10. POSSIBLE LACUNAS IN THE ADMISSIBILITY CRITERIA

10.1. INTRODUCTION

Based on the preceding analysis of the admissibility criteria, six possible lacunas can be discerned, four of which might lead to partial or complete impunity. The six situations are: first, where a trial has been completed with proper intentions but resulted in a wrongful acquittal due to the state’s inability to proceed adequately (10.2); second, where the accused has abused a national process which was otherwise adequately conducted (10.3); third, where the accused has been acquitted in a genuine trial but new significant evidence subsequently appears which would have secured a conviction (10.4); fourth, where a convicted person is subsequently pardoned or paroled by the state (10.5); fifth, where the state has conducted a genuine trial as such but failed to characterise the crime as international (10.6); and sixth, where the national proceeding is or has been genuine, but it would, due to the case’s implication for other cases before the ICC, have been desirable to bring it before the ICC (10.7).

10.2. COMPLETED TRIALS AND INABILITY

Article 20(3), dealing with completed national trials, only renders admissible a case where the state has been unwilling, i.e. where it has proceeded for the purpose for shielding the person concerned or where the trial has not been independent and impartial. The provision fails to address the situation where the accused has been acquitted due to the state’s inability to prosecute genuinely. The reasoning has probably been that once the state has completed a trial, it has demonstrated sufficient ability. Yet, the ability to complete a trial is one thing; the ability to complete it genuinely another. The state might, for instance, have been unable to “obtain the necessary evidence” due to problems described in article 17(3), i.e. collapse or unavailability. The case will still be inadmissible unless the ICC concludes that the “trial” does not qualify as a trial due to the inability, bringing the matter outside the scope of article 20(3) in the first place. A problem with that, however, is that article 17(1) (a), which refers to the state’s inability in the context of an ongoing trial (i.e. “prosecution”), does not disqualify the trial as such but merely characterises it as non-genuine. Thus, a trial as described above can scarcely be considered a non-trial, although a “trial” might exceptionally be a non-trial. Thus, while the trial is still ongoing, the case might be deemed admissible, but once the trial is completed, the trial bars ICC interference. The result is at odds with the Statute’s purpose.
One might argue that where an unable state has conducted a trial, it indicates that the state is also unwilling. Such inference may or may not, depending on the circumstances, be reasonable. When the state has started a trial with the right intentions, but as it turns out it is unable, it might be difficult, perhaps impossible, for the state under the domestic legislation to call off the trial without acquitting the accused.\textsuperscript{1045} It is submitted that the failure of article 20(3) to refer to the state’s inability in the context of a completed trial is a flaw.

10.3. THE ACCUSED HAS ABUSED THE NATIONAL PROCESS

Article 20(3) also fails to cover the situation where the state has demonstrated willingness to proceed genuinely, but the accused has escaped justice by abusing the process, \textit{e.g.} by bribing or intimidating witnesses, tampering with evidence, \textit{etc}. Here the state will not have proceeded “for the purpose of shielding the accused”. The same is implied by the term “inconsistent with an intent to bring the person to justice”, which seems exclusively to refer to the intent of the state. While such abuse probably will constitute an offence in all national justice systems, not all domestic legislations list this as a ground for revisiting an acquittal. The \textit{ne bis in idem} principle might entitle the acquitted person to rely on the acquittal even when it was the result of such abuse. One such a situation is described by a New Zealand court. Here the person concerned had escaped conviction for murder by committing conspiracy to pervert the course of justice. He could later only be prosecuted for the conspiracy. The High Court remarked that the

\begin{quote}
“maximum sentence [for the conspiracy] is an encouragement to offenders like you to commit the type of conspiracy you committed. The law does not permit you to be retried for the murder you committed as you were acquitted of it because of your conspiracy. You escape the sentence of life imprisonment that should be the minimum you receive. Instead you receive a much lesser sentence.”\textsuperscript{1046}
\end{quote}

\textsuperscript{1045} When the prosecution is unable to establish evidence beyond reasonable doubt as to the guilt of the accused, the accused will be acquitted, unless the court avoids handing down a verdict altogether. The national prosecutor might feel compelled to seek an acquittal, due to the right of the accused to be tried “within a reasonable time”, see \textit{e.g.} article 6(1) of the ECHR, or due to the provision in 6(1) that the person shall be presumed innocent until proved guilty according to law”, \textit{ibid.}, article 6(2).

\textsuperscript{1046} \textit{R. v. Moore}. The accused could apply for release on parole after only two years and four months, whereas murder carried a minimum non-parole period of ten years. New Zealand has