



At the most basic level Complementarity embodies the concept that the Court was designed to supplement... rather than supplant domestic enforcement of international norms'.<sup>1</sup> As per the Ellis, The complementarity principle establishes the most efficient framework for collaboration between domestic and international accountability mechanisms, facilitating the enforcement of domestic criminal law and allowing domestic courts to manage grave international crimes within their jurisdiction in an efficient manner,<sup>2</sup> while Schabas argued that “the term ‘complementarity’ in international criminal law may be somewhat of a misnomer”, because the “two systems function in opposition and to some extent with hostility with respect to each other”.<sup>3</sup>

Although above definitions are given for the formation of an initial understanding and to go deeper into the essence of the topic, central question the essay raises pertains not so much to the notion of complementarity itself, but to the effect of complementarity in achieving the goal of the ICC. To be more precise, the essay discusses hindrances of complementarity to the achievement of the ICC's main objective by analyzing *Saif Gaddafi* and *Abdullah Al-Senussi cases*.

## **II. IS COMPLEMENTARITY PRINCIPLE BLESSING OR CURSE FOR ICC?**

<sup>1</sup> M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (The Hague: Martinus Nijhoff Publishers, 2008) 157–158.

<sup>2</sup> *Sovereignty and Justice : Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals*, by Mark S. Ellis p 8

<sup>3</sup> William A. Schabas, *An Introduction to the International Criminal Court*, 2nd edn. (Cambridge: Cambridge University Press, 2004), p. 85.

**2.1.** The concept that the International Criminal Court (ICC) will be subordinate to prosecutions carried out in national jurisdictions is significantly different from the creation of ad hoc international criminal tribunals by the United Nations Security Council, which were specifically established to handle cases from the former Yugoslavia and Rwanda. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) works under the principle of 'primacy' and this tribunals possess the authority to prevent a legal proceeding in a domestic jurisdiction if the panel opts to proceed further.<sup>4</sup> Unlike them, The ICC respects jurisdiction of sovereign states, leaves a room for their accountability and can only intervene where a State is unable or unwilling to genuinely carry out the investigation and prosecute the perpetrators based on the principle of complementarity.<sup>5</sup>

Interestingly, the Rome Statute establishing the International Criminal Court (ICC) does not explicitly define the term "complementarity" in its provisions. However, the plain readings of Paragraph 10 of the Preamble and Article 1 necessitate the interpretation that the ICC was conceived as a complementary institution to supplement domestic prosecution of international crimes, rather than supersede or displace national enforcement of international legal norms. The principle of complementarity is designed to preserve the ICC's jurisdictional authority over delinquent States that are unwilling to prosecute perpetrators of egregious international crimes. It strikes a balance between this

<sup>4</sup> Linda E. Carter, 'The Future of the International Criminal Court: Complementarity as a Strength or a Weakness' (2013) 12 Wash U Global Stud L Rev 457

<sup>5</sup> Elinor Fry Between show trials and sham prosecutions: the rome statute's potential effect on domestic due process protections



Inability occurs when a national system is severely affected to the point where it is unable to proceed with the acquisition of evidence or the trial of an individual.<sup>8</sup>

But although this principle is a wise approach to provide accountability and responsibility of states, sometimes, it hinders to achieve the ICC's goal: '[T]he most serious crimes of concern to the international community as a whole must not go unpunished...and their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.<sup>9</sup>

Therefore, I am in favour of this view that 'the Rome Statute-unlike statutes of the Ad Hoc international criminal tribunals for the former Yugoslavia and Rwanda, which include the principle of the superiority of international jurisprudence, so they could exercise their jurisdiction to prosecute suspected crimes has recognized national proceedings as a barrier to the admissibility of a case before the ICC, leaving the latter to decide on the genuineness of such proceedings'.<sup>10</sup> Nonetheless, the failure of the complementarity regime to recognize the primacy of international jurisdiction leads to concession to national sovereignty, which, no doubt, has weakened the performance of the Court, as Silvia correctly stated.<sup>11</sup>

## **2.2. Said Gaddafi case and principle of complementarity**

<sup>8</sup> Linda E. Carter, 'The Future of the International Criminal Court: Complementarity as a Strength or a Weakness' (2013) 12 Wash U Global Stud L Rev 453-54

<sup>9</sup> See Rome Statute of the International Criminal Court, Rome, opened for signature 17 July 1988, 2187 UNTS 90 (entered into force 1 July 2002) UN Doc. A/CONF.183/9 (hereinafter, ICC Statute or Rome Statute), Preamble [emphasis added].

<sup>10</sup> Rome Statute of the ICC, *supra* note I at art 17.

<sup>11</sup> Silvia A Fernandez de Gurmendi, "Foreword by H.E. Judge Silvia A. Fernandez de Gurmendi," in Stahn & El Zeidy, eds., *The International Criminal Court and Complementarity: From Theory to Practice* (New York, NY: Cambridge University Press, 2011) vol I at xix [Fernandez de Gurmendi].

Saif Al-Islam Gaddafi, son of the former Libyan leader Muammar Gaddafi, was accused of crimes against humanity during the 2011 Libyan civil war. These accusations included murder and persecution, charges that are within the jurisdiction of the ICC. However, the Libyan government insisted on trying Saif Al-Islam domestically, leading to a challenge of admissibility which is the main aspects of complementarity principle at the ICC. Libya argued that they were both willing and capable of handling the proceedings. The ICC had to evaluate Libya's judicial capacity to conduct a fair and effective trial, a process fraught with complexities given the nation's unstable political and judicial infrastructure post-2011 uprising.<sup>12</sup>

Libya's failure to meet the initial requirement of the two-step test was enough to determine that the case might be considered admissible. However, the Pre-Trial Chamber further determined that Libya was incapable of exercising jurisdiction as defined in Article 17(3) of the Statute. This conclusion was mostly reached due to the fact that Libya was unable to secure the custody of the accused individual, since he was being held by the local Zintan militia rather than the national authority in Tripoli. However, this discovery appeared to contradict the related directive that Libya must promptly hand him over to the ICC. Libya can only hand over the accused if it actually has custody of him.<sup>13</sup>

It should be noted that although complementarity principle respects the sovereignty of states by allowing them to handle their criminal matters before international intervention is considered and encourages National Legal Systems by

<sup>12</sup> No.: ICC-01/11-01/11 Decision on the admissibility of the case against Saif Al-Islam Gaddafi (Pri-Trial)

<sup>13</sup> Complementarity Conundrums The ICC Clock in Transitional Times Payam Akhavan 1052



criminal law.<sup>16</sup> Setting that aside, comprehending complementarity requires a thorough comprehension of the supreme authority held by state parties.<sup>17</sup> But, in contexts like Libya, where the judicial system is compromised or dysfunctional, this principle can **inadvertently protect perpetrators from international prosecution, delaying or obstructing justice in the shield of sovereignty**. The ICC's reliance on cooperation from national jurisdictions can be problematic when states are **non-cooperative** or when their **judicial processes are manipulated to shield defendants from international scrutiny**.

Thus, in this case, the principle of complementarity has arguably **hampered the ICC's ability** to effectively prosecute those accused of the most serious crimes. The principle's dependence on the state's capability and willingness introduces significant challenges, particularly in unstable regions like Libya, where political and security conditions severely impede the operation of a **fair and effective judicial system**. A comprehensive formulation of the "due process thesis" was presented in a recent blog post on EJIL:Talk! by Jonathan O'Donohue and Sophie Rigney, specifically discussing its relevance to the Gaddafi case: 'The ICC must consider **fair trial concerns** in determining Libya's application to prosecute Saif al-Islam Gaddafi nationally'.<sup>18</sup>

As it mentioned before, while complementarity respects national sovereignty and encourages local legal processes, it also presents substantial

<sup>16</sup> Regional Complementarity: The Rome Statute and Public International Law Miles Jackson Journal of International Criminal Justice, Volume 14, Issue 5, December 2016, Pages 1061–1072

<sup>17</sup> S. Nouwen, Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court (Cambridge University Press, 2013) 58.

<sup>18</sup> J. O'Donohue and S. Rigney, 'The ICC Must Consider Fair Trial Concerns in Determining Libya's Application to Prosecute Saif al-Islam Gaddafi Nationally', EJIL:Talk! Blog of the European Journal of International Law, 8 June 2012, available online at <http://www.ejiltalk.org/the-icc-must-consider-fair-trial-concerns-in-determining-libyas-application-to-prosecute-saif-al-islam-gaddafi-nationally/> (visited 13 November 2012). supra note 5.

obstacles that can delay or prevent the pursuit of international justice. In essence, the principle of complementarity, although foundational to the ICC's operations, requires careful application and, possibly, reevaluation in cases where it impedes rather than facilitates justice.

Furthermore, the principle of complementarity requires the ICC to defer to national jurisdictions if they are conducting **genuine proceedings**. In the case of Libya, the national judicial system expressed a readiness to prosecute Saif Al-Islam. However, as documented by the ICC's Pre-Trial Chamber I, Libya faced significant challenges, **including securing Saif Al-Islam's custody**, ensuring a **fair trial**, which questioned **the genuineness of its proceedings** and Libya has been found to be unable genuinely to carry out the investigation or prosecution against Mr Gaddafi. Therefore, the Chamber need not address the alternative requirement of **'willingness'** and, specifically, the concerns presented by the Defense regarding the inability to conduct a fair trial for Mr. Gaddafi in Libya.<sup>19</sup> Moreover, the **political instability and fragmentation of judicial authority** in Libya highlighted the practical difficulties in **assessing the ability and willingness of national courts** to manage such complex cases.

### **2.3. Senussi case and principle of complementarity**

Libya has raised a challenge to the admissibility of the case involving Mr. Al-Senussi at the International Criminal Court (ICC), arguing that it is already conducting its own investigations into the same allegations. This challenge is based on Article 17(1)(a) of the Rome Statute, which posits that a case will be deemed

<sup>19</sup> Pri-Trial Chamber 216

inadmissible if a state with jurisdiction over the matter is already investigating or prosecuting it, unless that state is found to be either unwilling or incapable of genuinely conducting the proceedings. Further elucidation on the criteria for assessing unwillingness or inability of a state to conduct genuine proceedings is provided by Articles 17(2) and 17(3) of the Statute.<sup>20</sup>

The Appeals Chamber has noted that Article 17(1)(a) of the Statute establishes a two-step test to evaluate the admissibility of a case. Initially, it must be determined whether there is an ongoing investigation or prosecution at the national level at the time the admissibility challenge is assessed (the first criterion). If this condition is met, the next consideration is whether the state in question is unwilling or unable to genuinely conduct the investigation or prosecution (the second criterion).<sup>21</sup> A case will be considered inadmissible only if both conditions are satisfied, underscoring the principle of complementarity fundamental to the Rome Statute of the ICC.<sup>22</sup> They asserted that their decision had been taken in accordance with the principle of complementarity, incorporated in the Rome Statute of the ICC<sup>23</sup>

However, critical analysis reveals several concerns regarding Libya's judicial processes. Reports indicated issues such as **lack of access to lawyers, and impartiality** of proceedings, raising doubts about the **fairness and effectiveness** of the trials. Moreover, there were claims that the Libyan judiciary was not fully

<sup>20</sup> Decision on the admissibility of the case against Abdullah Al-Senussi 24-25

<sup>21</sup> Pre-Trial Chamber I, "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", 7 December 2012, ICC-01/11-01/11 239, para. 6.

<sup>22</sup> Decision on the admissibility of the case against Abdullah Al-Senussi 24-27

<sup>23</sup> Hilmi M. Zawati, 'The International Criminal Court and Complementarity' (2016) 12 J Int'l L & Int'l Rel 208, p 209



The principle of complementarity is foundational to the ICC but its application in cases like that of Al-Senussi highlights its limitations. While it is crucial for respecting state sovereignty and encouraging local judicial processes, its implementation must be meticulously scrutinized to ensure it does not inadvertently hinder the pursuit of justice. The ICC must balance respect for national proceedings with its mandate to prosecute the gravest crimes, especially when national courts may not meet the required standards of **impartiality and effectiveness**.

**On the one hand**, complementarity did not so much hinder the ICC as reveal the challenges of applying this principle in complex geopolitical and judicial landscapes in the case of Abdullah Al-Senussi.

**On the other hand**, the Senussi case proved a particular tension: by deferring to Libyan courts, the ICC might have missed an opportunity to set a higher standard of justice and reinforce its role as an international tribunal. This deference could be seen as a failure to fulfill its mandate to prosecute the most serious crimes of international concern effectively. To elucidate, the principle of complementarity is intended to empower local jurisdictions but also risks the ICC's effectiveness being undermined when national proceedings are not up to international standards. The ICC must develop **clearer guidelines for assessing the willingness and ability of national courts**, ensuring that the principle of complementarity does not inadvertently allow grave injustices to go unpunished.

In conclusion, although the principle of complementarity makes a special contribution to ensuring the sovereignty of states and increasing their





17. Human Rights Watch, Libya: Gaddafi Son, Ex-Officials, Held Without Due Process, (Feb. 13, 2014, 12:00 AM), <https://www.hrw.org/news/2014/02/13/libya-gaddafi-son-ex-officials-held-without-due-process>.

18. Human Rights Watch, Libya: Ensure Abdallah Sanussi Access to Lawyer, supra note.