, create and define the meaning of a state that is unable or unwilling to conduct “genuine” proceedings.

Phillipe Kirsch¹

I. INTRODUCTION

Under the principle of complementarity, the International Criminal Court (ICC) will only exercise jurisdiction when a state is “unwilling or unable genuinely to carry out the investigation or prosecution” of alleged criminals. Unfortunately, “unable” is largely undefined. Article 17(3) of the ICC statute provides a skeletal definition, stating “[t]o 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.”² This definition raises as many questions as it answers.

The Dujail case of the Iraqi High Tribunal (IHT) presents an interesting test case for analyzing the principle of complementarity. Using the IHT as a case study is important because the Tribunal will likely serve as the model for future internationalized domestic tribunals. Thus, assuming *arguendo* that Iraq was a signatory to the ICC, would the IHT and Iraq’s criminal justice system have met the standards precluding the ICC from exercising jurisdiction? Under ICC jurisprudence, what constitutes “unable”? Did the procedural shortcomings and other failures of the Dujail case rise to the requisite level of inability?

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¹ Phillippe Kirsch, President, Int’l Criminal Court, The International Criminal Court, remarks John Tait Memorial Lecture in Law and Policy (Oct. 7, 2003), available at http://www.canada-justice.org/en/dept/pub/tait/kirsch_lecture.html (discussing the meaning of “unable or unwilling” articulated in Article 17 of the Rome Statute).

² Rome Statute of the International Criminal Court art. 17(3), July 17, 1998, 37 I.L.M. 999, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

In Part One, I consider the ICC standard for “unable.” I discuss the definition of “unable” as provided by ICC Statute Article 17. I examine the ambiguity of the term, and outline the ICC procedures for determining inability. I detail the due process thesis and textualist approaches to inability determinations, and explain the expanded ability criteria developed by the ICC and the ICC’s migration towards the due process thesis.

In Part Two, I apply the inability approaches detailed in Part One to the IHT. I begin by addressing the significance of the IHT and the criticisms of the IHT by various non-governmental organizations (NGOs). I then apply each of the inability approaches to the IHT fact pattern and the criticism leveled by the NGOs. I conclude this section by determining whether the IHT could be deemed “unable” under each test. I conclude the article by discussing the implications of these questions for the ICC and for domestically constituted tribunals. I recommend that the ICC determine clear-cut criteria for inability determinations, as this will promote domestic tribunals and placate some ICC critics.

II. ICC ARTICLE 17 “UNABLE”?

Inability is a prime feature of the ICC’s complementarity regime. Unfortunately, the concept is largely undefined and subject to varied interpretations. The ICC Statute, written to defer to the jurisdiction of domestic courts, establishes seemingly straightforward conditions for determining whether the ICC will hear a case on inability grounds.³ Nations are presumed capable to prosecute cases; for the ICC to exercise jurisdiction, the ICC Prosecutor must demonstrate that the state was unable to effectively pursue domestic prosecution.⁴ Specifically, Article 17(3) of the ICC Statute states that “[t]o 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.”⁵ Broadly speaking, complementarity is meant to ensure that the ICC only exercises jurisdiction over cases where the domestic judicial system does not investigate or prosecute the crime. In the case of inability, complementarity is designed to ensure that the ICC will not exercise jurisdiction if a state is able to investigate and prosecute a crime. States are generally

³ William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT’L LAW, 557, 575 (2005).

⁴ Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869, 899 (2002).

⁵ Rome Statute of the International Criminal Court art. 17(3), July 17, 1998, 37 I.L.M. 999, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

afforded the opportunity to address criminal wrongdoing, and with good reason. “[T]here are substantial arguments that the fullest cathartic impact of the prosecutorial approach to war crimes occurs when the responsible population itself comes to grips with its past and administers appropriate justice.”⁶ United States Ambassador to the United Nations John Bolton, an outspoken ICC critic, commented on complementarity, and the benefits of ensuring local justice stating:

It is within national judicial systems where the international effort should be to encourage the warring parties to resolve questions of criminality as part of a comprehensive solution to their disagreements. Removing key elements of the dispute to a distant forum, especially the emotional and contentious issues of war crimes and crimes against humanity, undercuts the very progress that these peoples, victims and perpetrators alike, must make if they are ever to live peacefully together.⁷

However, as Article 17(3) makes clear, when domestic systems fail and are unable to prosecute criminals, the ICC may assert jurisdiction. A state’s failure to act may be a result of

poor administration of justice, or a breakdown of State institutions, such as the national judicial system, or of widespread anarchy. The State must be unable to obtain an accused or key evidence and testimony, and its inability must relate to the total, substantial collapse, or unavailability of its judicial system.⁸

Article 17(3), articulates this “unwilling or unable” test and addresses the “failed state” scenario in which a “State’s legal and administrative structures have completely broken down.”⁹ However, some argue that Article 17 covers circumstances where states are unable to conduct trials meeting international human rights standards.

A. Ambiguity of Inability Terminology

Inability is an ambiguous term, and even members of the court have admitted that the jurisdictional authority stemming from the “unable” term remains unclear. In an address to the Canadian Department of Justice, President of the ICC Phillipe Kirsch explained that, when it comes to the principle of complementarity “[t]he Court will really have to invent, create and define the meaning of a state that is unable or unwilling to conduct

⁶ John R. Bolton, Remarks to the Federalist Soc’y: The United States and the International Criminal Court, (Nov. 14, 2002), *available at* <http://www.state.gov/t/us/rm/15158.htm>.

⁷ *Id.*

⁸ El Zeidy, *supra* note 3, at 903.

⁹ Katherine L. Doherty & Timothy L.H. McCormack, “Complementarity” for Comprehensive Domestic Penal Legislation, 5 U.C. DAVIS J. INT’L L. & POL’Y 147, 152 (1999).

'genuine' proceedings."¹⁰ If the provision must be left to the court's judges to "invent" and "create," it certainly lacks clarity and is subject to varying definitions.

The most popular definition is the one cited by the ICC's website, stating that "[a] country may be 'unable' when its legal system has collapsed."¹¹ Others contend that:

[t]he criteria for inability are clearly provided in Article 17(3) in [an] objective way. 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.

While this definition may be objective it is far from clear, particularly because no established definition for the term "collapsed" exists. According to one scholar, collapsed refers to a legal system that is "insufficiently organized to gather evidence or is 'otherwise unable to carry out its proceedings.'"¹² Another states that "[i]nability is confined to a total or partial collapse of the criminal justice system of the State concerned,"¹³ adding more complexity to the terminology by introducing the term "partial collapse." A third believes that inability or collapse refers "primarily to situations in which there is a lack of central government or a state of chaos due to conflict or crisis."¹⁴ None of these proposed definitions shed much light on what inability means, rather they simply restate what's already in Article 17. This reinforces the point that the actual content and operation of "unable" is still unclear.

B. *ICC Procedures for Determining Inability*

Some uncertainty exists as to the actual procedure to be followed to assess inability. For the ICC to determine that a state is "unable," it would have to determine that the state's "ability to administer justice is" in ques-

¹⁰ Kirsch, *supra* note 1.

¹¹ See Int'l Criminal Court, Frequently Asked Questions, <http://www.icc-cpi.int/about/ataglance/faq.html> (last visited May 17, 2007).

¹² Mireille Delmas-Marty, *Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 J. INT'L CRIM. JUST. 2, at 5-6 (2006) (citing I.C.C. Office of the Prosecutor, *Paper on Some Policy Issues*, Sept. 2003, at 4).

¹³ Johan D. van der Vyver, *Jurisdiction of the International Criminal Court*, FREDERICK K. COX INT'L LAW CENTER RESEARCH PORTAL, Sept. 23, 2003, http://law.case.edu/war-crimes-research-portal/instant_analysis.asp?id=5.

¹⁴ Delmas-Marty, *supra* note 11, at 5-6.

tion.¹⁵ This assessment would require a determination that “the state lacks effective mechanisms to obtain the accused or the necessary evidence and testimony; or that it is otherwise unable to carry out proceedings.”¹⁶ According to an official ICC policy paper, the provision on inability to investigate or prosecute “was inserted to take account of situations where there was a lack of central government, or a state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems”¹⁷

According to an informal ICC paper,¹⁸ the inability assessment first considers “collapse” or “unavailability” of the national judicial system, and then the state’s ability to obtain the accused or the evidence and testimony.¹⁹ Article 17 includes a catchall clause which raises for consideration whether a state is “otherwise unable to carry out proceedings.” The factors to consider when determining “inability” include the:

- lack of necessary personnel, judges, investigators, prosecutor [*sic*];
- lack of judicial infrastructure;
- lack of substantive or procedural penal legislation rendering system “unavailable”;
- lack of access rendering system “unavailable”;
- obstruction by uncontrolled elements rendering system “unavailable”;
- amnesties, immunities rendering system “unavailable.”²⁰

While the informal paper set forth seemingly objective criteria, the addition of further factors to consider increases the ambiguity of the process. The ICC has presented no paper or guidance indicating what weight will be attributed to the criteria outlined above. For example, if a tribunal has an adequate number of judges, investigators and prosecutors but lacks an appropriate number of personnel in its outreach office, is the tribunal thus “unable.” Or must all of the inability factors be met for a tribunal to be deemed “unable.” The ICC has provided very little guidance beyond the informal paper, which is the only substantive examination of possible inability considerations. This ambiguity and lack of consensus has resulted in expansive

¹⁵ Sarah Sewall & Carl Kaysen, *The United States and the International Criminal Court: The Choices Ahead*, AM. ACAD. OF ARTS & SCI., (2002), <http://www.amacad.org/projects/iccarticle.aspx>.

¹⁶ MARIANA PENA, AM. NON-GOVERNMENTAL ORG. COALITION FOR THE INT’L CRIM. CT., THE PRINCIPLE OF COMPLEMENTARITY 2 (2005), available at <http://www.amicc.org/docs/Complementarity.pdf>.

¹⁷ THE AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT, THE PRINCIPLE OF COMPLEMENTARITY n.5 (2005).

¹⁸ INT’L CRIM. CT. OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE (2003) [hereinafter INFORMAL PAPER], available at <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf>.

¹⁹ *Id.* at 15 (suggesting criteria for “inability”).

²⁰ *Id.* at 31.

notions of inability and has prompted some advocates to urge an expansive definition of ICC jurisdiction.

C. *Lack of Consensus Yields Expansive Notions of Inability*

1. Due Process Thesis

It is clear that the ICC informal paper attempted to define inability. However, this resulted in the addition of several more factors of consideration, factors which vary from the definitions of inability set forth by other experts, court officials, and even official court documents. Absent a clear definition of “unable,” states do not know the current scope of the ICC’s jurisdiction or how far it may expand. Many scholars have sought to fill the void with an aspirational vision of the ICC’s jurisdiction. These scholars state that inability refers to the lack of substantive law or the existing legislation which does not meet the standards of recognized international human rights. Professor Kevin Jon Heller described this theory as the “due process thesis.”²¹ This “due process thesis” presents a clear possibility of expanded ICC jurisdiction.

The “due process thesis” asserts that the jurisdiction of the ICC may extend to any nation which cannot conduct a trial meeting international standards of “due process.” For example, as Mark Ellis and others state: “If [s]tates desire to retain control over prosecuting nationals charged with crimes under the ICC Statute, they must ensure that their own judicial systems meet international standards. At a minimum, states will have to adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights of defendants.”²²

²¹ Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 256–57 (2006).

²² 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.”); Albin Eser, *For Universal Jurisdiction: Against Fletcher’s Antagonism*, 39 TULSA L. REV. 955, 960 (2004) (“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”) (citation omitted); 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”).

2. The Textualist Approach

While most scholars subscribe to the “due process thesis,”²³ Professor Heller, follows what I deem a textualist approach, more faithful to the language of the ICC Statute. Heller states that “article 17’s text, context, purpose, and history—the basic principles of treaty interpretation—all clearly indicate that a State’s failure to guarantee a defendant due process is not currently a ground for admissibility.” When the ICC reads the provisions of Article 17 regarding the meaning of “unable,” Heller questions whether the court must also consider the prior language and development of the unwilling provisions.²⁴ By critically analyzing the drafting history and specific language of the ICC Statute relating to the unwillingness determination, he concludes that the due process thesis is wholly ruled out both by the text and by the drafting history of Article 17. Once a state begins to conduct a prosecution, the ICC can only exercise jurisdiction over a case if it finds that the state’s substantive law deficiencies benefit the defendant, that is to say those deficiencies make it easier for the alleged perpetrator to evade justice.²⁵ He refers to this conclusion as the “‘shadow side’ of complementarity.”²⁶

Through this textualist approach, Heller addresses the “due process thesis” as it relates to inability. Heller states that one would not “ordinarily describe a functioning national judicial system that lacks certain due process protections as one that has ‘collapsed’ or become ‘unavailable.’”²⁷ In fact, he points out that “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.”²⁸ In assessing these criteria Heller flatly concludes that the only type of inability that could satisfy Article 17(3) is that which “prevents a State from effectively investigating or prosecuting the accused. Collapse or unavailability that prevents the State from fairly investigating or prosecuting . . . doesn’t qualify.”²⁹ However he leaves open the possibility that textual ambiguity in article 17(3), “regarding

²³ Heller, *supra* note 21, at 256–57.

²⁴ See *id.* at 271–73. Article 17 of the ICC Statute states that a case is inadmissible when “[t]he 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.” ICC Statute, *supra* note 4, at art. 17, ¶ (1)(a) (emphasis added).

²⁵ See Heller, *supra* note 21, at 273.

²⁶ *Id.* at 273.

²⁷ *Id.* at 264.

²⁸ *Id.*

²⁹ *Id.*

the paragraph's 'otherwise unable to carry out its proceedings' language" may allow the due process thesis to prevail.³⁰

3. ICC Migration toward "Due Process Thesis"

Despite the Professor Heller's well-reasoned analysis, the ICC has seemingly subscribed to the due process thesis, ignoring the lack of specific textual support for this approach in the ICC statute.³¹ The Report of the Commission of Inquiry on Darfur illustrates this point.³² The commission considered whether Sudan was "unable and unwilling to prosecute and try the alleged offenders."³³ The report explains the legal meaning of the principle of complementarity,³⁴ and provides six reasons to refer the situation to the ICC, two of which are relevant to this discussion of inability, and instructive regarding the ICC's analysis of inability.³⁵ The commission's reasons for a referral to the ICC included "the fair trial guarantees offered by the international composition of the Court and by its rules of procedure and evidence; the ability to intervene immediately; and finally the lack of 'significant financial burden' to the international community."³⁶

The first of these conclusions suggests that the commission subscribes to the due process thesis. Due process thesis proponents specifically look to fair trial guarantees in determining whether a state is able to conduct a trial, and the commission report highlights the same concerns, preferring the ICC for its "fair trial guarantees" and "its rules of procedure and evidence."³⁷

The second conclusion of the commission addresses the court's ability to act quickly, suggesting that unnecessary delays are an acceptable criterion for ICC referral determinations. Such a conclusion may have been designed to ensure that the commission's recommendations were not interpreted to support an ad hoc tribunal such as the Yugoslavia or Rwanda tri-

³⁰ *Id. But*, Heller makes clear that this possibility is foreclosed by the textual history of Article 17.

³¹ *See id.* at 260–77 (addressing the Report of the Commission of Inquiry on Darfur in terms of willingness and genuineness, but not on ability grounds).

³² Delmas-Marty, *supra* note 11 (citing The Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶¶ 574, U.N. Doc. S/2005/60 (Jan. 25, 2005) available at <http://www.ohchr.org/english/darfur.htm>; *see also* Symposia, 3 J. INT'L CRIM. JUST. 539, 539–607 (2005)).

³³ The Int'l Comm'n of Inquiry on Darfur, *Report to the United Nations Secretary-General*, ¶¶ 568, 586, 627, U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter *Darfur Commission Report*], available at <http://www.ohchr.org/english/darfur.htm>.

³⁴ *Id.* ¶¶ 606–09.

³⁵ *Id.* ¶ 648.

³⁶ Delmas-Marty, *supra* note 11, at 5–6.

³⁷ *Id.* at 5–6.

bunals, which take years to build, staff, and begin hearing cases.³⁸ However, given the ICC's permanency, it is difficult to imagine any post-conflict circumstance where the ICC would not have an advantage over a domestically constituted tribunal when measured in terms of its "ability to act quickly." A pre-existing court will always be able to act more quickly than a post-conflict nation could establish a court and commence proceedings.

4. Implications of the "Due Process Thesis" For Inability Determinations

The due process thesis represents an expansion of the principles of complementarity beyond those contemplated during the ICC Statute drafting, at least with respect to the ability of a tribunal to provide "fair trial guarantees," "rules of procedure and evidence," and swift justice on par with ICC standards.³⁹ During the creation of the ICC Statute, states were concerned that they might be deemed unable to genuinely carry out proceedings "simply because of a comparative lack of resources or because of a lack of full compliance with all human rights standards."⁴⁰ The central question is whether "proceedings are so inadequate that they cannot be considered 'genuine' proceedings."⁴¹ The "due process thesis" raises serious questions about the complementarity regime, the role local justice can play in a state's good faith efforts to provide post-conflict accountability, and the degree of competency required from such efforts to preclude the ICC from asserting jurisdiction?⁴²

³⁸ *Darfur Commission Report*, *supra* note 32, ¶ 574 ("Given that international action is urgently needed, one might consider opportune to establish an ad hoc International Criminal Tribunal, as was the case for previous armed conflicts such as those in the former Yugoslavia and in Rwanda, when the ICC did not exist yet. However, at least two considerations militate against such a solution. First, these Tribunals, however meritorious, are very expensive. Secondly, at least so far, on a number of grounds they have been rather slow in the prosecution and punishment of the indicted persons. It would seem that it is primarily for these reasons that at present no political will appears to exist in the international community to set up yet another ad hoc International Criminal Tribunal (another major reason being that now a permanent and fully-fledged international criminal institution is available)"). *See also* Helen Cobban, *Think Again: International Courts*, FOREIGN POLICY, Mar.–Apr. 2006, at 22 (arguing that modern ad hoc tribunals are "prolonged and expensive" and noting that "[a]s of November 2005, the ICTR had handed down judgments for only 25 individuals[, and that] more than \$1 billion has been spent on the tribunal so far, or about \$40 million per judgment").

³⁹ Heller, *supra* note 21, at 25–26.

⁴⁰ INFORMAL PAPER, *supra* note 17, at 8.

⁴¹ *Id.*

⁴² Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 4–5 (2006). "Under the doctrine of complementarity, the ICC can only exercise jurisdiction where a state is deemed 'unwilling or unable' to investigate or

The above conclusions can be summarized into a spectrum of inability tests. On one end is the most conservative approach, the textualist approach. Under this approach, the ICC will not exercise jurisdiction unless the shortcomings in a tribunal prevent a state from effectively investigating or prosecuting the accused: inability that prevents the state from fairly investigating or prosecuting does not qualify.

The middle—and perhaps the most ambiguous—approach is that articulated in the ICC Informal Paper⁴³ and expanded on in the Darfur Commission Report.⁴⁴ This approach is ambiguous because it introduces a series of factors lacking precise definitions or weight. Factors to consider include “collapse” or “unavailability” of the national judicial system,⁴⁵ the state’s ability to obtain the accused, or the evidence and testimony,⁴⁶ an ambiguous catchall clause considering whether a state is “otherwise unable to carry out proceedings,”⁴⁷ as well as at least six other facts and evidence criterion, fair trial guarantees, the state’s ability to intervene quickly, and the financial burden to the international community. In short, this approach introduces so many criteria that an inability determination may be entirely discretionary.

Finally, the most expansive definition is that advocated by “due process thesis” proponents. The “due process thesis” asserts that a nation unable to conduct a trial that meets international standards of “due process” may fall within the jurisdiction of the ICC; to avoid ICC jurisdiction, states will have to adhere to standards of due process found in international human rights instruments, especially those related to the rights of defendants.⁴⁸

Scholarly commentary, official court statements, and the Report of the Commission of Inquiry on Darfur all provide ambiguous criteria for making inability determinations. However, the trend amongst them suggests that the court is migrating toward the “due process thesis.” As will be discussed below, this theory of expanded ICC jurisdiction portends that a national jurisdiction whose good faith efforts at local justice resulted in a tribunal like the IHT would not retain jurisdiction over its defendants.

prosecute the crime.” *Id.* at 5 n.17 (citing ICC Statute, *supra* note 4, art. 17; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 66–70 (2001)).

⁴³ INFORMAL PAPER, *supra* note 17.

⁴⁴ *Darfur Commission Report*, *supra* note 32.

⁴⁵ INFORMAL PAPER, *supra* note 17, at 15.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Heller, *supra* note 21, at 241 (describing the due process thesis).

III. THE IHT AS AN ANALYTICAL TOOL

A. *Significance of the IHT*

The Dujail case is an important test for the complementarity regime. The IHT is the world's first "internationalized domestic tribunal," and is "likely to serve as a new kind of model for bringing former leaders to justice throughout the world, which will complement other options such as trial before the International Criminal Court or before Hybrid International-Domestic tribunals like the Special Court for Sierra Leone."⁴⁹

The IHT and the War Crimes Chamber of the Court of Bosnia and Herzegovina are the first of a new breed of domestic tribunals combining elements of international and domestic war crimes courts.⁵⁰ Seated in Baghdad with all Iraqi judges, the IHT is independent from the ordinary Iraqi court system, it is assisted by international advisers, and "its constituent instruments incorporate the definitions of crimes and due process rights contained in the statutes of the existing international war crimes tribunals and stipulate that the precedent of those tribunals are to guide the decisions of the IHT."⁵¹

The IHT's procedures, definition of crimes, and standards of due process will serve as a model for Iraqi courts and other courts in the Middle East.⁵² "In the future, internationalized domestic tribunals like the IHT may play an increasingly important role in the growing accountability web for atrocity crimes, a web which also includes the International Criminal Court, the Security Council-created ad hoc war crimes tribunals for the former Yugoslavia and Rwanda, the UN-created hybrid war crimes tribunals for Sierra Leone, East Timor, and Cambodia, and ordinary national courts."⁵³ With such high stakes, it is critical to assess whether the IHT meets the standards of ability necessary to preclude ICC jurisdiction. If so, then other "internationalized domestic tribunals" can follow the IHT model with confidence; however, if the tribunal does not meet the standard necessary to preclude jurisdiction, then key lessons can be drawn from the IHT's experience to improve future "internationalized domestic tribunals."

⁴⁹ Michael P. Scharf, *Is the Saddam Trial One of the Most Important Court Cases of All Time?*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 230 (Michael P. Scharf & Gregory S. McNeal, eds., 2006).

⁵⁰ Michael P. Scharf, *Lessons from the Saddam Trial*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 232 (Michael P. Scharf & Gregory S. McNeal eds., 2006).

⁵¹ *Id.*

⁵² *Id.* at 232.

⁵³ *Id.*

B. *Criticism of the IHT*

Human Rights Watch (HRW) and the International Center for Transitional Justice (ICTJ) criticized the IHT for failing to meet sufficient administrative, procedural, and substantive standards to ensure a fair trial, criticism which I summarize below.⁵⁴ The opinions of NGOs such as these are important because in the past, the ICC has cited to research and reports of these NGOs as persuasive authority for its decisions,⁵⁵ has considered their opinions in developing and planning activities of the court,⁵⁶ and has even catalogued their reports on the ICC website as legal tools for researchers.⁵⁷ Given the definitional ambiguity I addressed above, questions arise regarding the circumstances that would allow the ICC to assume jurisdiction over a case. “[T]he admissibility criteria of the [ICC] Statute provide but a thin set of guidelines or a skeletal framework for national judiciaries Despite efforts to expand on the criteria developed at Rome, the Statute leaves much for the Court to specify in early cases testing admissibility.”⁵⁸

⁵⁴ Human Rights Watch, *Iraq: Dujail Trial Fundamentally Flawed*, HUMAN RIGHTS NEWS, Nov. 20, 2006, available at <http://hrw.org/english/docs/2006/11/20/iraq14589.htm>; International Center for Transitional Justice, Briefing Paper, *Dujail: Trial and Error?*, at 11–15 (Nov. 2006), available at <http://www.ictj.org/images/content/5/9/597.pdf>.

⁵⁵ See Amicus Curiae Brief of the Prosecutor, *Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC* (Aug. 25, 2006), available at http://www.icc-cpi.int/library/cases/ICC-02-05-14_English.pdf (describing Human Rights Watch reports as “reliable”); see also *Prosecutor’s Response to Cassese’s Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC* (Sept. 11, 2006), available at http://www.icc-cpi.int/library/cases/ICC-02-05-16_English.pdf (relying on Human Rights Watch observations regarding sustained fighting in Darfur); *Letter of the Prosecutor Regarding the Situation in Iraq* (Feb. 9, 2006), available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (citing Human Rights Watch reports regarding factual circumstances), *Defence Appeal Against the Decision on the Defence Challenge to Jurisdiction of 3* (Oct. 26, 2006), available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-620_English.pdf (citing to Human Rights Watch Report about the arrest of Thomas Lubanga Dyilo).

⁵⁶ See REPORT ON THE STRATEGIC PLANNING PROCESS OF THE INTERNATIONAL CRIMINAL COURT, ICC Fifth Session Assembly of State Parties (Nov. 20, 2006), http://www.icc-cpi.int/library/asp/ICC-ASP-5-30_English.pdf.

⁵⁷ See ICC Website Legal Tools, <http://www.icc-cpi.int/legaltools/right.php?p=L0kuIE5hdGlvbmFsIGp1cmVzZGljdGlvbnMvQXVzdHJhbGhL1JlcG9ydHMgb24gSHVtYW4gUmlnaHRz> (last visited May 28, 2007).

⁵⁸ William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT’L L., 557, 576 (2005) (“The Pre-trial Chamber will make apply the complementarity provisions to make determinations of admissibility.”); *Id.* (citing F. Lattanzi, *The International Criminal Court and National Jurisdictions*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 49 (M. Politi & G. Nesi, eds.) (2001) (observing that “it is always up to the Court to decide on issues of complementarity”).

The possible and perhaps inevitable expansion of ICC jurisdiction beyond that contemplated by ICC statute signatories leads to my next question: in the face of the inability tests detailed above and NGO criticism, if Iraq were an ICC participant, would the IHT have avoided ICC jurisdiction? To appropriately address this question I summarize the fair trial guarantee and administrative criticism of the IHT. In light of that criticism, I apply the various inability tests to the IHT, examining the circumstances that would have counseled in favor of ICC jurisdiction,

1. Fair Trial Guarantees

During and after the Dujail case, the IHT was frequently criticized for failing to meet internationally accepted fair trial guarantees.⁵⁹ The Human Rights Watch Report concluded that “[t]he court’s conduct . . . reflects a basic lack of understanding of fundamental fair trial principles, and how to uphold them in the conduct of a relatively complex trial. The result is a trial that did not meet key fair trial standards.”⁶⁰ The International Center for Transitional Justice concluded that “[a] retrial may be the most desirable remedy [for the Dujail trial’s shortcomings] as it would allow the Chamber to seek to correct the procedural flaws as well as the evidentiary gaps—the trial’s two major deficiencies.”⁶¹

Human Rights Watch expressed concerns that the investigation and prosecution in Dujail failed to produce evidence establishing that the high-level defendants knew or had reason to know that crimes would be committed as a result of facially legal orders, or in the absence of explicit orders at all.⁶² This type of evidence is critical to establishing the political structure, authorization, and agreement to commit crimes. Human Rights Watch also criticized the IHT for failing to respect fundamental fair trial rights, listing all such rights guaranteed by international human rights standards.⁶³ Human

⁵⁹ See Nehal Bhuta, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL 5 (Human Rights Watch, 2006) [hereinafter HRW Judging], available at <http://hrw.org/reports/2006/iraq1106/> (“The evolution of the IHT over the past three years has given rise to serious concerns about its capacity to fairly and effectively try these massive crimes in a manner that is consistent with international criminal law and fair trial standards.”). See also Op-Ed, Kim Sengupta, *Is Saddam Hussein getting a fair trial in Baghdad?* THE INDEPENDENT (London) (Sept. 27, 2006) (discussing how the Dujail trial had descended into chaos); Editorial, *Iraq’s Rough Justice*, L.A. TIMES, (Nov. 7, 2006) (finding that the conduct of the Dujail trial had fallen short of American standards of justice).

⁶⁰ HRW Judging, *supra* note 58.

⁶¹ *Dujail: Trial & Error*, *supra* note 53, at 16.

⁶² HRW Judging, *supra* note 58, at 74.

⁶³ *Id.* at 36 (listing the human rights guaranteed in trial).

Rights Watch concluded that these rights “are the minimum requirements for a trial to be considered ‘fair’ in international law.”⁶⁴

2. Administrative Shortcomings

The IHT was also subject to frequent criticism for its handling of administrative issues. Administratively, the IHT is charged with “crucial responsibilities both inside and outside the courthouse. These include handling the court’s documentation . . . assisting the chambers, prosecutors, and defense office, forming a victims and witnesses unit, overseeing the detention of defendants, as well as communicating with the media.”⁶⁵ Human Rights Watch correctly states that “[c]ompetent administration is essential for any court to run effectively, but in the case of courts adjudicating multi-defendant trials concerning large-scale crimes, court administration is the fulcrum on which the trial pivots.”⁶⁶ While I have separated fair trial guarantees from administrative criticism, as did the NGO reports, the two are interlinked. Parties cannot effectively conduct a trial without administration that ensures access to evidence and witnesses, as well as clear motion practice.

Human Rights Watch asserts that, despite statutory direction, and despite the clear importance of administrative functions, the IHT has not created an effective administrative body.⁶⁷ Human Rights Watch highlights concerns regarding victims and witness protection, insufficient court documentation, inadequate security for private defense counsel, security concerns impacting the ability to communicate with the public, and equality of resources for the IHT defense office.⁶⁸ According to Human Rights Watch, court administrative staff complained that they received no training or instruction in administrative procedures relevant to trials of this kind,⁶⁹ while several judges asserted that the administration of the documentation and records of court proceedings was so poor that they could not easily determine which motions and documents they had received.⁷⁰

Voicing similar concerns, the ICTJ report stated that “In practice . . . the administrative structure outlined in the Tribunal’s framing laws has

⁶⁴ *Id.* at 37.

⁶⁵ *Dujail: Trial & Error*, *supra* note 53, at 14., “The goal of the unit is to protect anyone at risk, ‘on account of the testimony they give’ at the Tribunal, and includes safety measures, short and long term plans for protection, and medical treatment, counseling and rehabilitative support.” *Id.* at n. 45 (quoting Article 15 of the [IHT] Rules of Procedure).

⁶⁶ HRW Judging, *supra* note 58, at 12.

⁶⁷ *Id.* at 88.

⁶⁸ *Id.* at 88–89.

⁶⁹ *Id.* at 14.

⁷⁰ *Id.*

failed to function. A critical issue has been a lack of leadership. Administrative directors have been purged and replaced, and the director's duties have been divided among other IHT officials on an ad hoc basis.⁷¹ According to the ICTJ report, the administrative errors resulted in "concerns that went beyond inefficiency."⁷² Defense counsel complained that "very limited disclosure of witness identities (an hour before proceedings) damaged their ability to confront witnesses."⁷³ No written transcript was available during the trial phase, affecting final statements and limiting public understanding of events.⁷⁴ Unless an unedited transcript is subsequently produced, defendants will not have a court transcript on which to base appeals.⁷⁵

C. *Applying the Inability Tests to IHT Criticism*

1. Textualist Approach

Under the textualist approach detailed earlier, the deficiencies in fair trial guarantees highlighted by Human Rights Watch and the ICTJ would not have risen to the level necessary to allow the ICC to exercise jurisdiction. Under the textualist approach, inability preventing a state from fairly investigating or prosecuting a defendant does not establish jurisdiction. This is Heller's "shadow side" of complementarity,⁷⁶ whereby an inability determination is only appropriate when the purported inability advantages the defendant, potentially shielding him from prosecution. Even assuming arguendo that all of the HRW and ICTJ assertions were true, the deficiencies highlighted above, such as a failure to respect human rights standards or failure to present sufficient evidence to justify a conviction, all served to make a conviction more likely and therefore under a textualist approach would not justify jurisdiction premised upon inability.

From a textualist perspective, the administrative criticism presents a closer inability call than did criticism regarding fair trial guarantees. Following the logic of the textualist test, only an inability determination potentially shielding a defendant from prosecution can qualify. When objectively measured, some of the administrative and procedural shortcomings of the IHT posed by Human Rights Watch and the International Center for Transi-

⁷¹ *Dujail: Trial & Error*, *supra* note 53, at 14. *stating* "Salem Chalabi, the original Director, was replaced in August 2004; his replacement was removed in August 2005; the post has been vacant since. The tasks of media outreach and establishing a victims and witness protection unit were assigned to the chief investigative judge." *Id.* at n. 46.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*; *see also id.* at n.47 (comparing "article 53 of the Rules of Procedure, mandating the preservation of trial records.").

⁷⁶ *See Heller*, *supra* note 21.

tional Justice may have favored the defendants. Of course, given the outcome of the trial they were not dispositive, however they may in the narrowest sense run to the advantage of the defense.

For example, procedures (or the lack thereof) for dealing with documentation may have created circumstances where key prosecutorial evidence and motions were lost; depending upon the importance of these documents, this certainly could benefit the defendant. Moreover, the Human Rights Watch report points out administrative difficulties were not limited to support of the defense office, but also included assistance to chambers and to prosecutors.⁷⁷ Furthermore, the reports point out that the proceedings lacked protections for victims and witnesses.⁷⁸ This presents a potentially substantial advantage for the defendants, by increasing the possibility that opposing witnesses would choose not to testify for fear of reprisals.

Also, the chaotic and sporadic communication with the media, highlighted in reports as outreach deficiencies,⁷⁹ could present a case for inability under a textualist approach. In the Dujail case, the defense conducted outreach efforts more sophisticated than those of the prosecution, which was slow to develop a media strategy and to respond to defense comments to the press.⁸⁰ This situation was not rectified until halfway through the Dujail case, when the prosecution entered key documentary evidence against the defendants and went to the media to explain the significance of the evidence.⁸¹ Such inability benefited the defendants: while it may not have shielded them from justice, it may have marginally increased the likelihood of an acquittal.

Overall, under a textualist approach it is unlikely that the ICC would exercise jurisdiction over the IHT and its defendants. While there were some flaws, very few of those flaws helped the defendants. If anything, most criticism alleged that the tribunal was a show trial, aimed at

⁷⁷ HRW Judging, *supra* note 58.

⁷⁸ *Id.* See also *Dujail: Trial and Error*, *supra* note 53.

⁷⁹ HRW Judging, *supra* note 58; *Dujail: Trial and Error*, *supra* note 53.

⁸⁰ See Frederick K. Cox International Law Center, Archived Webcast, Lessons from the Saddam Trial, Saddam Onstage: Assessing the Media Coverage of the Trial, Opening Comments of Gregory S. McNeal, <http://law.case.edu/centers/cox/webcast.asp?dt=20061006&type=rm&a=4> (noting that “buffoonery” often overshadowed the evidence in the Dujail trial since “the prosecution wasn’t necessarily doing as much [media] outreach as it could have” in the case).

⁸¹ See *id.* (noting a shift in media coverage when the prosecution presented this documentary evidence to the tribunal and to the media); See also *Saddam on Trial*, Comments of Gregory S. McNeal, (C-SPAN 2 Book TV broadcast Nov. 29, 2006), available at <http://www.lawandterrorism.com/posts/1173142912.shtml>.

securing a conviction of the defendants,⁸² an unfortunate “shadow side”⁸³ of the complementarity regime, but not one that would justify ICC jurisdiction.

2. ICC Informal Paper and Darfur Commission Report Approach

The ICC Informal Paper and the Darfur Commission Report each provide a series of elements and factors to consider when making an inability determination. Because these factors overlap and complement one another, I have combined them into a series of tests detailed below representing a middle approach between the textualist approach and the due process theorist approach. However, as was highlighted above, this approach appears to be migrating towards the due process theorist approach.⁸⁴

The approach of the ICC Informal Paper and Darfur Commission Report considers a series of elements that are somewhat ambiguous and oftentimes contradictory. The first of these elements is the “collapse” or “unavailability” of the national judicial system. Applying this test to the IHT, this criterion is clearly not satisfied; it would be difficult to argue that the judicial system had collapsed or was unavailable, at least for the Dujail case.

The second element deals with the state’s ability to obtain the accused, the evidence, and the testimony necessary to effectively conduct a trial. The IHT was clearly able to obtain the accused, as all were in custody well before the trial.⁸⁵ The tribunal also obtained the evidence necessary for the trial; even the Human Rights Watch report and the International Center for Transitional Justice report do not indicate that the tribunal was unable to obtain the necessary evidence to conduct its proceedings. The tribunal utilized a fairly comprehensive investigatory scheme, staffed by investigators from allied nations, non-government organizations, and international bodies.⁸⁶ Similarly, another element highlighted in the ICC Informal Paper and

⁸² Jeannie Shawl, *Former Tribunal Head Says Iraq Wants Show Trial for Saddam*, JURIST, Sept. 23, 2004, available at <http://jurist.law.pitt.edu/paperchase/2004/09/former-tribunal-head-says-iraq-wants.php> (quoting Salem Chalabi, former head of the Iraqi Special Tribunal, who accused the Iraqi interim government of wanting “show trials followed by speedy executions” for Saddam and his cohorts); John Nichols, *A Show Trial and a Show Execution*, THE NATION, Dec. 30, 2006, available at <http://www.thenation.com/blogs/notion?bid=15&pid=152494>; Ravi Agrawal, *Highlights From the World’s Press*, CNN, Nov. 6, 2006, available at <http://edition.cnn.com/2006/WORLD/europe/11/06/tbr.papers> (summarizing criticism and accounts of the trial and its aftermath published in papers around the world).

⁸³ See Heller, *supra* note 21.

⁸⁴ See *id.*

⁸⁵ Michael P. Scharf & Gregory S. McNeal, *Timeline of Events*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 76 (Michael P. Scharf & Gregory S. McNeal eds., 2006) (providing dates of Saddam and his co-defendants capture).

⁸⁶ See U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, IRAQ’S LEGACY OF TERROR MASS GRAVES, http://www.usaid.gov/iraq/pdf/iraq_mass_graves.pdf.

Darfur Commission Report, irrelevant to the IHT analysis, is the cost to the international community; the IHT is staffed almost entirely by local experts, with the international community providing little support to the tribunal.⁸⁷

Not so for the final element of the second factor, the ability of the tribunal to obtain testimony, which was seriously questioned by both Human Rights Watch and the International Center for Transitional Justice Report.⁸⁸ Both NGOs stated that the security situation and lack of witness protection in Baghdad made it difficult to procure witnesses. This inability to secure witnesses cut both ways, presenting difficulty for the prosecution and defense.⁸⁹ However, unlike the textualist approach, the approach favored by the ICC Informal Paper or Darfur Commission Report does not indicate that inability must favor one party—the mere inability to obtain testimony is a considered element, irrespective of whom it benefits.

In the case of the IHT, it took nearly three years for the court proceedings to begin.⁹⁰ The commission report's second conclusion addressed the speed with which a tribunal could begin proceedings. By international criminal law standards, a three year turnaround was relatively quick, especially when compared to the years it took the ICTY and ICTR to begin hearing cases.⁹¹ When analyzed under the commission's approach though,⁹² this

⁸⁷ John B. Bellinger, *Give a Hand to Justice in Iraq*, INT'L HERALD TRIB., Mar. 5, 2006, available at <http://www.iht.com/articles/2006/03/05/opinion/edbell.php> (stating “the international community criticizes the trial from afar but has not found ways to support the Iraqis as they pursue justice and accountability”).

⁸⁸ See *Dujail: Trail & Error*, *supra* note 53, at 10–11.

⁸⁹ See *id.* at 14.

⁹⁰ Michael Moss, *Iraq's Legal System Staggers Beneath the Weight of War*, N.Y. TIMES, Dec. 17, 2006, at A1; see also 2 *Co-Defendants Sentenced to Hang for Dujail Killings*, THE ASSOCIATED PRESS, Nov. 5, 2006.

⁹¹ Gabriel Partos, *Analysis: Serbia in the Dock*, BBC NEWS, Feb. 27, 2007, <http://news.bbc.co.uk/1/hi/world/europe/4748960.stm>; BBC News, *Genocide Suspect Finally on Trial*, BBC NEWS, Sept. 2, 2002, <http://news.bbc.co.uk/1/hi/world/africa/2230784.stm>.

⁹² See *Darfur Commission Report*, *supra* note 32, ¶ 684 (“The Commission holds the view that resorting to the ICC would have at least six major merits Fifth, the ICC could be activated immediately, without any delay (which would be the case if one were to establish ad hoc tribunals or so called mixed or internationalized courts.)”); *id.* ¶ 447 (“The trials are still conducted summarily, as was done by the Special Courts and the death penalty may be pronounced by the court for a wide-range of offences. According to the decree, an appeal must be filed within seven days to the head of the judiciary, who delegates the case to members of the Court of Appeal. This is a rather short period, considering that court records and grounds for appeal need to be prepared before completing filing. Also interlocutory decisions are not subject to any appeal. One cannot but believe that there is an element here to discourage convicted persons from appealing against their convictions. Save for sentences of death, amputations, or life imprisonment, which are heard by a panel of judges, the appeals are heard by one judge. There is no possibility of further judicial review. In a situation where the right of appeal is limited, the likelihood that innocent persons may be put to death is increased.”).

relatively quick turnaround time may still have not prevailed. Any ICC jurisdiction determination will not compare a new domestically constituted tribunal such as the IHT and a new ad hoc tribunal, but rather compare the new tribunal to the ICC, an existing institution.

The ICC Informal Paper and Darfur Commission Report approach also include a catchall element, which considers whether a state is “otherwise unable to carry out proceedings.” This ambiguous clause provides six factors of consideration, three of which are relevant to the IHT proceedings.⁹³

The first factor of the ICC Informal Paper and Darfur Commission Report approach assesses facts and evidence that indicate a “lack of necessary personnel, judges, investigators, or prosecutor”⁹⁴ No one has suggested that the IHT lacked the necessary judges, investigators, or prosecutors. However with respect to personnel generally, the International Center for Transitional Justice Report criticized the IHT for failing to staff key administrative functions in accordance with the mandate set forth by the IHT Statute.⁹⁵ This lack of personnel, they allege resulted in serious deficiencies in the tribunal’s ability to carry out proceedings.

The fourth and fifth factors may apply directly to the case of the IHT. These factors look to a “lack of access rendering system ‘unavailable’” or “obstruction by uncontrolled elements rendering system unavailable;” both factors may have been exacerbated by the security situation, as was highlighted above in the discussion and analysis of the tribunal’s ability to obtain the accused, the evidence and the testimony necessary to effectively conduct a trial.

It is unclear whether a failure to provide fair trial guarantees standing alone would be enough for the ICC to exercise jurisdiction, but the Darfur Commission Report and the ICC Informal Paper certainly suggests the tribunal should consider this element. As highlighted in Section B.1 above, the IHT was frequently criticized for failing to meet internationally accepted fair trial guarantees.⁹⁶ Such criticisms alleged that the IHT lacked an understanding of fair trial principles, and even asserted that a retrial was the only remedy for the trial’s shortcomings.⁹⁷ The ICC Informal Paper and Darfur Commission Report approach does not specifically detail criteria for meeting fair trial guarantees. However, the Darfur Commission Report does cite

⁹³ This paper does not address the second factor, dealing with a lack of judicial infrastructure, the third factor dealing with a lack of substantive or procedural penal legislation, and the sixth factor dealing with “amnesties or immunities,” as the IHT was not criticized with regard to these elements.

⁹⁴ INFORMAL PAPER, *supra* note 17, at 15, 31.

⁹⁵ See *Dujail: Trial & Error*, *supra* note 53, at 8, 14.

⁹⁶ HRW Judging, *supra* note 58, at 36–37.

⁹⁷ *Id.*

to the International Covenant on Civil and Political Rights (ICCPR),⁹⁸ which is generally considered to establish the minimum standards for a fair trial.⁹⁹

3. The IHT Under Informal Paper and Commission Report Approach

The ICC Informal Paper and Darfur Commission Report approach is not clear on whether any one element or factor alone is enough to justify ICC jurisdiction. Such a conclusion seems unlikely, but absent certainty regarding these provisions, states are left without a clear standard for determining what good faith efforts on their part will survive an ICC inability determination. Under the ICC Informal Paper and Darfur Commission Report approach however, a few conclusions are clear about a tribunal such as the IHT.

Assuming that the NGO criticisms of the IHT were correct, the IHT would have failed in three major ways. First, the tribunal would have been deemed unable to obtain the necessary testimony. This inability was attributable to the violent security situation in Iraq, particularly fear of reprisals or assassination attempts against witnesses,¹⁰⁰ and the lack of a victims and witness protection program.¹⁰¹ Related to this is the ability of the tribunal to ensure that the system is not rendered unavailable due to a lack of access or obstruction by “uncontrolled elements.” The security situation exacerbated this factor, too, and may contribute to a determination that the IHT was unable to conduct its proceedings.

Second, the timeliness of the IHT, despite its relatively quick turnaround time when benchmarked against previous war crimes trials, may not have been able to meet the standards of the ICC Informal Paper and Darfur Commission Report approach. This is a simple fact of permanence; if measured against the permanent International Criminal Court, a new tribunal could never establish itself quickly enough to conduct proceedings. Moreover, even assuming that a judicial system in a post-conflict state was fully operational and capable of beginning proceedings, the specialized nature of international criminal law would still require training for judges, prosecutors, and court personnel, adding to the time it would take a tribunal to bring about proceedings. Related to this element, but distinct, is the tribunal’s ability to afford enough personnel, irrespective of their training. The NGO

⁹⁸ *Darfur Commission Report*, *supra* note 32, ¶ 454.

⁹⁹ See generally Amnesty Int’l, *Fair Trials Manual*, at 83–147, AI Index POL 30/002/1998, Dec. 1, 1998, available at [http://web.amnesty.org/library/pdf/POL300021998ENGLISH/\\$File/POL3000298.pdf](http://web.amnesty.org/library/pdf/POL300021998ENGLISH/$File/POL3000298.pdf).

¹⁰⁰ *Saddam Lawyers ‘Need Protection’*, BBC NEWS, Nov. 25, 2005, http://news.bbc.co.uk/1/hi/world/middle_east/4469354.stm.

¹⁰¹ See *id.*

reports criticized the IHT for failing to appropriately staff the IHT in accordance with its statute, a separate issue from the training provided to those personnel. Taken together, it is possible that the timeliness, personnel training and personnel staffing issues would have contributed to a determination that the IHT was unable to proceed.

Third, and perhaps most expansively, the ICC Informal Paper and Darfur Commission Report approach is migrating toward the due process thesis. This approach asks whether the tribunal can provide necessary fair trial guarantees.¹⁰² As was highlighted above the IHT was frequently criticized for failing to provide fair trial guarantees. The NGO reports explicitly relied upon the ICCPR as the standard for fair trial guarantees, a standard accepted by the ICC Informal Paper and Darfur Commission Report approach. If the NGO criticism is accepted as accurate, it suggests that a lack of fair trial guarantees would also contribute to a determination that the IHT was unable to conduct its proceedings.

In summary, the three major shortcomings identifiable under the ICC Informal Paper and Darfur Commission Report approach are (1) inability to obtain testimony and guarantee access to the tribunal, (2) inability to quickly begin proceedings (relative to the ICC) with appropriately trained personnel, and (3) inability to assure fair trial guarantees in accordance with the ICCPR. While it may be simple to identify shortcomings, the more difficult question is whether these shortcomings rise to the level necessary to determine that the tribunal is unable to proceed. The approach applied herein does not specify whether any one of these factors standing alone would be sufficient to make an inability determination. To conclude that any one of these criteria if not satisfied would constitute jurisdiction creates an absurd situation in which any deficiency, no matter how minor, would allow ICC jurisdiction. Such an approach would expand the court's jurisdiction beyond even that of the due process theorist approach. For example, such an approach could mean that a failure to effectively secure testimony in one instance of witness intimidation might rise to an inability determination. Clearly the signatories to the ICC Statute did not intend such an expansive and unclear approach. However, to conclude in the alternative that only some unmet criteria would allow for jurisdiction would require someone to determine which criteria to select, or to determine the weight one criterion should receive at the expense of another. The ICC Informal Paper and Darfur Commission Report approach, while providing additional factors of consideration, has done little to provide states with clarity regarding when the ICC is precluded from exercising jurisdiction. Weighing the factors above, one group of experts could conclude that the IHT was unable to proceed while another group could reach the opposite conclusion. The only clear

¹⁰² INFORMAL PAPER, *supra* note 17, at 15–16.

conclusion is that the ICC Informal Paper and Darfur Commission Report lacks the clarity necessary for effective determinations.

4. Due Process Theorist Approach

The “due process thesis” asserts that a nation that cannot conduct a trial meeting international standards of “due process” may fall within the jurisdiction of the ICC. Under this approach, states must “adhere to standards of due process found in international human rights instruments, particularly as they relate to the rights of defendants.”¹⁰³ Applying this test to the IHT is far less complicated than applying the ICC Informal Paper and Darfur Commission Report test. Under this test though, the tribunal almost certainly would not have retained jurisdiction.

First, the IHT applied the death penalty, regarded by human rights groups as a violation of international law.¹⁰⁴ Furthermore, the IHT’s procedures appeared to violate the ICCPR. Specifically, “Article 6(4) of the ICCPR states that ‘anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases’ The IHT Statute’s prohibition on amnesty or commutation appears to infringe upon the constitutional authority of the president” of Iraq who has the ability to commute sentences under the Iraqi Constitution, but not under cases decided by the IHT.¹⁰⁵ Second, as highlighted above and throughout the NGO reports, many claimed that the IHT failed to meet the international standards necessary to provide for a fair trial. Under the due process theorist approach, if the NGO criticism of the tribunal is accepted as accurate, the IHT would not have been able to preclude ICC jurisdiction.

¹⁰³ Heller, *supra* note 21, at 258 (citing Mark S. Ellis, *The International Criminal Court and Its Implications for Domestic Law and National Capacity Building*, 15 FLA. J. INT’L L. 215, 241 (2002)).

¹⁰⁴ *Iraq: Don’t Add Death Penalty to Dujail Sentence*, Human Rights Watch (Feb. 12, 2007), available at <http://hrw.org/english/docs/2007/02/12/iraq15295.htm> (stating that Human Rights Watch and the ICTJ both consider the death penalty to be an inherently cruel and inhuman punishment); See also Mike Newton, *Should Saddam Hussein Be Exposed to the Death Penalty?*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 102 (Michael P. Scharf & Gregory S. McNeal eds., 2006); William Schabas, *Should Saddam Hussein Be Exposed to the Death Penalty?*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 104 (Michael P. Scharf & Gregory S. McNeal eds., 2006); Michael P. Scharf, *Should Saddam Hussein Be Exposed to the Death Penalty?*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 106 (Michael P. Scharf & Gregory S. McNeal eds., 2006) (debating the propriety of subjecting the defendants to the death penalty).

¹⁰⁵ HRW Judging, *supra* note 58, at 87.

5. Was the IHT Unable?

Determining whether the IHT would have been able to conduct proceedings in a manner precluding ICC jurisdiction turns upon what test the ICC applies. Under a textualist approach, it is unlikely that the ICC would exercise jurisdiction over the IHT and its defendants. Despite flaws, those flaws ran to the advantage of the defendants; though unfortunate, this does not qualify as shortcoming justifying ICC jurisdiction. Following the ICC Informal Paper and Darfur Commission Report approach, it is not clear whether the ICC would exercise jurisdiction, as the approach lacks the clarity necessary for effective determinations. While seemingly objective criteria were set forth in the paper and the report, the method of applying these criteria, and the authority to do so, leaves open the question as to whether the IHT would have been deemed unable under the IHT approach. Finally, under the due process theorist approach, the IHT would likely have been deemed unable to conduct proceedings in a manner necessary to preclude ICC jurisdiction. If accepted as accurate, the NGO criticism focused extensively on the inability of the tribunal to provide protections meeting international standards of due process,¹⁰⁶ fair trial guarantees,¹⁰⁷ and international human rights.¹⁰⁸

One clear conclusion cutting across all of the tests is the impact of the security situation on ability determinations. Under the textualist approach, an unstable or declining security situation could create a circumstance where inability on the part of the tribunal to effectively conduct its proceeding may have run to the advantage of the defendant. For example, a defendant could be shielded from justice through attacks on judges, prosecutors, and prosecution witnesses. A violent security situation could prevent the tribunal from effectively gathering evidence necessary to prove their case, or could result in the tribunal deciding to forgo holding the proceedings and perhaps even releasing defendants. Such potential outcomes of a violent security situation can all advantage the defendants, and would justify ICC jurisdiction under the textualist approach. Security also has an impact under the Informal Paper and Commission Report approach. Fear of reprisals or assassination attempts against witnesses or members of the tribunal staff¹⁰⁹ and the lack of a victims and witness protection program both related to the security situation.¹¹⁰ Moreover a violent security situation im-

¹⁰⁶ See HumanRightsWatch.org, Tribunal's Flaws Raise Fair-Trial Concerns, <http://www.globalpolicy.org/intljustice/tribunals/iraq/2005/1217fairtrial.htm> (last visited May 28, 2007).

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ INFORMAL PAPER, *supra* note 17, at 30.

¹¹⁰ *Saddam Lawyers 'Need Protection'*, *supra* note 99.

pacts the tribunal's ability to ensure that the system is not rendered unavailable due to a lack of access or obstruction by "uncontrolled elements." Finally, under the due process theorist approach the security situation has a direct impact on ability determinations, particularly as the security situation relates to the defendant's ability to effectively defend his case in accordance with international fair trial guarantees. A violent or declining security situation could impact the defendants' ability to meet with counsel and mount an effective case. This was a fact in the Dujail case, when multiple defense counsel were assassinated or kidnapped.¹¹¹ The "essential ingredient [for a fair trial] is the service of zealous defense counsel who can investigate, confer, speak, and work without fear. A regime that cannot guarantee the opportunity for defense counsel to perform this way cannot claim to dispense justice in its courts."¹¹²

Accepting the security factor as a constant, and considering the other factors detailed in each test one can conclude that the IHT would have been able to conduct proceedings under a textualist approach, and unable under a due process theorist approach. Under the Informal Paper and Commission Report approach, it is unclear whether the IHT would have precluded ICC jurisdiction. However attributing equal weight to each factor, and accepting the arguments put forth by various human rights groups, it seems likely that the IHT would have been deemed unable under the Informal Paper and Commission Report approach.

IV. CONCLUSION AND IMPLICATIONS

As my colleagues and I point out in *Ten Lessons from the Saddam Trial*, the ICC's "complementarity regime" attempts to reflect international recognition that domestic trials have advantages over international trials and are to be preferred unless the national courts are unable or unwilling to prosecute.¹¹³ Despite this fact, "undertaking international war crimes trials is arduous; in a country plagued by sectarian violence and devoid of reliable security mechanisms."¹¹⁴ To preclude ICC jurisdiction, future domestic tribunals will have to ensure they "guarantee the protection of defense coun-

¹¹¹ See Michael P. Scharf, *The Significance of the Kidnapping/Murder of Defense Counsel*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 121 (Michael P. Scharf & Gregory S. McNeal eds., 2006).

¹¹² See Raymond Brown, *The Significance of the Kidnapping/Murder of Defense Counsel*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 123, 124 (Michael P. Scharf & Gregory S. McNeal eds., 2006); See Michael Newton, *Should the IHT Relocate Outside of Iraq?*, in *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* 126 (Michael P. Scharf & Gregory S. McNeal eds., 2006).

¹¹³ Scharf et al., *Ten Lessons from the Saddam Trial*, GROTIAN MOMENT BLOG, http://law.case.edu/saddamtrial/category.asp?category_id=3.

¹¹⁴ *Id.*

sel, as well as the judges, prosecutors and witnesses—whether they desire such protection or not.”¹¹⁵

Second, the vaguely defined concept of inability and the varied tests and interpretations all provide support for ICC critics who assert that the court is seeking expansive jurisdiction, threatening national sovereignty.¹¹⁶ In its early years the ICC will be cautious, however—because its reach is largely judge-made—it may expand beyond that contemplated by signatories to the ICC Statute. In particular, the United States is concerned that

the vast majority of the court’s discretion lies within the Office of the Prosecutor, the ICC offers little opportunity to resolve these issues diplomatically and, because of its lack of appropriate checks and balances to prevent it from being misused, represents a dangerous temptation for those with political axes to grind. Americans need more reliable protection than the goodwill and good judgment of an international legal bureaucrat.¹¹⁷

The vagaries of inability determinations only add support to the arguments of critics.

Third, as domestically constituted tribunals proliferate, it is likely that the textualist theory will prevail in the short term, while the ICC is in its infancy and concerned about its legitimacy. However as it evolves over time, the “due process thesis” will be difficult for the court to resist. In fact, Heller, who provided us the useful textualist theory description, admits that he favors this approach, as do most scholars, with opinions differing only as to how this can be achieved. Heller favors modifying the statute through appropriate diplomatic channels.¹¹⁸ However, given the difficulty, others may be comfortable with achieving these goals through judicial fiat. As Heller points out, “[t]he 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.”¹¹⁹

Fourth, the court’s expanding jurisdiction will not only prevent critics from joining the ICC, but may actually hinder the pursuit of justice and the building of domestic institutions. While an “important ancillary function of the ICC is to prod national jurisdictions to assume their international legal obligations. Implicitly in the minds of some . . . the Court should also provide technical assistance and capacity-building support to the national criminal justice systems in their pursuit of investigations and prosecutions

¹¹⁵ *Id.*

¹¹⁶ ANNE-MARIE SLAUGHTER, KENNETH ROTH, JOHN BOLTON & RUTH WEDGEWOOD, COUNCIL ON FOREIGN RELATIONS, TOWARD AN INT’L CRIMINAL COURT? 31 (1999), available at <http://www.ciaonet.org/conf/cfr22/index.html>.

¹¹⁷ Brett D. Schaefer, *Justice by Fiat*, NAT’L REV ONLINE, Jun. 21, 2004, <http://www.nationalreview.com/comment/schaefer200406210845.asp>.

¹¹⁸ See Heller, *supra* note 21, at 277.

¹¹⁹ *Id.* at n.80.

for international crimes.¹²⁰ This goal is unlikely to be achieved if there is a perception that very few domestically constituted tribunals can meet the standards necessary to preclude ICC jurisdiction. In many circumstances, national jurisdictions may stand back, letting the ICC do the heavy lifting while international support and capacity-building may never come to the fore because of a fear that the ICC will pull the carpet out from under supporters before they can complete their work.

The ICC must determine clear-cut criteria for inability determinations, rather than allowing judges and the office of the prosecutor to make informal determinations about a national jurisdiction's ability to prosecute. While fair minded jurists may disagree about which of the inability factors merit the greatest weight, most can concede that two factors are non-derogable. First, a lack of experienced defense counsel and judges would make a strong case for an inability determination. Second, the inability of witnesses and victims to gain access to the court and its proceedings due to threatened or actual acts of violence undermines the fact seeking determinations of a tribunal. When those security factors rise to a level which prevents the admission of evidence (both inculpatory and exculpatory) the tribunal may be deemed unable.

The task of setting forth clear criteria for inability determinations is an important one. Doing so will prevent the unintended expansion of ICC jurisdiction favored by due process theorists. It will contribute to the development of domestically constituted tribunals, by encouraging states to seek local justice. Finally, it will placate the criticism of ICC opponents and may make it more likely that non-signatories, such as the United States, reconsider their opposition to the court.

¹²⁰ M. Cherif Bassiouni, *The ICC—Quo Vadis?*, 4 J. INT'L CRIM. JUST. 421, 422 (2006).