The International Criminal Court and Libya: Complementarity in Conflict

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Introduction

This is a summary of an event held by the International Law Programme at Chatham House. The meeting was convened in order to analyse the recent decisions of the International Criminal Court (ICC) in the cases concerning the former intelligence chief Abdullah al-Senussi and Saif al-Islam Gaddafi, son of the late Libyan leader, and to discuss the complex legal and policy issues arising from the on-going violence and political unrest in Libya. This summary amalgamates various strands of the discussion involving the speakers and participants at the meeting. Five major themes arose:

1. The principle of complementarity as the basis of ICC jurisdiction;
2. The ICC’s factual determinations and legal reasoning in the Gaddafi and al-Senussi admissibility decisions and the impact of the ICC’s approach for the principle of complementarity;
3. Recent developments in Libya and how the ICC has responded, and ought to respond, to these developments;
4. The potential for legal capacity-building in Libya and the challenges associated with such efforts;

The meeting was not held under the Chatham House rule. However, the comments and opinions presented by each speaker were made in their own personal capacity and in no way reflect the views of their respective institutions or employers.

The principle of complementarity

The Preamble to the Rome Statute states that the ICC was established with the aim of ending impunity for ‘the most serious crimes of concern to the international community as a whole’. Rather than an alternative to national prosecution, the ICC’s jurisdiction is complementary to it. Primary jurisdiction for the crimes within the ICC’s jurisdiction rests with states. The Preamble reiterates the essential ‘duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’ and emphasizes that the ICC’s jurisdiction ‘shall be complementary to national criminal jurisdictions’. Under Article 17 of the Rome Statute, in circumstances where a state is genuinely willing and able to prosecute nationally, the case will be inadmissible before the ICC.

When considering issues of complementarity, the question is therefore who ought to prosecute a person accused of one of the offences within the ICC’s jurisdiction: a state or the ICC? Where the ICC has issued an arrest warrant, the onus falls on the state claiming jurisdiction to demonstrate that the ICC cannot exercise jurisdiction as the case is inadmissible pursuant to Article 17. In making its case, the state concerned bears the burden of demonstrating three things: first, that it is actively investigating the same case (i.e. the same person and substantially the same conduct); second, that the state is willing to bring the person to justice, as understood in the statute; and third, that the state has the capacity to bring the person to justice. In both the Gaddafi and al-Senussi cases, Libya challenged the ICC’s jurisdiction on the ground that, as it was willing and able to prosecute nationally, the cases were inadmissible.

1 This summary was prepared by Callum Musto.
The **Al-Senussi and Gaddafi cases**

The ICC’s reasoning

The ICC issued arrest warrants for Saif Al-Islam Gaddafi and Abdullah Al-Senussi on 27 June 2011 for their alleged criminal responsibility as indirect co-perpetrators on two counts of crimes against humanity – murder under Article 7(1)(a) and persecution under Article 7 (1)(h) of the Rome Statute. Libyan authorities filed challenges to the admissibility of both cases.

On 31 May 2013, the Pre-Trial Chamber rejected Libya’s challenge to the admissibility of the case against Gaddafi and concluded that Libya had fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, that Libya’s domestic investigation covered the same case that is before the ICC. The Pre-Trial Chamber also found that Libya was genuinely unable to carry out the investigation and prosecution of Gaddafi because of its inability to secure the transfer of Gaddafi into state custody from his place of detention in Zintan, the lack of capacity to obtain necessary testimony, and the inability of judicial and governmental authorities to exercise full control over certain detention facilities and to provide adequate witness protection, as well as significant practical impediments to securing legal representation for Gaddafi. On 21 May 2014, the Appeals Chamber rejected Libya’s appeal against the Pre-Trial Chamber’s decision and confirmed that the Pre-Trial Chamber did not err when it concluded that Libya had not provided enough evidence to demonstrate that it was investigating the same case as the one before the ICC. Having found that Libya was not investigating the same case, the Appeals Chamber did not proceed to consider the arguments about Libya’s ‘inability’ to carry out the domestic proceedings. Judge Song appended a separate opinion arguing that in his view Libya was investigating the same case but that the case was admissible because Libya was unable to obtain custody over Gaddafi for the purpose of the trial. Judge Ušacka appended a dissenting opinion arguing that the Pre-Trial Chamber’s decision should be reversed and remanded for a new decision because the Pre-Trial Chamber’s test for determining whether Libya was investigating the case against Gaddafi was erroneous and too demanding in its application.

On 11 October 2013, the Pre-Trial Chamber decided that the case against Al-Senussi was inadmissible before the ICC as he was subject to on-going domestic proceedings by the competent Libyan authorities covering the same case as that before the ICC. Acknowledging Al-Senussi’s lack of legal representation in the national proceedings, the absence of effective witness protection programmes and the difficulties faced by the national authorities in exercising control over certain detention facilities, the Pre-Trial Chamber nevertheless concluded that Libya was not unwilling and unable genuinely to carry out its investigation against Al-Senussi. In contrast to the Gaddafi case, where attempts to secure his legal representation have repeatedly failed, the Pre-Trial Chamber was satisfied that although Al-Senussi’s right to legal representation had yet to be implemented because of the security situation, several local lawyers had indicated their willingness to represent him in the domestic proceedings. On 24 July 2014, the Appeals Chamber rejected the appeal by the Defence of Al-Senussi and unanimously confirmed the

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5 Warrant of Arrest for Abdullah Al-Senussi, Situation in the Libyan Arab Jamahiriya, No. ICC-01/11, Pre-Trial Chamber, 27 June 2011.
Pre-Trial Chamber’s decision that Al-Senussi be tried in Libya. The Appeals Chamber held that to prove a state’s unwillingness it must be shown that the proceedings are not conducted independently or impartially, and that they are conducted in a manner inconsistent with the intent to bring the person concerned to justice. The Court clarified that this determination does not involve an assessment of whether the due process rights of a suspect have been breached per se but it recognized that there might be cases where violations of a suspect’s rights are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect. The Appeals Chamber found no errors in the findings of the Pre-Trial Chamber that Libya is not unwilling or unable to genuinely prosecute Al-Senussi, or in the exercise of its discretion in the conduct of the proceedings and in the evaluation of the evidence.

Explaining apparently contradictory decisions

So the Court has decided that Gaddafi must be tried by the ICC, but Al-Senussi may be tried in Libya. In assessing the ICC’s different reasoning in these cases, three main differences were identified. First, the two cases were factually different. Whereas the allegations against Gaddafi had a broad geographical and temporal scope, spanning events occurring across the country including in Tripoli, Benghazi, Derna and Tobruk, the case against Al-Senussi concerned conduct only occurring during the repression of demonstrations in Benghazi. As such, the amount and quality of evidence and testimony required in each case were different. The Appeals Chamber determined that although Libya had demonstrated its capacity to collect sufficient evidence in Al-Senussi, the same could not be said in the Gaddafi case.

Secondly, the Appeals Chamber confirmed the Pre-Trial Chamber’s approach to the issue of whether Libya could exercise control over the two accused. At the time of the admissibility proceedings, Saif Gaddafi was in the custody of a local militia in Zintan. Al-Senussi, on the other hand, was held in an ostensibly government-controlled detention facility in Tripoli. In discussion it was emphasized that the fact that the Libyan government could not effect Saif Gaddafi’s transfer and did not have control over the militia holding him was determinative in both Chambers’ reasoning. However, it was noted that the reality on the ground may not have reflected the ICC’s decision – as recent events have demonstrated, it is arguable that the Libyan national government has no control over either accused.

The third major difference explaining the divergent decisions was the position taken by the ICC Prosecutor in relation to the admissibility challenges. In Al-Senussi, the Prosecutor supported Libya’s argument in favour of national prosecution. In Gaddafi, however, the Prosecutor opposed Libya’s challenge. The speakers agreed that the Prosecutor’s position in each case can go a long way in explaining the different outcomes and raises broader questions of the proper role of the prosecutor in admissibility challenges before the ICC.

Recent developments in Libya

Participants noted the numerous factions competing for political influence in the country and the lack of a single central government with the capacity to ensure security across the entire Libyan territory. Competing legislative and security structures and on-going and resurgent violence were identified as key issues affecting the administration of criminal justice and the identification and arrest of perpetrators. The question of whether Libya is capable of administering an effective criminal justice system was considered of particular relevance, not just in relation to the admissibility of cases before the ICC but in

relation to crimes committed after the fall of the Gaddafi regime in late 2011. It was remarked, as noted above, that it is now doubtful whether the government has control over either of the accused in the cases under consideration. The participants also addressed difficulties in ensuring cooperation between the ICC and Libya and pointed out that in current circumstances and given the security situation in Libya, the Prosecution will face serious difficulties in gathering evidence in regard to the Gaddafi case.

The ICC’s approach to the renewal of violence

The question of the extent to which the ICC is able to, and ought to, consider the renewal of violence in Libya in assessing the admissibility challenges in Gaddafi and Al-Senussi was raised. In both its Gaddafi and Al-Senussi decisions, the ICC’s Appeals Chamber was strict in its approach of only considering the ‘concrete circumstances’ present in Libya at the time when the Pre-Trial Chamber originally heard the admissibility challenge. As a legal issue, in the main the Court cannot be criticized on this point: as an appellate court, the Appeal Chamber’s role is to look at the facts as decided by the Pre-Trial Chamber and to ensure that no error was made in interpreting the requirements of the Rome Statute. However, the question was raised as to the extent to which the Appeals Chamber’s legal interpretation necessarily involved reassessment of the factual circumstances underpinning the Pre-Trial Chamber’s findings.

One issue of concern to the speakers was the fact that the Appeals Chamber reached different conclusions on the issue of the accused’s access to local counsel. Although both Gaddafi and Al-Senussi faced extreme challenges in locating and making use of local legal representation in their defence, the Appeals Chamber came to divergent opinions on markedly similar sets of fact. Both accused lacked legal representation, but the Chamber held that, as Al-Senussi had been offered plausible offers of future representation, this lack of representation was not determinative in assessing whether Libya was unable to prosecute under Article 17(3) of the Statute. The Appeals Chamber pointed out that the main distinguishing factor between the two cases is the fact that the central authorities were unable to obtain Saif Gaddafi for purposes of his trial; therefore guaranteeing that a lawyer would be appointed would be considerably more difficult than in the case of Al-Senussi.

It was further remarked that there appears to be a disjunction between the legal and governmental capacity claimed by (at least elements within) the Libyan government and the ICC’s findings. Certain Libyan government statements suggest that, even at the time of the decisions, the authorities were unable to provide justice in an appropriate manner. It was regrettable that Al-Senussi – the first case in the ICC’s jurisprudence to determine inadmissibility because of on-going national prosecution and, as such, an important test case – should result from such factual circumstances. An important question considered was whether the ICC ought to reconsider its decisions in Al-Senussi and Gaddafi to reflect the changes to the situation in Libya.

The ICC’s on-going role in Libya

Participants raised the issue of whether and to what extent the ICC will have an on-going role in prosecuting crimes in Libya, including crimes committed since the fall of the Gaddafí regime. The potential consequences of the Libyan authorities’ 2012 decision to grant amnesty for ‘acts made necessary’ by the revolution were discussed. The ICC’s Chief Prosecutor Fatou Bensouda has previously raised concerns that the Special Procedures Law amendments of May 2012 may lead to impunity for crimes committed in Libya and called on the national government to ensure that there was ‘no amnesty for
crimes, regardless of who the perpetrator is’. The likelihood of the ICC issuing arrest warrants in relation to conduct occurring since the fall of the Gaddafi regime was a key point of consideration.

Speakers and participants discussed the 2013 Memorandum of Understanding between the ICC’s Office of the Prosecutor and the Libyan government (the MOU) whereby the Libyan authorities would have responsibility for investigating offences committed by Libyans who remained in Libya and the ICC would focus on prosecuting accused outside Libyan authority and control. Although the ICC’s Prosecutor has made clear that ‘this agreement does not relinquish the ICC or the Libyan courts of their respective jurisdiction, nor does it apply and/or affect the ongoing judicial proceedings in either the Saif Al-Islam Gaddafi or the Al-Senussi cases’, participants in the meeting raised concerns as to whether, given the current security and political crises, the MOU may contribute to perceptions of impunity for offences committed by opposition forces, both during and after the revolution which led to the fall of the Gaddafi regime. Participants noted that although the UN Security Council has addressed the recent violence in Libya and has authorized sanctions against individuals engaged in violence through UN Security Council Resolution 2174 (2014), it has not gone so far as to refer any conduct arising from the current situation to the ICC.

Speakers noted that Libya has stated that it would file an additional admissibility challenge to the ICC exercising jurisdiction in the Gaddafi case. It is likely that Libya will first attempt to overcome some of the issues which led to the rejection of its admissibility challenge, notably access to local defence counsel and issues concerning detention. However, there could be a long timescale for such a challenge. It was noted that in the meantime Libya is under an obligation to transfer Gaddafi to the ICC.

As regards the Al-Senussi case, speakers pointed out that the Prosecutor could ask the Court for a review of its admissibility decision in accordance with Article 19(10) of the Rome Statute. Given the recent events and serious deterioration of security situation in Libya, the speakers agreed that the ICC Prosecutor should at this point ask the Court to reconsider the admissibility decision in the Al-Senussi case. One speaker pointed out that the Al-Senussi Defence requested the Appeals Chamber to rely at the appeal stage on additional new evidence allegedly demonstrating that Libya is unwilling and genuinely unable to carry out the proceedings against Al-Senussi, including evidence of his mistreatment in detention, which was not available at the time when the Pre-Trial Chamber issued its admissibility decision. The Appeals Chamber rejected the request, noting that the Prosecutor could use such evidence to submit a request to the Pre-Trial Chamber to review the decision pursuant to Article 19(1) of the Rome Statute. The problem, however, is that the evidence by the Al-Senussi Defence was filed on a confidential and ex parte basis and could thus potentially concern defence witnesses. Neither the Appeals Chamber judgment nor the mechanism envisaged by Article 19(10) of the Rome Statute takes into account the possibility that there could be crucial evidence concerning the domestic proceedings which cannot and should not be provided to the Prosecution (i.e. if it concerns defence evidence or witnesses). The Defence are therefore faced with an impossible choice: the Appeals Chamber and the Rome Statute envisage that the Prosecutor should be the triggering mechanism for any review based on new evidence, but if the Defence disclose that evidence to the Prosecution, they potentially compromise the defendant’s fair trial rights by prematurely revealing key aspects of their defence strategy to the Prosecution, or otherwise affecting the safety and security of defence witnesses.

Legal capacity-building

Many NGOs are involved in attempting to provide solutions to the many problems facing the Libyan criminal justice and judicial systems. The national government has been very willing to accept assistance and training on law reform and associated issues. However, given the current political and security situation, many of the programmes contemplated and commenced in the period following the fall of the Gaddafi regime have stalled and currently remain at the ‘intention phase’.

One challenge of the work conducted by NGOs lies in finding ways to ensure that victims of the most horrific crimes and abuses can receive justice. In the debate on whether trials should occur nationally or internationally, NGOs play an important role in liaising with and assisting victims. One element of the ICC system which makes it rare among international criminal tribunals is its approach to victim participation. Victims are represented in the ICC by an office of public counsel similar in structure to that offered to the defence. Through this system victims are consulted and the result of such consultations is considered by the Court in reaching decisions. In the Libya context one speaker noted that most victims do not seem to have a strong preference whether trials take place domestically or at the international level. What is most important for victims is that a fair trial takes place. There is a widespread common belief that justice is hollow unless trials can be seen to be fair. Affected communities are also concerned that legal capacity be built to ensure that atrocities are not repeated and that all parties to the conflict are held accountable.

Throughout the debate, the importance of the security situation was emphasized by speakers and participants. Legal capacity-building is entirely contingent on achieving security and stabilizing the political situation in Libya.

The issue of the extent to which the ICC deals with legal capacity-building when considering admissibility challenges was considered. The speakers discussed the fact that, although complementarity is a core principle underpinning the Rome Statute, the judicial arm of the Court does not deal with ‘positive complementarity’; it needs to deal expeditiously with admissibility challenges. The ICC’s role in capacity-building is limited to the role played by the Prosecutor in forming cooperative arrangements with national governments.

One issue discussed was the extent to which foreign governments are able to and ought to provide assistance for domestic prosecutions. Should foreign governments assist national authorities to conduct trials that result in the death penalty, or where torture or human rights abuses are alleged? What are the potential legal consequences of such assistance, particularly for parties to regional human rights instruments? Participants compared the present situation in Libya and the situation in Iraq post-2003 when Iraqi transitional courts imposed the death penalty for certain offences. In the latter case, the UK government and others withdrew their official support for transitional justice programmes in which the death penalty was applied.

The ICC’s role – broader questions

Due process and the right to a fair trial

Throughout the discussion, fundamental questions concerning the ICC’s proper role and approach were raised, particularly in relation to considerations of due process and national authorities’ capacity to ensure a fair trial when assessing admissibility. It was emphasized that one significant reason why states
were finally able to conclude the Rome Statute was the agreement that the ICC would not be a human rights court. This can be seen in the Statute’s drafting history when an Italian proposal to include due process requirements in assessing complementarity failed. However, despite the absence of formal ‘fair trial’ or ‘due process’ requirements in the text of the Rome Statute, it was noted that the ICC’s jurisprudence has developed a limited ‘fair trial’ requirement. The Court’s current approach appears to be that in circumstances where substantive or procedural rights abuses are so severe that it can be considered that no ‘trial’ is possible at all Article 17 will not be satisfied.

Arguably the Court’s decisions on these issues have muddied the waters about where due process and abuse of rights sit within the Rome Statute framework, and the extent to which such considerations are relevant in assessing admissibility challenges. There was some agreement between the speakers on the dangers of overly creative judicial interpretation here, given that the court was established and possesses jurisdiction solely through state consent as expressed in a multilateral treaty. However, it was noted that the Rome Statute includes reference to international human rights standards, and judges are bound to consider such standards in determining issues. Although the International Criminal Tribunal for Rwanda (ICTR) was established through a very different political process its jurisprudence on the issue of the applicability of human rights standards in Rule 11bis proceedings, which involve determination of whether a case can be referred back to the national courts for domestic prosecution in Rwanda, may be relevant and provide useful guidance, especially in relation to due process.

The speakers also discussed whether the ICC could base an admissibility determination on information that has been obtained in violation of the Rome Statute or internationally recognized human rights. Article 69(7) of the Rome Statute provides that such information shall not be admissible in ICC proceedings if: (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and seriously damage the integrity of the proceedings. The Special Rapporteur on Torture has also confirmed that evidence obtained through torture, cruel and inhumane treatment should not be used in any legal proceedings, including extradition proceedings. This therefore raises the possibility that the ICC could be violating Article 21(3) or Article 69(7) of the Rome Statute if it were to base its admissibility ruling on information or evidence procured through torture, cruel and inhumane treatment, or other substantial violations of human rights.

The ICC’s approach to Libya’s continued non-compliance in Gaddafi

It was noted that the ICC has issued repeated requests that Libya transfer Saif Gaddafi into ICC custody. Speakers questioned whether the ICC’s approach in the face of Libyan reluctance to defer to or comply with the ICC’s transfer orders could be described as ‘learned helplessness’. Given the political sensitivities of managing complementary jurisdiction and the Court’s dependence on local cooperation to mount an effective trial, it is understandable that a certain amount of ‘carrot and stick’ behaviour would occur. The question of what the ICC can and should realistically do in circumstances of non-compliance was raised. In spite of the political sensitivities inherent in its functions, speakers and participants agreed that the ICC should focus strictly on legal issues when dealing with complementarity issues, and that political considerations should be left for states. It was noted that the ICC’s approach reflected hopes of assistance in improving the Libyan political and security situations – hopes which have not been fulfilled.

It was agreed that the ICC requires greater support from UN political organs. Participants raised the question of the proper role of the UN Security Council in inducing compliance with ICC orders, especially in circumstances where the cases before the Court are the result of Security Council referral. The Council ought to bear more responsibility in ensuring that states cooperate with ICC rulings and be prepared to
follow up, including with sanctions in the case of non-compliance. Speakers noted that an inadequately supported ICC risks ineffectiveness and a ‘lose-lose-lose’ situation in which the interests of the ICC, the United Nations, the victims and the accused are all negatively affected. Having a high-level interlocutor to engage with organs such as the UN Security Council is likely to be a boon in increasing the Court’s effectiveness.

Conclusions

It was acknowledged that the situation in Libya represents a unique challenge and important test case for the principle of complementarity. It was further acknowledged that the on-going violence and political unrest in Libya raise important broader legal and policy questions concerning the proper role of the ICC, and the challenges faced by governments and NGOs in providing effective legal capacity-building assistance in post-conflict states. The extent to which due process and fair trial considerations ought to play a part in complementarity assessments and the difficulties ICC judges have faced in addressing these issues were key points identified and discussed by speakers and participants. A central theme of discussion was the proper action the ICC ought to take in cases of non-compliance. Speakers and participants discussed the inherent political sensitivity of the ICC’s mandate but stressed the need for legal considerations to remain the Court’s primary concern. For the ICC to be effective and thus to provide a meaningful solution in ending impunity for international crimes, it requires greater political support from both governments and UN organs. This last point was identified as particularly important in considering the proper role the UN Security Council ought to play in cases of non-compliance with ICC orders.