The awakening hypothesis of the complementarity principle[1]

VICTOR TSILONIS
LL.M. (Nottingham); Ph.D. (Aristotle) Senior Attorney-at-Law included in the ICC List of Counsel Member of the International Criminal Court Bar Association

Abstract

The principle of complementarity prescribed in the ICC Rome Statute is often taken for granted in the legal analysis of international criminal law and its jurisprudence. Indeed, apart from William Schabas and his monumental paper 'Complementarity in Practice': Some Uncomplimentary Thoughts' very few have ever questioned it. However, a closer examination proves that the complementarity principle was a mere shadow which never obtained flesh and bones, at least – arguably– until the Abdullah Al-Senussi case. Hence, the 'awakening hypothesis' of the complementarity principle examines, first, the myth of the complementarity principle and the fact that it was never actually enforced until October 2013 and, then, the reasoning of the two Abdullah Al-Senussi judgments (Pre-Trial and Appeals Chamber).Finally, the

[1] I would like wholeheartedly to thank Professor Olympia Bekou (University of Nottingham), Professor Elisavet Symeonidou-Kastanidou, Professor Adam Papadamakis and Professor Maria Kaiafa-Gbandi (Aristotle University) for significant comments on previous drafts of this paper. Moreover, I would like to thank Sophia Simiti for her assistance in the translation of the first draft written in Greek as part of my PhD thesis, Nina Ioannidou for linguistic suggestions and Stergios Aidinlis (trainee lawyer & LLM student in Criminal Law at Aristotle University) for insightful comments. Finally, I am lost for words for Brett Dakin (general counsel of the Child Mind Institute and former editor-in-chief of the Harvard Human Rights Journal) who meticulously edited the final version. Clearly, I remain the sole responsible for any errors or omissions [victor@newlaw.gr].

awakening hypothesis of the complementarity principle leaves open to questioning whether or not the Al-Senussi case is indeed the first instance of the implementation of the complementarity principle.

Keywords: principle of complementaritiy; self-referrals; voluntary referrals; Abdullah Al-Senussi case; Abdullah Al-Senussi judgments; awakening hypothesis of the complementarity principle; complementarity as a dead letter; ICC jurisdiction

Introduction

It is considered essential for any true legal system to function on fundamental principles, which are initially reflected in its legislation. Some of these principles may be of utmost importance while others less so; nonetheless they are all considered to be inviolable and performing a function *par excellence* – apart from specific exceptions which can be prescribed in existent provisions or may appear during the evolution of case law. This paper addresses significant issues concerning the application of the complementarity principle, as it is contained in the 6th, 10th paragraph of the Preamble and Article 1 ICC Rome Statute, especially-indirectly in Article 17 ICC Rome Statute entitled "Issues of admissibility"[2] and indirectly in Article 20(3) ICC Rome Statute

[2] The forerunner of Article 17 ICC Rome Statute was an article which was approved by the International Law Commission entitled "Issues of admissibility". Draft Statute for an International Criminal Court, 1994: Article 35 – Issues of admissibility: The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question: (a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded; (b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or (c) is not of such gravity to justify further action by the Court. <http://legal.un.org/ilc/texts/instruments/ english/draft%20articles/7_4_1994.pdf>, 28 October 2014.

(*ne bis in idem*).[3]

The complementarity principle means that ICC jurisdiction is activated only in the form of a reserve security parachute in case the original 'parachute', i.e. the national jurisdictions, fails to perform its duty effectively and directly.[4,5] In other words, the ICC's impetus to act can be halted by the states-parties' judicial systems, so long as the latter demonstrate the characteristics of a functional legal system and adequate willingness to prosecute war crimes, genocide, crimes against humanity and, possibly, the crime of aggression.[6]

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[3] Article 20 ICC Rome Statute – *Ne bis in idem*… "3.No person who has been tried by another court for conduct also proscribed under article 6. 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court: or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

[4] Although the Article 17 ICC Rome Statute refers to the case of "a state" (state-party, according to the author's view) being "unwilling" or "unable" but not inactive, this phrasing has not been interpreted to mean that a case is inadmissible before the ICC when a state is inactive, without being unwilling or unable, as a narrow interpretation of Article 17 ICC Rome Statute would imply. A typical fact is that in the case of Lubanga the Pre-Trial Chamber I noted that: The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible *only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable*, within the meaning of article 17 (1) (a) to (c), * and 3 of the Statute (f. 19 Interpretation *a contrario* of article 17, paras. 1 (a) to (c) of the Statute), (my emphasis). Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-8-US-Corr 09-03-2006, *ibid.*, at 19, para. 29.

[5] El. Kastanidou-Symeonidou, 'Legitimizing basis and ICC jurisdiction limits', (51 *No B*, 2003), p. 452.

[6] After the 2010 Kampala conference, only 15 states eventually followed the path paved by the minuscule Liechtenstein and ratified the articles 8bis, 15bis and 15ter which activate the ICC jurisdiction on the crime of aggression. See official list

In effect, however, the complementarity principle had never been applied until recently, in the recent decision on the case against Al-Senussi in October 2013. It is a fact that even since the first ICC case, which concerned the recruitment of minors as soldiers by Thomas Lubanga Dyilo, the competent ICC Trial Chamber (following the Office of the Prosecutor's submission) ruled against the application of the complementarity principle, so that the Thomas Lubanga Dyilo trial could take place.[7,8]

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of states at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY &mtdsg _no=XVIII-10-b&chapter=18&lang=en, 4 September 2014. According to the data provided by the official campaign launched for the ratification of the amendment, 36 states including Greece currently examine the ratification of the crime of aggression: http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/, 4 September 2014. Press release 09-05-2012, http://www.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202012/Pages/pr793. aspx, 4 September 2014. The ICC can exert its jurisdiction for the crime of aggression as soon as 30 states-parties ratify the amendment and a two-thirds majority decision of states-parties is taken at a Review Conference no sooner than 1 January 2017. However, until the amendment is accepted by seven-eighths of States Parties, the ICC will be unable to exercise its jurisdiction regarding a crime of aggression when committed by a State Party's nationals which has not accepted the amendment or committed on its territory. See Articles 15ter (2) and (3), 121 (3), (5) and (6), http://www.icc-cpi.int/iccdocs/PIDS/ publications/RomeStatut Eng.pdf, 4 September 2014.

[7] V. Tsilonis, 'Thomas Lubanga Dyilo: the unstable step of the International Criminal Court?', in A. Pitsela (ed.), *Criminological Quests: Treatises in the honour of Emeritus Professor Stergios Alexiadis* (Thessaloniki, Sakkoula) (2010), 1039-1057.

[8] The whole debate in the 2010 Review Conference of the Rome Statute in Kampala, as well as the stocktaking exercise that took place during the Conference in question had no practical impact whatsoever on the ICC policy change neither at that time nor, as evidently proved today, three years later. For an extremely optimistic review see M. Bergsmo, O. Bekou & An. Jones, 'Complementarity after Kampala: capacity building and the ICC's legal tools', *Goettingen Journal of International Law*, 2 (2010), 791-811.

About the Principle of Complementarity and its Relation to ICC Jurisdiction

Undoubtedly, the complementarity principle constitutes a novel concept for international criminal law,[9] since its notion was coined in Rome in 1998 during the final drafting of the ICC Rome Statute.[10] Until then – as the decisions of earlier international criminal tribunals (predominantly ICTY and ICTR) show – any responses to international crimes had limited temporal and territorial jurisdiction which was exerted on the basis of the 'reverse' principle of primacy over national jurisdictions.[11,12]

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[9] Although its ideological roots may be traced back to Article 6 in the London Agreement of August 8th 1945 (which led to the founding of IMT), <http://avalon.law.yale.edu/imt/imtchart.asp>, 10 September 2014, where it is stated: "Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals." However, the IMT tried only 22 of the accused due to the allies' lack of political will and lack of resources and not because the "role of criminal jurisdiction". See *contra* E. Zeidy, 'The principle of complementarity: a new machinery to implement international criminal law', (2003) 23 *MJIL*, 869.

[10] The final text of the 6th para. in the Preamble derives largely from the 'Dominican Republic: proposal regarding the Preamble', which initially referred to the fact that the Statute's state-parties "Being prepared to strengthen the United Nations system harmoniously with a permanent international criminal court which, complementary to national jurisdictions, will have jurisdiction over those crimes which are of concern to international society as a whole." 'Dominican Republic: proposal regarding the Preamble', UN Doc. A/CONF.183/C.1/L.52, p. 203 <http://legal. un.org/diplomaticconferences/icc-1998/docs/english/vol3/a_conf_183_commwholedocs.pdf>, 13 October 2014.

[11] Article 9(2) ICTY Statute and Article 8(2) ICTR Statute, where it is expressly stated that "the International Tribunal shall have primacy over national jurisdictions".

[12] On the contrary, Article 1(2) and (3) of the SCSL Statute similarly recognizes the complementarity principle: Article 1 – Competence of the Special Court: "…2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to theStatus of Mission Agreement in force between the United Nations

The complementarity principle was initially included in ICC Rome Statute three times: **a)** verbally in a way that resembles *reductio ad absurdum* the 6th paragraph of the Preamble of ICC Rome Statute,[13] **b)** expressly in the 10th paragraph of the Preamble of ICC Rome Statute,[14] and **c)** expressly in Article 1 ICC Rome Statute, where it is mentioned that the ICC 'shall be supplementary to the national criminal courts' jurisdictions'. Nonetheless, no clear definition of the unprecedented complementarity principle is indicated in any of the aforementioned passages, therefore its practical application is regulated: 1) first, in Article 17 ICC Rome Statute entitled "Issues of admissibility",[15] 2) indirectly in Article 20(3) ICC Rome Statute, which refers to the fundamen-

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and the Government of Sierra Leoneor agreements between Sierra Leone and other Governments… shall be within the primary jurisdiction of the sendingState.**3.** In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons", <www.sc-sl.org%2FLinkClick.aspx%3Ffileticket%3DuClnd1MJeEw%253D%26&ei=Jw1Ut2LD4LOhAfvoGoAw&usg=AFQjCNH0UzEbn_fCUET_Dy1LNw1TqJhdQg&bvm=bv.52164340,d.ZG4>, 22 September 2014.

[13] "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", 6th para. of the ICC Rome Statute Preamble.

[14] "Emphasizing that the international Criminal Court established under this Statute shall be complementary to national criminal jurisdictions", 10th para. of the ICC Rome Statute Preamble.

[15] Article 17 Issues of Admissibility: "1. Having regard to para. 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, para. 3; (d) The case is not of sufficient gravity to justify further action by the Court."

tal legal principle *ne bis in idem*.[16] This has been accepted by the ICC Appeals Chamber, which has acknowledged the existence of the complementarity principle in Article 17 ICC Rome Statute in subsections (a) and (b) of Article 17(1) ICC Rome Statute.[17]

Nevertheless, it is clearly indicated that the complementarity principle also includes -apart from subsections (a) and (b)- a third subsection (c) of Article 17(1) ICC Rome Statute, which summarily refers to the principle *ne bis in idem* (which is further analysed in Article 20 ICC Rome Statute).The above analysis is valid because all three subsections regulate the ICC's power to evaluate the judicial authorities' jurisdiction of the primary state in regard to its own officially supplementary jurisdiction. Consequently, the first subsection of Article 17(1) ICC Rome Statute refers to cases under investigation or prosecution by a State which has jurisdiction over them; the second subsection of Article 17(1) ICC Rome Statute refers to cases that have been investigated by a State having jurisdiction over them, *but* has ruled against prosecution; and the third subsection of Article 17(1) ICC Rome Statute refers to

[16] Article 20 ICC Rome Statute *Ne bis in idem…* "No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court: or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

[17] The Statute itself imposes obstacles upon the Court's exercising jurisdiction, as stated in Article 17, referring firstly to complementarity (article 17(1)(a) to (b)), secondly to *ne bis in idem* principle (articles 17(1)(c), 20) and thirdly to the sufficient gravity of the crime (article 17(1)(d)). The existence of any of the aforementioned obstacles, listed in article 17, makes the case inadmissible. *Prosecutor v. Thomas Lubanga Dyilo,* Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ICC–01/04– 01/06-772, 14 December 2006, para. 23, <http://www.icc-cpi.int/iccdocs/doc/doc243774.pdf>, 29 September 2014.

cases of a State which has already tried the accused in question for conduct that constitutes the specific subject of the charges.[18]

However, according to another, slightly different view, the issues of admissibility involve the exertion of jurisdiction despite its own existence. In other words, the ICC may have jurisdiction over one case, but for reasons exemplified in Article 17 ICC Rome Statute the ICC may finally decide it has no right to exert it.[19] Hence, following this train of thought, one could argue that, if Articles 11-15 ICC Rome Statute refer to the ICC '*original jurisdiction*', then Article 17 ICC Rome Statute regulates the ICC '*eventual jurisdiction*'.[20]

Consequently, Article 17(1) ICC Rome Statute includes three, *ab initio* identifiable, standards[21] which regulate the ICC '*final jurisdiction*': 1) the first two subsections involve the application or not of the complementarity principle, following certain actions and decisions of a member-state's judicial system; 2) the third subsection involves the application of the fundamental principle *ne bis in idem*; and 3) the fourth and final subsection involves the evaluation of the case's gravity.

Although Article 17(1) ICC Rome Statute sets the criteria that must be examined (first, complementarity, second, *ne bis in idem* and third, the gravity standard), it does not expressly clarify in which order the criteria will be examined. However, it seems that the Prosecutor selected the reverse order, examining the gravity standard first. This can be aptly proved by a letter sent at the beginning of 2006 concerning the situation in Iraq, where it is mentioned: "Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute. In light of the conclusion reached on gravity, it

[18] Rod Rastan, 'Complementarity: contest or collaboration', in Morten Bergsmo (ed.),*Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*(Oslo, Torkel Opsahl Academic Epublisher, 2010) at 84, f. 2.

[19] W.A. Schabas, *The International Criminal Court: A commentary on the Rome Statute*, (New York, Oxford University Press, 2010), at 340.

[20] The author's format is in accordance with original – final wrong.

[21] See previous analysis for the indirect connection of complementarity with *ne bis in idem* principle.

was unnecessary to reach a conclusion on complementarity."[22] However, the Pre-Trial Chamber I had a different opinion, since it considered in Thomas Lubanga Dyilo's case that the issue of whether or not the complementarity principle will be applied is "the first part of the examination of admissibility"[23] and the gravity standard "the second part of the examination of admissibility".[24]

Nevertheless, although the issues of admissibility raised on the basis of ICC Rome Statute are directly linked to the determination of situations where there is reasonable basis to proceed with an investigation,[25] Article 17 ICC Rome Statute is essentially triggered only when an individual case has been considered. According to the ICC case law, a case comprises "specific incidents during which one or more crimes

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[22] Letter of Prosecutor, 9 February 2006, at 9, <http://www.iccnow.org/documents /OTP_letter_to_senders_ re_Iraq_ 9_February_2006.pdf>, 28 October 2013.

[23] The Pre-Trial Chamber I separated legally the terms "situation" and "case" according to the following: The Chamber considers that the Statute, the Rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceedings, initiated by any organ of the Court, that they entail. Situations**,** which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. *Cases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects,* entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear. Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, para. 65, (my emphasis), <http://www.icc-cpi.int/ iccdocs/doc/doc183441.pdf> 23 October 2014. Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-8-US-Corr 09-03-2006, at 20, para. 30, <http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF> 28 September 2014.

[24] *Ibid.* at 19, para. 29 and at 24, para. 41.

[25] Articles 15(3) and 53(1) ICC Rome Statute.

within the jurisdiction of the Court seem to have been committed by one or more identified suspects",[26] while it has also been argued by academics that "a case must always be linked to an incident – specific conduct for the application of the Rome Statute complementarity provisions."[27]

Through a narrow interpretation of the Article 17(1)(a) ICC Rome Statute provision, it has been widely argued that the complementarity principle should be applied in any case when any State investigates a criminal case, i.e. regardless or whether or not it has ratified the Rome Statute.[28] This view, which adheres to the strictest grammatical interpretation of Article 17(1)(a) ICC Rome Statute, construes "the case… investigated or prosecuted by a State which has jurisdiction over it" not as a case being investigated or prosecuted by a state-party of the Rome Statute, but potentially as a case being investigated or prosecuted by any state in the world, i.e. even by a state which has not become a member of the UN. But in this case, the question is whether or not such an interpretation could substantially damage the ICC and diminish it to a quasi diplomatic ploy: where any leading state would employ the Rome Statute provisions to advance their own national interests, while abstaining from the Rome Statute's ratification and opposing the ICC's legal function.

However, it is evident that when the international legislators drafted the Rome Statute, they actually intended via Article 17 to give priority to the states that would ratify the Statute and not every state in the world. The above conclusion is supported by four distinct views: 1) *the historical point of view*, i.e. according to the previous examples of the

[26] Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPR-6, para. 65, (my emphasis), <http://www.icc-cpi.int/iccdocs/doc/doc183441.pdf> 23 October 2014.

[27] R. Rastan, 'What is a "Case" for the Purpose of the Rome Statute?', *Criminal Law Forum* 19 (2008) 435, at 438.

[28] W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, *supra* note 19, pp. 340-341.

international criminal tribunals (especially ICTY and ICTR, where the reverse principle of primacy was in force), 2) *the functional point of view*(since such a wide interpretation could severely complicate the jurisdictional issues and largely obstruct the ICC's work),[29] 3) *the general interpretive point of view* (since Article 17 ICC Rome Statute has not been interpreted by the ICC within its narrow grammatical framework, as demonstrated by the fact that the ICC can try a case even when a state does not investigate it although neither unwilling or unable to do so), and **4)** *the teleological point of view*(since all content and principles of the Rome Statute develop in a dialectical way the Court's relationship to the states-parties).

The Complementarity Principle 'In Practice'

In addition to the foregoing analysis of the complementarity principle, we must consider the way it has practically been addressed by the Office of the Prosecutor and judges of ICC.

A typical example is Luis Moreno Ocampo who, during his installation as Chief Prosecutor of the ICC in June 2003, stated:

> Interdependence is also requested by the complementary nature of the Court. The Court is complementary to national systems. This means that whenever there is genuine State action, the Court cannot and will not intervene. As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success. For this reason, the first task of the Office of the Prosecutor will be to establish links with prosecutors and judges from all over the world. They continue to bear primary responsibility for investigating

[29] Paolo Benvenuti, 'Complementarity of the International Criminal Court to national jurisdictions', in Latanza and Schabas (eds.), *Essays*, Vol. I, pp. 21-50· John T. Holmes, 'The principle of complementarity', in Lee (ed.), *The Making of the Rome Statute*, 41-78, p. 67.

> and prosecuting the crimes within the jurisdiction of the Court…[30]

Nevertheless, three months later, on September 2003, in the official document entitled 'Paper on some policy issues before the Office of the Prosecutor'[31] (the finalized version was completed after a public meeting that took place on June 17 and 18 in The Hague), the first official position of the Office of the Prosecutor of the ICC was publicised regarding the application of the complementarity principle.

The above paper, which came to the attention of the academic community only several years after its publication,[32] raises the following issues concerning the application of the complementarity principle:

1. *National jurisdictions and the Office of the ICC Prosecutor: the selection of jurisdiction*

It is explicitly stated in the second page of the paper that "national investigations and prosecutions, where they can be undertaken, will normally be the most effective and efficient means of bringing offenders to justice; States themselves will normally have the best access to evidence and witnesses. To the extent possible the Prosecutor will encourage States to initiate their own proceedings",[33] while in the next paragraph of the same page one reads: "Close co-operation between the Office of the Prosecutor and all parties concerned will be needed to determine which forum may be the most appropriate to take jurisdic-

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[30] Luis Moreno-Ocampo, Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC, Monday 16 June 2003, Palace of Peace, Hague, <www.iccnow.org%2Fdocuments%2 FMorenoOcampo16June03.pdf &ei=ltE9UpLPCISk0AXU84Go Aw&usg=AFQjCNGq1 -Q7XGDWDYfPF1TJnTgDP uMpF Q&bvm=bv.52434380,d.d2k> 22 September 2014.

[31] ICC-OTP, 'Paper on some policy issues before the Office of the Prosecutor', <http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905 _policy_paper.pdf>, 13 October 2014.

[32] William A. Schabas, '"Complementarity in practice": some uncomplimentary thoughts', 19(1) *Criminal Law Forum* (2008), 5-33.

[33] 'Paper on some policy issues before the Office of the Prosecutor', *supra* note 31, p. 2.

tion in certain cases, in particular where there are many States with concurrent jurisdiction, and where the Prosecutor is already investigating certain cases within a given situation."[34]

Hence, the above paragraphs raise a question about the way the court's competency will be determined in order to exert jurisdiction in the aforementioned 'certain cases'. This question is answered in the second paragraph of the third page of the above paper.

2. *The twofold approach of cases by the Office of the Prosecutor*

Following the reference to the ICC's limited resources, in the second paragraph of the third page of the paper, it is stated that "the Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means."[35]

The use of phrase 'some other means', via which lower-ranking perpetrators will be brought to justice, is nebulous, yet not of grave significance. Nonetheless, the twofold approach system of cases that the Office of the Prosecutor adopts from the outset, i.e. from the very first moment of the beginning of its operations, is of great importance and constitutes *the first evidence of the scholar's awakening hypothesis of complementarity principle.* The introduction of a twofold system facilitates the distinction between higher-ranking and lower-ranking perpetrators, according to which the higher-ranking perpetrators will come under the ICC jurisdiction and the lower-ranking perpetrators under the national courts.

However, the aforementioned strategy adopted by the Office of the

[34] *Ibid.*. It should be reminded here that the term 'situation' used in ICC Rome Statute refers to the investigation of a case in a wider or narrower geographical region, which could include one part of a single State (e.g. Sudan) or territories of more states.

[35] *Ibid.*, p. 3.

Prosecutor, which was largely accepted by the ICC up to October 2013, manifests 'reverse' interpretation and practical application of the complementarity principle, which collides with the historical, grammatical, teleological or any other sincere and objective interpretation, as stated in the Preamble and Articles 1, 17 (and indirectly in 20) of the ICC Rome Statute. At this point, it must be clarified that the grounds on which the Office of the Prosecutor divides cases into big and small, so that the big cases can be initially investigated by the Office of the Prosecutor and others by the state-parties, are in no way related to the gravity of a case (Article 17 (1)(d) ICC Rome Statute), since there is no direct or indirect reference to it; hence any subsequent invocation could only be considered as a sophism.[36]

3. *The complementary nature of the ICC*

Nevertheless, it must be noted that in the fourth page of the paper entitled 'The complementary nature of the Court', efforts are made to mitigate or even divert the aforementioned conclusions. This is initially achieved through the repetition of the statement that the absence of trials would constitute a major success *for the* ICC, and then –after an express reference both to the principle of complementarity and the 'fact' that the ICC, as opposed to ICTY and ICTR, is not intended to replace national courts– through the statement that the ICC should operate when national authorities/courts are unwilling or unable to conduct investigations and prosecutions.[37] Furthermore, it is noted in the paper that the Prosecutor must first assess whether there is or could be an exercise of jurisdiction by national systems with respect to particular

[36] There is a reference to the gravity criterion in page 7 of the Paper, where it is stated that "Article 17, dealing with admissibility, adds to the complementarity grounds one related to the gravity of a case. It states that the Court (which includes the Office of the Prosecutor) shall determine that a case is inadmissible where 'the case is not of sufficient gravity to justify further action by the Court'. The concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission". *Ibid.*, p. 4.

[37] *Ibid.*

crimes within the jurisdiction of the Court.[38]

Nevertheless, the fifth page of the paper stipulates that the Court and an incapacitated state-party may agree that "a consensual division of labour is the most logical and effective approach"[39], given that "*groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial. There may also be cases where a third State has extra-territorial jurisdiction, but all interested parties agree that the Court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum. In such cases there will be no question of "unwillingness" or "inability" under article 17".*[40]

Moreover, Article 17 ICC Rome Statute neither foresees nor implies that: **1)** there is a possibility of an internal agreement between the Court and a state-party concerning jurisdiction issues and especially the investigation/trial of a case; **2)** there are assignments of judicial investigation and trial processes between the Court and a state-party by means of an unofficial or official agreement of both parties; **3)** priority will be given from the state-parties to the ICC to exercise jurisdiction, since ICC is considered objective and neutral;[41] or **4)** priority will be given from state-parties to the ICC to exercise jurisdiction, since ICC has developed an advanced know-how in collecting evidence and trying certain cases.

The Hypothesis of the Complementarity Principle as a Dead Letter

The attitude of the Office of Prosecutor – including its expressed *ab initio* position in 2003 and its performed intention to exercise its powers *ultra vires* since 2003 up to now– manifests an arbitrary interpretation

[38] *Ibid.*.

[39] *Ibid.*, p. 5.

[40] 'Paper on some policy issues before the Office of the Prosecutor', *supra* note 31, p. 5.

[41] Of course, this has no application neither in law nor in reality, since in recent years there have been individual reactions concerning the existence of a "prejudiced court" from several states and the African Union, which consists of 54 states.

of the complementarity principle. William Schabas, with a profound knowledge of the ICC legal framework and the political processes, highlights: "However, ever since the ICC commencement of operations, there have been initiations that aimed in attracting cases for prosecution, despite the fact that the state-parties have been coerced to meet their obligations."[42]

It is noteworthy that before Luis Moreno Ocampo took up office as the first ICC Prosecutor, the Office of the Prosecutor – which had already commenced its operations, though under no head of office[43] – had assigned to specialists the conduct of a study on the legal issue of complementarity. The paper, written by twelve acclaimed jurists, attempted to lay the foundations for the interpretation of the complementarity principle as a dead letter principle rather than a principle with substantive content. The twelve renowned jurists attempted – through defining and using terms, such as 'partnership', 'vigilance', 'dialogue with States' and 'division of labour' – to demarcate the desire of ICC for a new 'productive' relationship with the state-parties.

For instance, it is mentioned in the paper that the term partnership "highlights the fact that the relationship with States that are genuinely investigating and prosecuting can and should be a positive, constructive one. The Prosecutor can […] encourage the State concerned to initiate national proceedings […] and possibly provide advice and certain forms of assistance to facilitate national efforts. There may also be situations where the Office of the Prosecutor (OTP) and the State con-

[42] William A. Schabas, ' "Complementarity in practice": some uncomplimentary thoughts', *supra* note 32, p. 6.

[43] The specialists' study was conducted following the decision of the Director of the ICC Common Services at the time, Bruno Cathala. Antonio Cassese *et al*, 'Informal expert paper: the principle of complementarity in practice', 3 ICC-01/04-01/07-1008-AnxA 30-03-2009, <http://www.iclklamberg.com%2FCaselaw%2FOTP%2FInformal%2520Expert%2520paper%2520The%2520principle%2520of%2520complementarity%2520in%2520practice.pdf&ei=7UCpVIKmNaiv7AaemIHoDg&usg=AFQjCNFq-b5H1gPaI5Zmk5IPPdaase3pQ&bvm=bv.82001339,d.ZGU&cad=rja>, 4 January 2015).

cerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn State is unable to carry out effective proceedings against persons most responsible."[44]

Furthermore, as far as 'vigilance'[45] is concerned, it was defined – under the principle of the ICC's partnership with state-parties – mostly as the Prosecutor's duty to gather information and data in order to verify that national procedures are carried out genuinely, where otherwise the Prosecutor must be poised to take follow-up steps, leading if necessary to an exercise of jurisdiction.[46]

Moreover, apart from the initial definition of partnership, which is specialised in cases inadmissible by the Statute as 'consensual division of labour' between the Office of the Prosecutor and the ICC, another legal dissonance emanates from the legal text.

In paragraph 9 entitled 'Judicial Institutions' the twelve specialists argued that while Article 17 ICC Rome Statute states that a case is inadmissible when "the case is being investigated or prosecuted by a State which has jurisdiction over it",[47] the OTP should as a '*policy matter*'[48] "be prepared to adopt a similar approach as in respect of ICTY, the ICTR, hybrid tribunals as the Sierra Leone Special Court, courts and tribunals of UN administered territories and other such courts"![49]

Nevertheless, the adjudication of the twelve jurists on this issue, which is related to the complementarity principle, is apparently political and not legal. However, on a legal basis: 1)it is legally unjustified; 2)it proceeds to an overtly broad interpretation which equates *ad hoc* criminal tribunals with states-parties, clearly contradicting the preparatory proceedings that led to the enactment of the ICC Rome Statute, or from the ICC Rome Statute itself or any other legal document; and 3)it

[44] *Ibid.*, pp. 3-4.

[45] In the original text mentioned as *vigilance*, *ibid.*, p. 3.

[46] *Ibid.*, p. 4.

[47] Article 17(1)(a) ICC Rome Statute.

[48] Antonio Cassese *et al*, 'Informal expert paper: the principle of complementarity in practice', *supra* note 43, p. 5 (my emphasis).

[49] *Ibid.*, p. 5.

gives priority to tribunals rather than the ICC, whether they do exist and function today or may be created in the future. Nonetheless, ad hoc or hybrid tribunals have a temporal and regional restricted jurisdiction and their efficiency in all this – including the judicial priority against the ICC, equivalent to the one typically owned by state-parties (which by the way the twelve jurists practically negate with their analysis later on) – is not based on the ICC Rome Statute, it cannot be legally substantiated and is not in favour of the ICC enacted jurisdiction.

Furthermore, the third and likely most significant dissonance takes place in the fourth chapter of the paper, under the general title 'Special Issues' and the imaginative sub-title 'Uncontested Admissibility and Consensual Sharing of Labour'.[50] Undeniably, an ambitious goal of this chapter was to highlight those cases where the admissibility issue of a case brought before the ICC would undisputedly be positively judged, given that "none of the criteria of Article 17(1)(a)-(c) are satisfied" and "thus, even if a challenge were raised, the outcome would be clear".[51]

Therefore, within the aforementioned scope, in the next page of the paper and particularly paragraph 61 entitled 'Appropriate Circumstances for Burden-sharing' the following are written:

> There may also be situations where *the appropriate course of action is for a State concerned not to exercise jurisdiction*, in order to facilitate admissibility before the ICC. Voluntary acceptance of ICC admissibility does not necessarily presuppose or entail neither a loss of national credibility nor a lack of commitment to the fight against impunity *(sic)*.[52]

Consequently, as far as the legal opinion of the twelve jurists is concerned, the voluntary inaction of a state-party does not seem to constitute a violation of the ICC Rome Statute or infringement of the com-

50 *Ibid.*, p. 18, para. 59. The title of the official text is "Special issues" and the subtitle "Uncontested admissibility and consensual division of labour".

51 *I bid*.

52 *Ibid.*, p. 19, para. 61 (my emphasis).

plementarity principle.[53] Strangely, however, the most problematic part is not found in the above-mentioned text, but in the extended explanatory annotation that accompanies the text:

> Article 17 determines the admissibility consequences arising when a state investigates or prosecutes, but does not expressly compel states to act. However, it is stated in the paragraph 6 of the Preamble that exercising criminal jurisdiction is the States 'duty'. Although the Preamble as such does not create any legal obligations, the Statute provisions can be interpreted in the light of the Preamble. The duty to "exercise criminal jurisdiction" should be interpreted according to the common principle "*aut detere aut judicaire*",[54] and for that reason it is met through the extradition and surrender, since those are the legal proceedings that lead to prosecution. Nevertheless, as noted below, the reference to a duty reflects also the *spirit* of the Statute, i.e. that the States will be responsible for the investigation and prosecution. That is essential for the effective function of the ICC. In the cases described here, refusing to exercise jurisdiction against prosecution before the ICC is a measure taken in order to improve the efficiency of the performance of justice, and therefore is in line with the letter and the spirit of the Rome Statute and other international commitments regarding the basic crimes. This can be discerned from the failure to prosecute [a state] due to its indifference or its willingness to protect the offenders, which can be correctly considered incon-

53 The ICC case law opposed shortly after to the unofficial entry of the term 'inaction' in the Statute. See Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-US-Corr 09-03-2006, *ibid.*, p. 19, para. 29.

54 In the official text mentioned as *Aut dedere aut judicaire.Ibid.*, p. 19, note 24.

sistent to the struggle against impunity.

On the basis of the analysis above, the footnote of which was in fact considered 'useful', the twelve internationally acclaimed jurists clarify, while invoking the common principle of international law *aut dedere aut judicaire* – which, incidentally, is not expressly stated anywhere in ICC Rome Statute[55] – an innovative interpretation of the complementarity principle, through which a state acts lawfully when it refuses to exercise its jurisdiction as a matter of first priority and according to the complementarity principle.

The Issue of Voluntary Referrals

The above-mentioned analysis pointed towards the newly introduced version of complementarity –or the 'non-complementarity' principle – which was whole heartedly embraced by the first Prosecutor Luis Moreno Ocampo through the systematic promotion of the 'self-referral' system.[56] According to this new interpretation, certain states, which were members of the ICC but were also torn by conflict and serious domestic problems, could be 'encouraged' to remit a case that

55 It is highly dubious whether the "aut dedere aut judicaire" principle constitutes an active principle of International Criminal Law included in Article 21(1)(b) ICC Rome Statute today, i.e. after an initial ICC recommendation and subsequent ICTY, ICTR and SCSL recommendations.

Article 21: "Applicable Law. 1. The Court shall apply: (a) in the first place, this Statute. Elements of Crimes and its Rules of Procedure and Evidence; (b) in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict…"

In any case, none of the twelve eminent scientists cited any such legal source in the study in question, nor did they make any reference to Article 21 ICC Rome Statute!

56 In his study included in the *Essays in honor of Cherif M. Bassiouni*, William Schabas mordantly reveals: "Luis Moreno Ocampo, has essentially solicited such referrals from the states concerned". W. A. Schabas, 'Crimes against humanity', in Leila Nadya Sadat & Michael P. Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in honor of Cherif M. Bassiouni*, (Liden: Koninklijke Brill NV, 2008), 347-364, p. 361.

falls into their jurisdiction to the Office of the Prosecutor, according to Article 14 ICC Rome Statute.[57]

A characteristic incident took place in September 2003, when the Office of the Prosecutor initially stated in the Annex to the "Paper on some policy issues before the Office of the Prosecutor: referrals and communications" that "in the light of the complementarity regime set out in the Statute and the central role accorded to it in the general policy of the Office, the Prosecutor will generally seek to alert the relevant State of the possibility of taking action itself very early in the process".[58] However, he quickly demonstrated his preference for the self-referral of state-parties, on the grounds that when the State "of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses".[59]

In other words, despite the fact that the interested States were parties to the ICC Rome Statute and, according to Article 15(1) ICC Rome Statute the Prosecutor had the uncontested right to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court,[60] the Prosecutor adopted the policy of inviting

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[57] Article 14 Referral of a situation by a State Party: "(1) A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. (2) As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation."

[58] Annex to the 'Paper on some policy issues before the Office of the Prosecutor': Referrals and Communications, p. 4, <http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf>, 20 October 2014.

[59] *Ibid.*, p. 5.

[60] Article 15 Prosecutor: "1. The Prosecutor may initiate investigations proprio

and welcoming voluntary referrals by civil war or conflict-torn states.[61] Certainly, if this particular method *de lege ferenda* continues to gain ground, it will inadvertently distort the complementarity principle, allegedly the ICC Rome Statute's milestone.

It is legally evident that the *propio motu* procedure is included in the inalienable rights of the Office of the Prosecutor, given that, according to the provisions of Article 12(2)(a) and (b) ICC Rome Statute, the conduct in question occurred in a state-party territory (or if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft), or a state-party national.[62] However, it seems that this legal path was not selected by the Prosecutor due to political reasons. In other words, the Office of the Prosecutor believed that reasons of international policy imposed the interception of the *propio motu* procedure, since this could provoke scepticism about the Court's potential victimisation of certain states, when in fact there have been many situations throughout the world where the ICC jurisdiction could have been exerted following a *propio motu* inquiry of the Prosecutor. Inescapably, the selection of isolated cases would probably give rise to searing criticism against ICC and its arbitrary selection of cases by the discontented state(s). Such an attack against the ICC in the international political scene would damage the ICC credibility and would cause new problems in the already existent and unavoidable difficulties of its initial

motu on the basis of information on crimes within the jurisdiction of the Court."

[61] Office of the Prosecutor, 'Report on the activities performed during the first three years (June 2003-June 2006), 12 September 2006, p. 7.

[62] Article 12 Preconditions to the exercise of jurisdiction: "1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5."

2. In the case of article 13, para. (a) or (c), "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with para. 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) the State of which the person accused of the crime is a national."

operation.[63]

Nevertheless, on the "Report on the activities performed during the first three years", i.e. the first report of the Office of the Prosecutor operations during 2003-2006, the Prosecutor himself attributed the sidelining of the *propio motu* inquiry and the legally controversial selection of the voluntary referrals to the fact that this policy would increase "the likelihood of important cooperation and support on the ground",[64] i.e. in any case, to a practical and evidently non-legal reason. In the same report, he attempted to analyse the relationship between the right of *propio motu* inquiry and the self-referrals system, claiming that "while *propio motu* power is a critical aspect of the Office's independence, the Prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial states as a first step in triggering the jurisdiction of the Court. This policy resulted in referrals for what would become the Court's first two situations: Northern Uganda and the DRC."[65]

This view on the self-referrals legitimacy was soon imparted to the competent ICC judicial authorities. Therefore, in the case of Thomas Lubanga Dyilo, Pre-Trial Chamber I practically verified the Office of the Prosecutor's view that the self-referral system is in agreement with the complementarity principle.[66] Having ruled already that the term 'case' suggests "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects",[67] Pre-Trial Chamber I confirmed that

[63] See Office of the Prosecutor, 'Report on the activities performed during the first three years' (June 2003-June 2006), pp. 2 and 5,<http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3year report20060914_English.pdf, 22 October 2014.

[64] *Ibid*., p. 2.

[65] *Ibid*., p. 7.

[66] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-Corr 17-03-2006, <http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF>, 23 October 2014.

[67] As mentioned before, the Pre-Trial Chamber I has separated the legal terms

on 19 March 2005, Thomas Lubanga Dyilo was arrested and detained by the DRC authorities on charges of genocide and crimes against humanity (pursuant to Articles 144 and 166-169 respectively).[68]

In this case, Pre-Trial Chamber I completely adopted the Office of the Prosecutor's views and ruled that "when the President of the DRC sent the letter of referral to the Office of the Prosecutor on 3 March 2004, it appears that the DRC was indeed unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002. In the Chamber's view, this is why the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime, according to which the Court by no means replaces national criminal jurisdictions, but it is complementary to them."[69]

All the above occurred despite the fact that on 22 February 2006 – when the ruling in question was handed down by Pre-Trial Chamber I –a higher criminal court in Bunia (Tribunal de Grande Instance) had already indicted Thomas Lubanga Dyilo on charges of genocide and crimes against humanity, and there was generally no sign of unwillingness or incapacity of the state having jurisdiction over the case, according to Article 17(1)(a) ICC Rome Statute.

In the meantime, between 2003 and 2006, when the aforementioned ruling was given in Thomas Lubanga Dyilo's case, the Office of the

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"situation" and "case". Situation in the Democratic Republic of Congo, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, para. 65, (my own emphasis), <http://www.icc-cpi.int/iccdocs/doc/doc183441.pdf>, 23 October 2014.

[68] Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, para. 33. Oddly enough, para. 36 mentions that "Therefore, in the Chamber's view, the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of article 17 (1) (a) to (c) and (3), of the Statute does not wholly correspond to the reality any longer." Nonetheless, even this ICC recorded evaluation could not lead to a change of decision concerning the admissibility issue!

[69] *Ibid.*, para. 35.

Prosecutor campaign for the infringement of complementarity principle through 'self-referrals' quickly brought its first results. In December 2003, the Uganda government took the first step, when it reported the Northern Uganda situation to the ICC.[70] The Prosecutor refuted his original statements, 'clarifying' that "the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA",[71] whereas in the initial press release given for the journalists there was only talk of "locating and arresting the LRA leadership".[72] Nonetheless, it must be pointed out that Uganda's self- referral led to the issue of five warrants of arrest, four of which are still active but unexecuted, while the fifth warrant of arrestagainst Raska Lukwiya will remain after his death forever unexecuted.[73] Thus, almost nine years since July 2005, when these sealed five warrants of arrest were issued, Uganda's self referral does not seem to have the expected results, at least as far as the criterion of ICC's caseload is concerned.

In March 2004, the Democratic Republic of Congo (DRC) reported the situation in Ituri to the ICC. However,in the Ugandan case, the government had already sent an official letter to the ICC in May 2004 via its legal adviser, in which it stated *inter alia* that "the Government of Uganda has been unable to arrest… persons who may bear the

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[70] See Mohamed El Zeidy, 'The Ugandan Government triggers the first test of the complementarity principle: an assessment of the First State's Party Referral to the ICC', 5(1) *International Criminal Law Review* (2005) 83-120.

[71] Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, paras. 4-5, <http://www.icc-cpi.int/iccdocs/doc/doc97225.pdf>, 28 October 2014.

[72] 'President of Uganda refers situation concerning the Lord's Resistance Army',<http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20 releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx>, 28 October 2014.

[73] See official website of ICC on the Uganda situation, <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx>, 30 October 2014.

greatest responsibility" for the crimes within the referred situation; that "the ICC is the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility" for those crimes; and that the Government of Uganda "has not conducted and does not intend to conduct national proceedings in relation to the persons most responsible".[74] On the contrary, in the DRC government's letter the jurisdiction was simply assigned to the ICC without explicit reference to incapacity or/and unwillingness (elements which were both mentioned more or less explicitly at the aforementioned Uganda's letter).[75]

Finally, with a letter to the ICC Prosecutor in July 2012, the Mali Minister of Justice Malick Coulibaly wished to incorporate his country into the renowned club of states which attempt via self-referrals to override the complementarity principle and willingly enter the ICC jurisdiction. In his succinct letter he states: "According to the Article of ICC Rome Statute, the state of Mali, as a contracting State to the Rome Statute, has the honour to report to you the most serious crimes committed on its grounds since January 2012, to the extent that the Mali courts cannot prosecute or judge the offenders.[76] Nevertheless, this unlawful, to the author's opinion, self-referral case of the state of Mali, leaves simultaneously some room for a 'return to legitimacy', since the phrase "to the extent that" can be interpreted in many ways and always in reference to the emerging actual future incidents.

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[74] Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53, p. 11, para. 37, <http://www.icc-cpi.int/_iccdocs/doc/doc97185.pdf>, 28 October 2013, with reference to 'A letter about jurisdiction'. This letter also refers to other four warrants of arrest issued in secret for the situation in Uganda on 8 July 2005, <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx>, 28 October 2014.

[75] William A. Schabas, ' "Complementarity in practice': some uncomplimentary thoughts', *supra* note 32, p. 19.

76 Referral letter by the Government of Mali, 13 July 2012, <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>, 28 October 2014.

The Pre-Trial Chamber Decision on the Al-Senussi Case (11 October 2013)

At the end of June 2011, Pre-Trial Chamber I issued warrants of arrest for Muammar Gaddafi, Saif Al Islam Gaddafi and Al-Senussi for crimes against humanity, murder and persecution of any recognizable group or community for political, racial, national, ethnic, religious or gender reasons [Article 7(1)(a) and (h) ICC Rome Statute].[77] According to the indictment, the crimes in question were committed in Benghazi between February 15 and February 28, 2011. As Libya is not an ICC state-party, Al-Senussi is a Libyan citizen and the attributed crimes took place on Libyan grounds against Libyan citizens, the warrant of arrest could only be issued after the Security Council referred the situation in Libya to the ICC.[78]

Almost two whole years later, in April 2013, Libya contested the admissibility of the case against Al-Senussi in an appeal by virtue of Article 8 ICC Rome Statute,[79] and subsequently all the parties involved (the State of Libya, the Office of the Prosecutor, the Legal Representative of the Victims and the Counsel for the Defense of Al-Senussi) submitted written statements setting out their views. Libya, via the submission of responses, admissibility challenge and final submissions which lasted until September 26, 2013,[80] claimed that not only had it

[77] Pre-Trial Chamber I, 'Warrant of Arrest forAbdullah Al-Senussi', ICC-01/11-01/11-4, 27 June 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1101360.pdf>, 28 October 2014.

[78] UN Security Council Resolution 1970/26-02-2011 'Peace and security in Africa", para. 4, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement>, 27 October 2014.

[79] Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Rome Statute,ICC-01/11-01/11-307-Red2,03-04-2013,<http://www.icc-cpi.int/iccdocs/doc/doc1575650.pdf#page=1 &zoom=auto,0,849>, 28 October 2014.

[80] Decision on the Admissibility of the Case Against Abdullah Al-Senussi, ICC-01/11-01/11-466 Red, pp. 8-9, <http://www.icc-cpi.int/iccdocs/doc/doc1663102.pdf>, 28 October 2014.

initiated the investigation of the crimes purportedly committed by Al-Senussi, but it had also provided substantial evidence, which demonstrated the ability and willingness of its judicial authorities to conclude the investigation and conduct his trial in Libya. As far as the similarity of the ICC and Libya cases is concerned, Libya claimed that the subject matter of the Libyan investigation is much broader than the one of ICC, but it includes the same crimes as those outlined in the ICC indictment, since the national investigations stretched over the time period from the 1980s to October 20, 2011, when Muammar Gaddafi was killed, i.e. several months after the attacks against civilians in February 2011, in connection with which Al-Senussi is accused by the ICC. Therefore, Libya argued that the charges against Al-Senussi were sufficient to raise the admissibility challenge before the ICC.[81]

Furthermore, Libya set out in detail the requisite infrastructure, and the fact that a renovated courtroom complex and a prison facility will be used for the trial proceedings, in conjunction with the assistance provided by the UN, the European Union and other countries, so that issues of transitional justice can be effectively handled. Therefore, Libya highlighted that, since Al-Senussi is in safe and secure government-controlled custody in Libya and the necessary evidence and testimony is already collected and since the issue of infrastructure is already resolved, there is no evidence demonstrating that Libya is either unable or unwilling to carry out a genuine investigation into the case.[82]

On this basis, Libya requested that Pre-Trial Chamber I declare the case against Al-Senussi inadmissible before the Court or, in the alternative, to consider implementing a 'positive approach' of complementarity by declaring the case inadmissible, subject to the fulfillment of express conditions by Libya.[83] Libya was essentially requesting the ICC competent judicial authority to implement the complementarity principle for the very first time. Not only had it never been implemented

[81] *Ibid.*, pp. 9-13.
[82] *Ibid.*, 12-13.
[83] *Ibid.*, at 14.

until then; on the contrary – as we have seen – there had been successive attempts to infringe it, even before the foundation of the ICC.

Following the above legal actions, in mid-October 2013 Pre-Trial Chamber I issued a lengthy ruling. Based on the already existent case law of the Court of Appeal for the interpretation of Article 17 ICC Rome Statute,[84] Pre-Trial Chamber I clarified that there are two crucial questions, concerning whether a case is admissible before the Court: **a)** whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, there is an ongoing investigation or prosecution of the case at the national level **b)** whether the State is unwilling or unable genuinely to carry out such investigation or prosecution.[85]

It is evident that the first question concerns the assessment of whether or not Libya's judicial investigation relates to the 'same case', i.e. the same person and the same criminal conduct.[86] For this matter, Pre-Trial Chamber I highlighted that the Court of Appeal had already ruled, by broadly interpreting the term, that the conduct subject to the national investigation should be *substantially* the same conduct alleged in the proceedings before the Court.[87] As far as the definition of the phrase "substantially the same conduct" is concerned, Pre-Trial Chamber I highlighted that this varies and depends on the concrete facts and circumstances of the case[88] and, therefore, requires a case-by-case

[84]Appeals Chamber, *The Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui,* 'Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case', 25 September 2009, ICC-01/04-01/07-1497, paras. 1 and 75-79, <http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf>, 28 October 2013. Also see 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.

[85] 'Decision on the Admissibility of the Case Against Abdullah Al-Senussi', *supra* note 79, pp. 14-15.

[86] The term "conduct" is used in the official English text of the Decision, for which an analysis of the argumentation-interpretation of all state parties is presented, *ibid.*, pp. 18-31.

[87] *Ibid.*, p. 32.

[88] The term "facts and circumstances of the case" is used in the official English

analysis.[89, 90]

Pre-Trial Chamber I determined Al-Senussi's alleged conduct in the proceedings before the Court, as it is set out in the Warrant of Arrest which was issued against him, in conjunction with the Article 58 Decision (i.e. the decision about the warrant of arrest for Al-Senussi),[91] and compared it to the criminal conduct which is the subject of the legal proceedings in Libya, as it was delineated by Libya in its admissibility challenge.

The present case before the Court concerns the individual criminal responsibility of Al-Senussi for killings and acts of persecution due to their political opposition to Gaddafi's regime. The crimes were allegedly committed directly by Al-Senussi or through the Libyan Security Forces during the repression of the demonstrations that took place in Benghazi from 15 February 2011 to at least 20 February 2011, as part of a policy orchestrated by the highest level of the Libyan government to

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text of the Decision, *ibid*., at 34.

[89] The term "a case-by-case analysis" is used in the official English text of the Decision, *ibid*., at 34, where a special reference to the May 2013 decision is made, concerning the admissibility of Saif Al Islam Gaddafi. This term is repeated in page 40, para. 78. See 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-344-Red, 31-05-2013, p. 32, para. 77, <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf>, 28 October 2014. Also see ICTR, *The Prosecutor* v. *Ntagerura et al,* Case No. ICTR-99-46-A, Appeals Chamber Judgement, 7 July 2006, para. 23. ICTR, *The Prosecutor* v. *Ntakirutimana,* Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgement, 13 December 2004, paras. 73-74.ICTY, *The Prosecutor* v. *Kupreskic et al,* Case No. IT-95-16-A, Appeals Chamber Judgement, 23 October 2001; ICTY, *The Prosecutor* v. *Blaskic,* Case No. IT-95-14-A, Appeals Chamber Judgement, 29 July 2004; ICTY, *The Prosecutor* v. *Kvocka et al*., Case No. IT-98-30/1-A, Appeals Chamber Judgment, 25 February 2005.

[90] A swift reading of the cases brought before the ICC today suffices to show that they are significantly different, as far as the description of the true conduct parameters used in court against every suspect or accused is concerned, and proves that different cases cannot be considered necessarily equal to the alleged wide or narrow interpretation of the conduct, *ibid*., at 41, para. 75.

[91] 'Decision on the Admissibility of the Case Against Abdullah Al-Senussi', *supra* note 79, p. 36, para. 68.

deter and quell the revolution against the Gaddafi regime occurring throughout Libya.[92]

Pre-Trial Chamber I recalled that the previous decision on Article 58 ICC Rome Statute includes a list with specific 'incidents' or 'events'.[93] Nevertheless, "since, as in the case against Mr. Gaddafi, the conduct that is alleged in the criminal proceedings against Mr. Al-Senussi is not shaped by the 'incidents' mentioned in the Article 58 Decision (for the issue of a Warrant of Arrest for Al-Senussi), it is not required that domestic proceedings concern each of those 'events' at the national level in order for the Chamber to be satisfied that Libya is investigating or prosecuting Mr. Al-Senussi for substantially the same conduct that is alleged in the proceedings before this Court."[94] Consequently, since these 'events' constitute simple indicative examples of Al-Senussi's alleged conduct, the proceedings before the national authorities do not need to include in the indictment each 'incident' separately.[95] Thus, the

[92] *Ibid.*, pp. 36-38.

[93] *Ibid.*, p. 45, para. 78.

[94] *Ibid.*, p. 45, para. 79.

[95] The Decision for Article 58 (concerning the issue of the warrant of arrest for Al-Senussi) includes, *inter alia*, the following incidents that occurred in Benghazi during 15-20 February 2011: 1)the arrest, on 15 February 2011, by the Security Forces of a lawyer who was organising a protest against Gaddafi regime scheduled for 17 of February 2011 (para. 43);2) the arrest of several authors, writers and alleged dissidents (including that of the Libyan author Idriss Al-Mismari) between 15 and 17 February 2011 (para. 43 and 44); 3)the attack by the Security Forces on demonstrators with tear gas and live ammunition, following thegathering of an increasing number of demonstrators in the area of Birka, in A1 Fatah street and Jamal Abdun Naser street on 16 February 2011, causing the death of at least three civilian demonstrators (para. 36(i); 4) the attack, on the same day, by forces loyal to Muammar Gaddafi on civilian demonstrators who were hit with sticks and dispersed (para. 52); 5) the event of 17 February 2011 at the Juliyana Bridge, when Security Forces, armed with machineguns, barricaded the street to stop the demonstrators, opened fire for a significant period of time on the unarmed demonstrators, causing a large number of injuries and deaths among the demonstrators, and arrested those demonstrators that were not shot and were not able to flee (para. 36(ii) and 53); 6) the attack, on the same day, carried out by the Security Forces who fired

fact that the file of the national judicial proceedings may or may not include enough of these 'incidents' (especially those marked as extremely violent or typical of the criminal actions attributed to the accused) constitutes a critical indicator of whether or not the case investigated by the ICC and simultaneously by the national judicial authorities is the same.[96]

In this case, the competent ICC Pre-Trial Chamber ruled that the evidence submitted by the Libyan authorities proved that the judicial proceedings against Al-Senussi are ongoing. The Libyan authorities examined witnesses repeatedly, collected documents such as medical reports, death certificates and written orders, requested the victims to present evidence for their allegations, submitted requests for any additional information concerning this particular case to external sources (other states and international organizations) and did not neglect to seek potential evidence favorable to the accused.[97]

Moreover, Pre-Trial Chamber I deemed that "the evidence relied

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with live ammunition on unarmed demonstrators, who had gathered near the High Court in the centre of Benghazi to protest against the arrest of the individual who had been organizing the forthcoming protest against Gaddafi regime (para. 50); 7) the killing and seriously injuring, still on 17 February 2011, by the Security Forces of a number of other demonstrators in different areas of the town (para. 36(iii) and 52) and the attacks by the Security Forces continuing throughout the night (para. 53);8) the killing and seriously injuring by the Security Forces on 18 February 2011 of a number of civilians while participating in the funeral procession for the demonstrators killed the day before (para. 36(iv) and 54); 9)the killing by the Security Forces of at least 60 demonstrators on 20 February 2011 (para. 36(vi)). Furthermore, the Decision for Article 58 refers to protesters subjected to torture (para. 46) and abductions and subsequent torture of family members of alleged dissidents (para. 47). Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi', ICC-01/11-12, 27-06-2011, <http://www.icc-cpi.int/iccdocs/doc/doc1099314.pdf>, 30 October 2014.

[96] 'Decision on the Admissibility of the Case Against Abdullah Al-Senussi', ICC-01/11-01/11-466 Red, 8-9, <http://www.icc-cpi.int/iccdocs/doc/doc1663102.pdf >, 28 October 2014, p. 45, para. 78.

[97] *Ibid.*, pp. 46-82, para.81-157.

upon by Libya for the purposes of the Admissibility Challenge demonstrates the taking of identifiable, concrete and progressive investigative steps in relation to Mr. Al-Senussi's criminal responsibility… with a view to clarifying and ascertaining, inter alia, the following relevant factual aspects":[98]

i) the existence of a policy conceived by the highest level of the State government to deter and quell the demonstrations against the Gaddafi regime through "recruitment and arming of mercenaries and supporters for the repression"[99]
ii) the mobilisation of militia and transfer of equipment, recruitment of missionaries, incitement of civilians to kill protesters, provision of supplies to the Security Forces and other arrangements for the repression of the demonstrations, including the role of Al-Senussi himself and his alleged accomplices in these activities
iii) Al-Senussi's commandover the Security Forces and his presence in Benghazi immediately after the outbreak of the revolution in order to control the situation
iv) the numerous attacks on civilian demonstrators by the Security Forces in many areas of Benghazi between 15 and 20 February 2011, causing serious injuries to countless civilians or their death, as well as similar attacks conducted by them in the whole state throughout the period of the repression of the revolution against the Gaddafi's regime
v) Al-Senussi's direct involvement in the shooting of the civilian demonstrators in Benghazi between 15 and 20 February 2011
vi) the arrest of journalists, activists and civilians demonstrating against the Gaddafi regime and the role of Mr. Al-Senussi and his alleged accomplices in some of these events
vii) instances of detention and torture of civilian dissidents.[100]

Subsequently, Pre-Trial Chamber I reached the conclusion *ab initio*

[98] *Ibid.*, pp. 83-84, para.162
[99] *Ibid.*, p. 49, para.86.
[100] *Ibid.*, pp. 83-85, para.162.

that the judicial investigations of the Libyan authorities comprise the relevant factual aspects of the Al-Senussi's alleged criminal conduct and, therefore, Libya has initiated a national judicial procedure that includes the same case brought before the Court, according to the proper interpretation of the Article 17(1)(a) ICC Rome Statute.[101]

In other words, the ICC responded positively to the first crucial question of whether or not a case is admissible before the Court, i.e. whether or not there is an ongoing national judicial investigation or criminal prosecution during the ICC proceedings.

As far as the second question was concerned, i.e. whether or not a state is unwilling or unable to carry out such an important judicial investigation or criminal prosecution, Pre-Trial Chamber I recalled that the state challenging the admissibility of a case carries the burden of proof for "all aspects of the Admissibility Challenge to the extent required by the concrete circumstances of the case".[102] However, the Pre-Trial Chamber acknowledged that an unwillingness or incapability test for Libya could be conducted only if serious doubts existed about the true nature of the national judicial proceedings. Libya may bear the burden of proof for the admissibility challenge, but each party's allegations must still be evidentially substantiated in order to be lawfully submitted.

Subsequently, Pre-Trial Chamber I took into '*holistic*'[103] considera-

[101] *Ibid.*, p. 86, para.164. The court indicated that although a number of criminal acts inflicted on civilians because of their political opposition to Gaddafi's regime constitute the crime of "persecution" within the meaning of article 7(l)(h) of the Statute, the fact that the political factor is aggravating according to Articles 27 and 28 of the Libyan Criminal Code demonstrates efficiently the murders and inhuman acts by Al-Senussi. *Ibid.*, pp. 86-87, para.166. Also see 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-344-Red 31-05-2013, *supra* note 89, p. 46, para. 111.

[102] The decision states that "all aspects of the Admissibility Challenge to the extent required by the concrete circumstances of the case", 'Decision on the Admissibility of the Case Against Abdullah Al-Senussi', at 15, para. 27.

[103] My emphasis. It is probably the first time that this term is included in the case law of the ICC, even through the official summary of the lengthy decision. See

tion a wide range of actual allegations introduced by the parties and which were found to be evidentially substantiated and pertinent to the case. The data included the quantity and quality of the collected evidence, the range, methodology and resources available for the investigations of Al-Senussi's case; the recent transfer of Al-Senussi and his thirty co-accuseds' cases to the Accusation Chamber; the case-study of specific judicial proceedings conducted against other Gaddafi regime officials in Libya; and the recent efforts to resolve the Libyan judicial system's problems via international assistance. Furthermore, Pre-Trial Chamber I took into consideration the severe problems of Libya after the civil war;[104] the absence of witness protection programs; the significant difficulties that local authorities face in their effort to maintain security in certain prisons; and the absence of legal representation for Al-Senussi.

The holistic examination of the above did not result in any negative indications concerning the judicial proceedings in Libya against Al-Senussi. In other words, the judicial investigation of the case in Libya was not deemed to have been conducted in order to protect the accused from his criminal responsibilities, which would justify the notion of 'unwillingness' of Article 17(2)(a) ICC Rome Statute.[105] Furthermore,

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'Summary of the Decision on the admissibility of the case against Mr Abdullah Al-Senussi', p. 5, <http://www.icc-cpi.int/en_menus/icc/press%20and%20 media/ press%20releases/Doc uments /pr953/Summary%20Al-Senussi%20English.pdf>, 28 October 2014.

[104] ICC Judge Christine Van den Wyngaert highlighted in a separate declaration that she was extremely shocked to hear about the abduction and liberation of the Libyan Prime Minister Ali Zeidan on October 10, 2013, as well as the general security levels in Libya, since the deterioration of such criminal acts could dramatically affect Libya in its ability to carry though the proceedings against Al-Senussi. Furthermore, she would prefer to have received before the issue of the Decision the views of all interested parties, concerning whether the current security situation in Libya is safe enough to trial Abdullah Al-Senussi there. See Declaration of Judge Christine Van den Wyngaert, available online <http://www.icc-cpi.int/iccdocs/doc/doc1663117.PDF>, 30 October 2014.

[105] Article 17 Issues of admissibility: "2. In order to determine unwillingness in

it was decided that the course of the judicial proceedings on a national level did not involve any unjustified delay, which would certainly collide with the true intention to bring Al-Senussi before justice pursuant to Article 17(2)(b) ICC Rome Statute. In addition, Pre-Trial Chamber I reached the conclusion that the judicial investigations against Al-Senussi had been conducted in an impartial and independent way and with the intention to bring the person in question before the court and, consequently, there was no issue concerning the application of cumulative requirements pursuant to Article 17(2)(c) ICC Rome Statute.

Moreover, the fact that Al-Senussi had no legal representation at this stage of interrogations did not constitute 'unwillingness' pursuant to Article 17(2) ICC Rome Statute, since it was not an indication of Libya's unwillingness to bring Al-Senussi before the court, but rather a consequence of the country's state after the civil war and the overthrow of the Gaddafi's regime. Hence, following a strictly grammatical interpretation of the provision, Pre-Trial Chamber I concluded that Libya is not unwilling to put Al-Senussi on trial, simply because Al-Senussi has no legal representation in Libya. Besides, the scope of Article 17 ICC Rome Statute does not regrettably cover human rights issues that deal with the 'fair trial' principle or the prohibition of death penalty, since in both cases Al-Senussi would have to remain in The Hague and be brought before the ICC.[106]

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a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."

[106] The Defence highlighted in a previous paper the fast trials that took place in Libya against higher officers of the Gaddafi regime, which caused the enforcement of death sentence on the accused. 'Defence Application on behalf of Abdullah Al-

As far as Libya's *ability* to investigate the case and persecute Al-Senussi was concerned, the ICC Pre-Trial Chamber I first examined the possibility that Libya "is not able to obtain the accused", due to a total or substantial collapse or unavailability of its national judicial system pursuant to Article 17(3) ICC Rome Statute.[107] Certainly, in the case of Al-Senussi who was already in custody in Libya, such a claim could not be validly supported. Consequently, Pre-Trial Chamber I continued to examine Libya's ability to "obtain the necessary evidence and testimony" pursuant to Article 17(3) ICC Rome Statute, by taking into consideration the data collected by the Libyan authorities and the current stage of the national judicial proceedings. Undisputedly, the lack of a specific witness protection programme and the fact that certain prisons still fall outside the jurisdiction of the Libyan Ministry of Justice were deemed as negative factors.Nevertheless, in Al-Senussi's case Libya presented substantial evidence, which included several witness and victim testimonies,[108] as well as documents such as orders, medical records, and flight records.

For these reasons, Pre-Trial Chamber I concluded that, following an overall assessment of all factors, Libya is neither unable to conduct its judicial proceedings in Al-Senussi's case nor otherwise unable to

Senussi for Leave to Reply' to the "Libyan Government's Response to 'Defence Application on behalf of Mr. Abdullah Al-Senussi concerning Libya's Announcement of Trial Date in August 2013' and 'Defence Request for this Application and the Defence Application of 10 July 2013' to be decided on an urgent basis, ICC-01/11-01/11-398, para. 10, <http://www.icc-cpi.int/iccdocs/doc/doc1631011.pdf>, 23 October 2014.

[107] Article 17 Issues of Admissibility: 3. 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.

[108] It is noteworthy that at least one of the witnesses testified while detained, and that several potential witnesses are kept today in Al Hadba prison, which operates under the supervision of the present Libyan government, i.e. the National Transitional Council.

"carry out its proceedings" due to a total or substantial collapse or unavailability of its national judicial system.[109] In an attempt to set apart Al-Senussi's case from Saif Al Islam Gaddafi's case, where the continuous attempts to find him a legal representation had subsequently failed, it must be stressed that in Al-Senussi's case there had been several Libyan lawyers who wished to represent him in the national judicial proceedings, despite the fact that none of them has managed to visit him and be granted the power of attorney to do so.

Concomitantly, following the aforementioned legal analysis, Pre-Trial Chamber I – after its first decision, according to which the ICC was considered as the competent judicial body to rule on this case– decided on October 11, 2013 that because of the fact that the Al-Senussi case is today under judicial investigation by Libya's criminal system and Libya is willing and able to carry out its investigation, the case is inadmissible pursuant to Article 17(1)(a) ICC Rome Statute and does not fall under ICC jurisdiction due to the complementarity principle.

However, at the end of its decision, the Court highlighted the Prosecutor's right to appeal the decision pursuant to Article 19(10) ICC Rome Statute when "he or she is fully satisfied that new facts have arisen that negate the basis on which the case had previously been found inadmissible" pursuant to Article 17 ICC Rome Statute. Nonetheless, given the cumulative requirements of Article 19 ICC Rome Statute "fully satisfied + new facts → negation of case inadmissibility", as well as the five-day period of time set by 154(1) Rule of Procedure and Evidence to submit the request; this did not occur and is not likely to occur in the future.

To sum up, if one considers the conclusions of the *awakening hypothesis of the complementarity principle*, one should feel content by this *prima facie* positive development in favour of the complementarity principle's application for the first time in the ICC history. On the other hand, it could be argued that political tendentiousness, international diplomatic considerations and the two-year persistent denial of Libya's

[109] Article 17 (3) ICC Rome Statute.

National Transitional Council to deliver Al-Senussi to ICC, ultimately led to a judicial compromise, pursuant to the aforementioned report of the twelve jurists and the Office of the Prosecutor's Paper on Policy Issues in 2003. Therefore, if the last conclusion is right, the case of the complementarity principle functioning as a dead letter remains true and cannot be overturned by the awakening hypothesis.

Consequently, this decision splits into two the single – up to now – case of Saif Al Islam Gaddafi and Abdullah Al-Senussi[110]: on the one hand, it brings the more important and notorious Gaddafibefore the ICC; on the other hand, it brings the less famous Al-Senussi before the Libyan judicial authorities. Hence, in spite of the Decision on the Admissibility of the Case against Saif Al Islam Gaddafi – where one of the three main reasons for deciding that the ICC should try him was that "the Chamber has noted a practical impediment to the progress of domestic proceedings against Mr. Gaddafi as Libya has not shown whether and how it will overcome the existing difficulties in securing a lawyer for the suspect"[111] –the insuperable problems in Al-Senussi's communication with his lawyers were not considered equally significant,[112] at least as it was shown by the different judicial outcomes and jurisdictions (ICC's jurisdiction over Gaddafi case and Libya's jurisdiction over Al-Senussi case).

Nonetheless, on October 17, 2013 Al-Senussi's Defense Team (which includes Professor William Schabas) filed a request for the review and suspension of the case by virtue of the admissibility of the case against

[110] See ICC official website for the case 'The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi' <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/Pages/icc01110111.aspx>, 30 October 2014.

[111] 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', *supra*note 89, p. 89, para. 215

[112] Although it is also highlighted in the Decision that the Pre-Trial Chamber I "is mindful that the Defence ability to raise certain factual matters may have been prejudiced by the absence of direct contacts with Mr Al-Senussi, since a visit to Mr Al-Senussi by his counsel has not taken place despite the Chamber's order to this effect". *Ibid.*, p. 110, para. 219.

Al-Senussi, in line with Articles 19(6), 82(1)(a), 82(3), 83(2)(a) ICC Rome Statute, Articles 154(1) and 156 Rules of Procedure and Evidence and 64 Regulation of the Court.[113, 114]

In its appeal, the Defense argued that the Court of Appeal must suspend the decision of October 11, 2013, because if Libya was to proceed to conduct and complete the trial proceedings in line with this decision, this "would defeat the purpose of the appeal", thus creating an irreversible situation.[115] Therefore, the Defense argued that "it is essential that the Admissibility Decision is suspended to prevent Libya from relying on the Decision to try and sentence Mr. Al-Senussi before the Appeals Chamber has finally determined whether Libya can indeed try him".[116]

The Defense analyzed both the fact that Libya is "unable and unwilling genuinely to conduct fair trial proceedings"[117] and that, consequently, Pre-Trial Chamber I erred in finding that his case was inadmissible before the ICC. This part was admittedly crucial, because if it was decided that Article 17 ICC Rome Statute included respect for human rights and the fair trial principle, then it would be evident that Al-Senussi could not be tried in Libya. In that way the Defense seemed to have been attempting to implant the fair trial criterion within the interpretational framework of Article 17 ICC Rome Statute. However, the scope of Article 17 seems much more restricted and refers to cases where a state attempts to use judicial proceedings taking place on its grounds as a shield protecting the accused, and not in cases where the accused faces infringement of his human rights and rights as an ac-

[113] Public censored document, Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I's 'Decision on the admissibility of the case against Abdullah Al-Senussi', and Request for Suspensive Effect, ICC-01/11-01/11-468-Red 17-10-2013, <http://www.icc-cpi.int/iccdocs/doc/doc1666694.pdf>, 30 October 2014.

[114] It is noteworthy that the OPCV was against the Libyan request not to bring Al-Senussi before the ICC. *Ibid.*, pp. 99-100, para. 195-198.

[115] *Ibid.*, pp. 6-7.

[116] *Ibid.*, p. 8.

[117] *Ibid.*, p. 10.

cused or faces the death penalty (in Al-Senussi's case all of the above apply).

Therefore, the fact that Al-Senussi "has been detained in Libya for nearly 13 months without access to any lawyer despite his repeated requests to see a lawyer"[118] or that "he has been interrogated in detention in violation of his rights under Libyan law without any lawyer being present"[119] or that "he is cut-off from the world and has been denied family visits and telephone calls"[120] or even that "his ICC Defense team has been prevented by the Libyan authorities from having any contact with him despite the Pre-Trial Chamber's orders to this effect"[121] do not constitute *stricto sensu* issues under Article 17 ICC Rome Statute.[122]

Nevertheless, what ultimately emerged from the appeal as an exceptionally crucial issue is the suspension of the Admissibility Deci-

[118] *Ibid.*, p. 11.

[119] *Ibid.*, p. 11.

[120] *Ibid.*, p. 11.

[121] *Ibid.*, p. 11.

[122] "[T]he Chamber emphasizes that alleged violations of the procedural rights of the accused are not *per se* grounds for a finding of unwillingness or inability under article 17 of the Statute. In order to have a bearing on the Chamber's determination, any such alleged violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute. In particular, as far as the State's alleged unwillingness is concerned, the Chamber is of the view that, depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process recognized under international law, under article 17(2)(c) of the Statute. However, this latter provision, identifying two cumulative requirements, provides for a finding of unwillingness only when the manner in which the proceedings are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice." Decision on the Admissibility of the Case Against Abdullah Al-Senussi', 117-118, para. 235 and f. 541 where there is an extremely interesting analysis on the different phrasing of Article 17 (2) (c) ICC Rome Statute and Article 9(ii) Rules of Procedure and Evidence (cumulative phrasing in the first, disjunctive phrasing in the second).

sion, since the acceptance of this request would result in Al-Senussi sustaining the position of the accused as it was prior to the Admissibility Decision. Furthermore,

> the Appeals Chamber could then find that the immediate surrender of Mr. Al-Senussi to The Hague during the appellate proceedings is justified in light of the appeal against the postponement of the surrender order and to ensure a secure and privileged setting for communications between Mr. Al-Senussi and his Counsel, given that Libya has not permitted him to have any such contact with his Counsel in Libya. In the Defence's submission such a finding would serve to protect Mr. Al-Senussi's fundamental rights, taking into account that the failure to do so could not be corrected or reversed at any later stage.[123]

Undoubtedly, though, the unhindered communication of Al-Senussi with his Defense Team is of utmost importance for one more reason: it could constitute a significant source of new information, not only about the issue of possible inability or unwillingness of Libya to bring his case before the domestic courts, but first and foremost about the whole situation in Libya. Finally yet importantly, it is clear that although the fair trial principle and the protection of Al-Senussi's fundamental rights as a human being and accused do not seem to fall *ab initio* into Article 17 ICC Rome Statute, an alternative interpretational approach could possibly be *telologically* accepted, given that both (on one hand, a state's unwillingness and inability to bring a case to court and the infringement of the fair trial principle and the fundamental rights of the accused on the other) lead to exactly the same outcome: harsh criticism against the ICC, the failure of international criminal justice and the rescission of any attempt to put an end to impunity in a legally proper, fair and civilized way.

Nonetheless, On July 24, 2014 the ICC Appeals Chamber confirmed the Pre-Trial Chamber's decision that Al-Senussi should stand trial in

[123] *Ibid.*, p. 13.

Libya. Although the Appeals Chamber rejected the Defense's arguments, the ICC judges seem to be cautiously adopting for the first time what has already been coined as 'positive complementarity'[124]; that is, whether a trial according 'minimised rights' to the accused could fall afoul of Article 17's 'unwilling' or 'unable' criteria:

> Taking into account the text, context and object and purpose of the provision, this determination is not one that involves an assessment of whether the due process rights of a suspect have been breached per se. In particular, the concept of proceedings "being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice" should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely to establish his or her criminal responsibility, in the equivalent of sham proceedings that are concerned with that person's protection.
>
> However, there may be circumstances, depending on the facts of the individual case, whereby violations of the rights of the suspect are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect so that they should be deemed, in those circumstances, to be "inconsistent with an intent to bring the person to justice.[125]

[124] Kevin Jon Heller, 'The shadow side of complementarity: the effect of Article 17 of the Rome Statute on national due process, (2006) 17 *Criminal Law Forum,*<http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=907404>, 24 October 2014; William W. Burke-White, 'Implementing a policy of positive complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum*, 59-85; Enrique Carnero Rojo, 'The role of fair trial considerations in the complementarity regime of the International Criminal Court: From 'No peace without justice' to 'No peace with Victor's justice'?', (2005) 18(4) *Leiden Journal of International Law,* 829-869.

[125] 'Judgment on the Appeal of Mr Abdullah Al-Senussi' against the 'Decision of Pre-Trial Chamber I on 11 October 2013 on the Admissibility of the Case against Abdullah Al-Senussi', paras 2-3, pages 3-4, <http://www.icc-cpi.int/iccdocs/doc/

According to Yvonne McDermott Rees, the second paragraph seems to suggest that the ICC left open a more expansive interpretation of the complementarity clause, to include unfairness to the accused. Conversely, however, the Appeals Chamber refused to accept additional evidence from the Defense, which purported to show that the authorities had mistreated the accused in custody for the purposes of obtaining a confession from him.[126]

The Hypothesis of Complementarity Principle as a Dead Letter or the Awakening Hypothesis of Complementarity Principle: Which Will Prevail?

Although legal theory generally suggests otherwise, all provisions and principles may not be equal in practice for one who applies the law. And if this can be reasonably and lawfully true on the basis of the hierarchy of laws, it can also occur in a 'paradoxical' way, even within the same legal framework and despite the fact that no issue of conflict of laws arises, where the 'weighing' of different laws is largely inevitable.

Nevertheless, a legally enacted principle as an actual dead letter, i.e. totally inapplicable or applied in a manner contradictory to its expressly defined context, constitutes a rare phenomenon in advanced judicial systems operating within a democratic society. Undeniably, such an exceptionally rare anomaly brings confusion and awkwardness to jurists, since referring to it expressly as such in studies and monographs casts serious doubts on the judicial system within which it is supposed to exist and 'operate'. Thus, this principle passes its 'legal life' as a dead letter and the judicial system within which it 'exists' continues to operate in a manner inconsistent with the officially proclaimed approach and despite its inherent weakness or, better yet, anomaly.

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doc1807073.pdf>, 29 December 2014.

[126] Yvonne McDermott Rees, 'Towards positive complementarity?', 26 July 2014, electronically available at: Phd in Human Rights Blog, <http://humanrights-doctorate.blogspot.gr/2014_07_01_archive.html>, 24 October 2014.

The complementarity principle of the ICC Rome Statute has constituted until very recently a dead letter, which may have just begun to become 'fulfilled' via the decision against Al-Senussi.[127]

The present application of the complementarity principle constitutes proof of the awakening hypothesis of the complementarity principle; on a first level, a hypothesis that presents the case of an expressly formulated principle which has been substantially non-existent within its legal framework for many years, and only after the publication of a judgment begins to fulfill its express purpose. Furthermore, on a second level, the complementarity principle's awakening shows the paradox of principles with different legal force, although, theoretically, they all have the same nominal force within their formulated legal framework

The ICC decisions against Al-Senussi in October 2013 and July 2014 indicate that complementarity has ceased being a principle 'in trance'. Of course, the question of whether the awakening hypothesis of complementarity principle or the hypothesis of complementarity principle as a dead letter (since, if one accepts that the decisions were the result of a political arrangement to bring Gaddafi's son before The Hague and Al-Senussi before Libya, the complementarity principle was once more not applied), will only be resolved by future decisions of the ICC. Although the culmination of the civil war in Libya recently cannot make us optimistic about the awakening of the complementarity principle,[128] ultimately, history will decide which hypothesis triumphs.

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[127] It is noteworthy here that while the complementarity concept constitutes a loan from quantum mechanics to law science (since the term complementarity is used to express the paradox of wave-particle duality in the scientific field of quantum mechanics), the new term of the awakening hypothesis that this study attempts to introduce constitutes a loan-neologism of the scientists of philology, who were asked to aid the author in the description of this paradoxical phenomenon: a legal principle remains empty for several years and suddenly it starts to 'fill', to take a form.

[128] The last episode of the civil unrest and war being the bombing of a Greek oil tanker. 'Greek oil tanker bombed in Libyan port of Derna', *BBC*, 5 January 2015,<http://www.bbc.com/news/world-africa-30681904>, 11 January 2015; George

POSTSCRIPT: After the writing of this article, the principle of complementarity has finally started emerging as a core factor for ICC's jurisdiction. The Chief Prosecutor Ms Bensouda has invoked the principle of complementarity in the situation between Russia and Georgia in Ossetia region.[129] Moreover, following the threats of certain African states (initially Burundi, Gambia and South Africa) to withdraw their ratifications,[130, 131] the Chief Prosecutor Ms Bensouda has once more referred to the principle of complementarity as a core principle of ICC's jurisdiction and has more extensively focused on the principle's application on the latest Office of The Prosecutor's Report on Preliminary Examination Activities 2016.[132] The author of this article hopes the informal dissemination of this article to academics and members of the International Criminal Court Bar Association has *inter alia* assisted in the complementarity's late recognition as well.[133] Certainly, it remains

Joffe, 'Libya air strikes: conflict linked to wider Middle East', *BBC*, 27 August 2014,<http://www.bbc.com/ news/world-africa-28948948>, 11 January 2015.

[129] Situation in Georgia, Public Document with Confidential, *EX PARTE*, Annexes A,B, C, D.2, E.3, E.7,E.9, F, H and Public Annexes 1, D.1, E.1, E.2, E.4, E.5, E.6, E.8,G,I, J, ICC-01/15-4 13-10-2015 1/160 EO PT, pp. 132-133, 150-151, <https://www.icc-cpi.int/CourtRecords/CR2015_19375.PDF>, 10 April 2017.

[130] But see also ASP President welcomes the revocation of South Africa's withdrawal from the Rome Statute, 11 March 2017 <https://www.icc-cpi.int/ Pages/item.aspx?name=pr1285>, 10 April 2017.

[131] Statement of the President of the Assembly of States Parties on the process of withdrawal from the Rome Statute by Burundi, 18 October 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1244>, 10 April 2017; President of the Assembly regrets withdrawal of any State Party from the Rome Statute and reaffirms the Court's fight against impunity, 22 October 2016, <https://www.icc-cpi.int/Pages /item.aspx?name=pr1248>, 10 April 2017;Press Conference by the President of the Assembly on withdrawal from the Rome Statute, today at 15:00 (GMT) in Dakar, 24 October 2016, https://www.icc-cpi.int/Pages/item.aspx?name=ma206, 10 April 2017;

[132] The Office of the Prosecutor, Report on Preliminary Examination Activities 2016, pp. 2-3, 5, 48-49, 72, <goo.gl/QYsMfM>, 10 April 2017.

[133] The latest explicit referral of the complementarity principle can be found at the Statement of the Prosecutor of the International Criminal Court, Ms Fatou Bensouda, regarding the situation in the Kasaï provinces, Democratic Republic of the

yet to be seen to what extent this core principle of the Rome Statute will be truly revived and obtain the position the international legislators had initially envisaged.

Congo, 31 March 2017, <https://www.icc-cpi.int/Pages/item.aspx?name=170331-otp-stat>, 10 April 2017.