Conflict of Jurisdiction Between the ICC and National Criminal Courts (The Libyan Situation as a Case Study)

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Abstract

In early 2011, a number of Arab States experienced waves of protest calling for improved social and economic conditions. In that context, considerable legal debate arose over the legitimacy of proceedings before the International Criminal Court (ICC) involving nationals of States that had not ratified the Rome Statute. The resulting jurisdictional tension between the ICC and the Libyan criminal courts became one of the most prominent legal issues arising from crimes allegedly committed in Libya.

The central issue is governed by the principle of complementarity. The ICC is not intended to replace national courts; accordingly, Libyan courts retain primary jurisdiction unless the conditions for ICC intervention are met. This conflict became particularly visible in the case of Saif al-Islam Gaddafi, where Libya insisted on its right to prosecute him before its domestic courts, while the ICC maintained that the case fell within its jurisdiction.

Key words: conflict, ICC, national courts, Libyan situation, complementarity,…

Introduction

The establishment of a permanent International Criminal Court in 1998 responded to the need to ensure accountability for the gravest international crimes and built on earlier experiments in international criminal justice. The creation of the Court marked an important step in combating impunity for crimes of concern to the international community. Yet the ICC was not designed to displace national criminal justice systems. Its jurisdiction is founded on complementarity: national jurisdiction remains primary, while the ICC performs a supplementary role.

Relatively few situations have reached the ICC, and the Libyan situation has been exceptional both within the international criminal justice system and in the Court's own practice, particularly because it arose through a Security Council referral. The relationship between international and national criminal jurisdiction became especially acute after the events that unfolded in Libya from 2011 onward and the accompanying serious violations of international humanitarian law and international human rights law. On 26 February 2011, the United Nations Security Council referred the situation in Libya to the ICC under Resolution 1970, thereby enabling the Court to exercise

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jurisdiction over crimes within its subject-matter jurisdiction committed in the context of that situation.

At the same time, the Libyan authorities asserted their right to investigate and prosecute crimes committed on Libyan territory. This produced a legal dispute over the boundary between the jurisdiction of the ICC and that of the Libyan criminal courts. Security Council involvement may also be viewed as affecting the Court's institutional independence and the priority ordinarily accorded to domestic jurisdiction, notwithstanding the original criminal jurisdiction recognized for national courts under international instruments, including the Rome Statute.

The importance of this subject therefore lies in the interaction of legal and political considerations shaped by the structure of the international system and interest-based international relations. The principal question is: to what extent does the principle of complementarity define the boundary between matters falling within the jurisdiction of the ICC and those falling within the jurisdiction of the Libyan criminal courts?

The discussion proceeds through the following two parts:

- The legal framework governing the jurisdictional conflict between the International Criminal Court and the Libyan criminal courts.
- Admissibility and the role of complementarity in resolving the jurisdictional conflict between the International Criminal Court and the Libyan criminal courts.

1. The Legal Framework Governing the Jurisdictional Conflict Between the International Criminal Court and the Libyan Criminal Courts

1.1. Primacy of Libyan Criminal Jurisdiction

Given the close relationship between the jurisdiction of the ICC, established under the Rome Statute, and the domestic jurisdiction of States Parties, the Statute adopts the general principle of complementarity. As reflected in its Preamble and Article 1, the ICC's jurisdiction over international crimes within its mandate is complementary rather than substitutive (Al-Buqayrat, 2007, p.217).

The Preamble likewise affirms that every State has the duty to exercise its criminal jurisdiction over those responsible for international crimes and that the Court is intended to complement national criminal jurisdictions. Domestic courts therefore retain the primary role in addressing crimes of concern to international criminal law.

The ICC does not intervene merely because an offence has an international character; its intervention depends on the conditions laid down by the Rome Statute and on whether national authorities are genuinely carrying out the investigation and prosecution expected of them (Al-Juhani, 2026, p.376).

This recognition of national jurisdiction from the outset means that international criminal adjudication is subsidiary. The ICC should assume jurisdiction only where domestic criminal justice fails to act because the State is unwilling or unable genuinely to proceed. So long as national judicial authorities are genuinely exercising their investigative or prosecutorial functions, the international jurisdiction remains secondary.

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The key question in complementarity analysis is therefore which forum should prosecute a person alleged to have committed a crime within the ICC's jurisdiction: the State concerned or the International Criminal Court?

The Rome Statute makes admissibility dependent chiefly on whether the State is unwilling or unable genuinely to investigate or prosecute. Article 17 sets out the complementarity criteria in substance as follows:

Subject to the tenth paragraph of the Preamble and Article 1, a case is inadmissible where:

(a) A State with jurisdiction is investigating the case, unless that State is genuinely unwilling or unable to carry out the investigation or prosecution.

(b) A State with jurisdiction has investigated the case and a national decision has been made not to proceed with prosecution in circumstances described by the source as engaging inability to prosecute.

(c) The person concerned has already been tried for the conduct that is the subject of the complaint, and a further trial before the Court would not be permitted under Article 20(3).

(d) The case is not of sufficient gravity to justify further action by the Court.

In determining unwillingness in a particular case, the Court considers whether one or more of the following circumstances exists, having regard to the principles of due process recognized by international law:

(a) The proceedings were undertaken, are being undertaken, or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the Court's jurisdiction under Art.5.

(b) There has been an unjustified delay in the proceedings which, in the circumstances, is inconsistent with an intention to bring the person concerned to justice.

(c) The proceedings were not or are not being conducted independently or impartially, or were or are being conducted in a manner inconsistent with an intention to bring the person concerned to justice.

In determining inability in a particular case, the Court considers whether, because of a total or substantial collapse or unavailability of the national judicial system, the State is unable to obtain the accused, secure the necessary evidence and testimony, or otherwise carry out its proceedings (Rome Statute of the International Criminal Court, 1998, art. 17).

Human-rights commentary cited in the source argues that the circumstances listed in Article 17(2) and (3) are exhaustive rather than merely illustrative. On that view, the Court must establish a total or substantial collapse of the judicial system and, in cases of unwillingness, demonstrate the intent of the national authorities not genuinely to proceed, which may be difficult in practice.

The same commentary also criticizes the use of concepts such as ineffectiveness or unavailability as practical criteria for assessing domestic reforms instead of the statutory concepts of unwillingness and inability (Al-Issawi, 2016, p.91).

Applied to crimes committed in Libya, complementarity therefore means that jurisdiction lies, in principle, with the Libyan criminal courts. The remaining question is the ICC's assessment of

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whether the Libyan justice system is willing and able genuinely to exercise that jurisdiction over persons accused of crimes within the Court's mandate (Cherad, 2021, p.328).

1.2. The Role of the United Nations Security Council in the Libyan Situation

On 26 February 2011, the United Nations Security Council adopted Resolution 1970. It condemned the violence used by the Libyan security authorities against civilians, denounced serious and systematic human-rights violations, expressed grave concern over the killing of civilians during protests, and rejected incitement against demonstrators as a serious breach of international human-rights instruments (Al-Hadri, 2026, p.121).

Resolution 1970 required the Libyan authorities to cooperate fully with the ICC. That obligation was treated as binding on Libya under the United Nations framework even though Libya was not a State Party to the treaty establishing the Court; the required cooperation included compliance with decisions and requests of the Court and respect for the immunities afforded to Court officials (United Nations Security Council, 2011a).

The Security Council also referred the situation in Libya since 15 February 2011 to the Prosecutor of the ICC and required the Libyan authorities to cooperate fully with the Court and the Prosecutor and provide the necessary assistance.

At the same time, the resolution recognized that States not party to the Rome Statute have no treaty obligations under the Statute and urged all States, regional organizations, and other international organizations to cooperate fully with the Court and the Prosecutor (United Nations Security Council, 2011a).

Under this reasoning, Libya could not rely on the consensual nature of treaty obligations to avoid cooperation merely because it was not a party to the Rome Statute. The source invokes Article 6/2 of the United Nations Charter for the proposition that non-member States may be required to act in accordance with relevant principles where necessary for the maintenance of international peace and security (Charter of the United Nations, 1945., art. 6/2). The ICC Prosecutor then had to decide whether opening an investigation or commencing judicial proceedings was appropriate (Gueldich, 2018, pp.4-5).

On 17 March 2011, acting under Chapter VII of the United Nations Charter, the Security Council adopted Resolution 1973 and authorized measures aimed at protecting civilians (Al-Saeed, 2023, p.45). Paragraph 18 of that resolution reaffirmed the Council's strong commitment to the sovereignty, independence, territorial integrity, and national unity of Libya (United Nations Security Council, 2011b).

The Council's express reference to Libyan sovereignty reflects a settled principle of public international law. National sovereignty is one of the essential attributes of statehood and a foundational element closely connected with the existence and international recognition of States (Raymond, 1996, p.80).

A Security Council referral does not, by itself, automatically open an investigation. Although such a referral provides the ICC with jurisdiction over the situation, the Prosecutor must still decide whether an investigation should in fact be opened.

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The referral of the Libyan situation illustrates a central dilemma for the ICC and international criminal justice more broadly. On one hand, there is a clear need to preserve a mechanism capable of investigating crimes committed in States that are not parties to the Rome Statute. On the other, linking access to ICC jurisdiction to Security Council action risks making the reach of international criminal justice dependent on the political interests and power relationships among the Council's most influential members.

2. Admissibility and the Role of Complementarity in Resolving the Jurisdictional Conflict Between the ICC and the Libyan Criminal Courts

2.1. Admissibility and the Mechanisms for Resolving the Jurisdictional Conflict

The ICC Prosecutor, Luis Moreno Ocampo, reported to the United Nations Security Council that he would seek the arrest of three persons alleged to have ordered the commission of war crimes and crimes against humanity, without initially identifying them by name (Abdelkader, 2015, p.212).

Following the Security Council referral, the Court issued arrest warrants against several Libyan officials, including former Libyan leader Muammar Gaddafi, his son Saif al-Islam Gaddafi, and intelligence chief Abdullah al-Senussi, in connection with allegations of crimes against humanity, including murder and persecution, said to have been committed in Libya at least during the period from 15 to 28 February 2011.

The source also refers to subsequent arrest warrants concerning Al-Tuhamy Mohamed Khaled, former head of the Internal Security Agency under Muammar Gaddafi, and Mahmoud Mustafa Busayf al-Werfalli. The present analysis focuses on the cases of Saif al-Islam Gaddafi and Abdullah al-Senussi (Gueldich, 2018, p.6).

Article 17(1) of the Rome Statute provides the basis on which the ICC may find a case admissible or inadmissible. Where a case is inadmissible before the ICC, jurisdiction remains with the national courts under domestic law. This represents the "negative" operation of complementarity, in which the Court declines to proceed because the domestic jurisdiction retains priority (Al-Atoum & Abbasi, 2011, p.626).

Article 19 of the Rome Statute further provides that the Court must satisfy itself that it has jurisdiction over a case before it and may, on its own motion, determine the admissibility of the case under Article 17 (Rome Statute of the International Criminal Court, 1998, art. 19).

On 1 May 2012, Libya directly challenged the admissibility of the case against Saif al-Islam Gaddafi and sought postponement of the surrender request pending determination of that challenge under Article 95. Libya argued that its domestic judicial system was actively investigating Saif al-Islam Gaddafi and Abdullah al-Senussi for alleged criminal responsibility for killings and persecution.

It invoked State sovereignty and maintained that the Libyan Government had taken substantial steps to ensure a genuine and effective investigation, that it did not intend to conduct a summary trial, and that it was committed to international standards through the completion of the proceedings. Statements attributed to then Prime Minister Abdurrahim El-Keib after Saif al-

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Islam's arrest reinforced Libya's position that the matter should be dealt with under Libyan law, while also affirming an intention to work alongside the ICC (Al-Sayed, 2016, p.123).

During 2012 and 2013, the Libyan authorities filed several admissibility challenges before the ICC and sought to prosecute Saif al-Islam Gaddafi and Abdullah al-Senussi in Libya. According to the source, Saif al-Islam was arrested and held in November 2013 by a Zintan-based armed group known as the Abu Bakr al-Siddiq Brigade (Cherad, 2021, p.239).

In May 2013, the Pre-Trial Chamber rejected Libya's admissibility challenge in the Saif al-Islam case under Article 17 on the grounds that Libya was not investigating the same case as the ICC and was not able genuinely to carry out the investigation or prosecution. The Appeals Chamber upheld that decision in May 2014.

By contrast, the Pre-Trial Chamber accepted Libya's admissibility challenge in the Abdullah al-Senussi case, finding that Libya was investigating the same case and was neither unable nor unwilling genuinely to proceed; the Appeals Chamber upheld that decision.

The source notes that the composition of Pre-Trial Chamber I and the Appeals Chamber was the same in the two cases (International Criminal Court, n.d., Doc. Nº.663-11/01/-11/01-ICC). In the al-Senussi case, the matter was consequently left to Libyan national jurisdiction after the authorities demonstrated their willingness and ability to prosecute, while the source describes the proceedings as remaining subject to ICC oversight (Al-Zabr, 2022, p.287).

On 15 May 2014, Pre-Trial Chamber I requested Libya to submit observations on the status of its compliance with outstanding cooperation obligations. Libya then sought an additional twelve weeks to respond. On 11 July 2014, the judge acting for the Chamber ruled on issues concerning Libya's duty to cooperate and found that the requested extension was not appropriate. The judge also noted Libya's failure to provide information concerning the transfer of Mr. Gaddafi. Ultimately, on 10 December 2014, the Court issued a decision finding non-compliance with its cooperation requests (Pierini, 2015).

On 28 July 2015, in proceedings involving 37 former members of the Gaddafi regime, the Tripoli court convicted Gaddafi and al-Senussi on a number of charges, including indiscriminate killings, sexual violence, and unlawful detention, and sentenced them to death.

On 6 August 2015, Gaddafi filed a second admissibility challenge, arguing that the ICC case was inadmissible under Articles 17(1)(c) and 20(3) because he had already been tried before the Tripoli Criminal Court and had benefited from an amnesty under Law Nº.6 of 2015.

In March 2020, the Appeals Chamber upheld the rejection of that challenge, concluding that the Pre-Trial Chamber had not erred in finding that the Tripoli judgment was not final and that Law Nº.6 did not apply to the offences for which Gaddafi had been convicted (International Criminal Court, 2019, Doc. Nº.663-11/01/-11/01-ICC).

As part of efforts by the Office of the ICC Prosecutor to secure Saif al-Islam Gaddafi's surrender, an application was made in April 2016 asking Pre-Trial Chamber I to instruct the Registry to transmit the request for his arrest and surrender to al-Ajmi al-Atiri, the commander of the armed group detaining him.

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On 21 November 2016, the Chamber rejected the Prosecutor's request on the basis that the Court could deal only with the government legally representing the State and could not direct cooperation requests to non-State entities claiming to represent it. The Chamber also observed that any alternative communication channel had to be clearly designated by the State and that it could not determine with certainty that Libya had designated such an alternative channel (Cherad, 2021, p. 350).

Alice Autin, identified in the source as an international justice researcher at Human Rights Watch, stated that the ICC's decision to send the first Libya case to trial opened a long-awaited path toward justice for victims of abuses in Libya's detention system, and called on Libyan authorities to support the proceedings and surrender remaining suspects in order to demonstrate a genuine commitment to ending impunity (Human Rights Watch, 2026).

2.2. Legal Problems in Applying Complementarity in the Libyan Situation and Proposed Solutions

Although both Saif al-Islam Gaddafi and Abdullah al-Senussi faced serious difficulties in obtaining local legal representation, the Appeals Chamber reached different conclusions on fact patterns that were, in important respects, similar. Neither accused initially had effective legal representation.

The Chamber nevertheless considered that al-Senussi had received reasonable and realistic prospects of obtaining counsel in the future, and therefore treated the absence of legal representation at that stage as non-determinative when assessing Libya's ability to conduct the proceedings under Article 17(3).

The decisive distinction, according to the source, was that the central Libyan authorities were unable to secure physical custody of Saif al-Islam for trial, which made arranging counsel for him substantially more difficult than in al-Senussi's case. The text characterizes this aspect of the al-Senussi case as regrettable (Ferstman et al., 2014, p. 5).

Practice has shown that the effectiveness of complementarity depends to a significant degree on the competence and independence of national justice systems and on the willingness of States to cooperate with the ICC in implementing obligations arising under the Rome Statute. The Libyan experience also exposed a range of legal and political difficulties affecting the relationship between national and international criminal jurisdiction (Hijazi, 2019, p.10).

The Court's current approach appears to be that where violations of substantive or procedural rights are so serious that what takes place can no longer meaningfully be regarded as a "trial," the requirements of Article 17 are not satisfied. It may be argued that the Court's decisions have, in turn, increased uncertainty about the place of due process and rights violations within the Rome Statute framework and about the weight to be given to such considerations in admissibility challenges (Ferstman et al., 2014, p.8).

The jurisdictional dispute between the ICC and Libya's national criminal courts ultimately stems from the Security Council referral and raises several difficult legal questions. Can a Security Council referral restrict the authority of Libyan national courts and thereby give priority to the

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ICC, or does complementarity continue to operate regardless of the source of the referral? If a Security Council referral were understood to displace national jurisdiction, would that amount to interference in a State's internal affairs? The concept embodied in Article 17 of the Rome Statute continues to leave considerable room for interpretation. The Court's practice also reveals tensions between the aims of complementarity and the outcomes produced in particular cases (Zawati, 2011, p.212).

A further consideration invoked in support of the ICC's insistence on prosecuting both Saif al-Islam Gaddafi and Abdullah al-Senussi—before the Court later accepted Libya's admissibility challenge in relation to the latter—arises from the practical record of international criminal justice. The argument is linked to the Court's limited ability to bring all persons accused of serious international crimes to trial, particularly in cases concerning African States.

In light of the jurisdictional conflict between the ICC and the Libyan courts, the Rome Statute framework points toward the need for legislative harmonization so that national legal systems, including Libya's criminal justice system, are compatible with the Statute. Such harmonization would help prevent future jurisdictional disputes, reduce impunity, and advance the project of international criminal justice for which the ICC was established.

Accordingly, the Libyan judiciary in particular, and national criminal justice systems more generally, should be able to exercise jurisdiction irrespective of the place where the offence was committed or the nationality of the perpetrator or victim, consistently with the principle of universal criminal jurisdiction, while also ensuring effective jurisdiction over crimes committed on national territory or by or against nationals.

More broadly, complementarity requires States to establish comprehensive mechanisms for cooperation with the ICC and with other States throughout the proceedings. States should therefore review their constitutions and domestic legislation to ensure that they can genuinely benefit from complementarity and avoid conflicts between domestic law and the jurisdictional framework of the ICC.

Conclusion

The ICC operates under a distinctive admissibility regime through which it determines whether a case may proceed before it. This regime is based on complementarity and is designed to supplement national criminal justice systems in the fight against impunity where a State is "unwilling" or "unable" genuinely to investigate or prosecute.

The surrender of Saif al-Islam Gaddafi became the central point of the jurisdictional conflict between the ICC and Libya's national criminal courts after his capture by forces in Zintan. The ICC position, as described in the source, was that the Libyan authorities could not effectively exercise jurisdiction and had failed to provide adequate fair-trial guarantees.

The Saif al-Islam case therefore became not only a means of insisting that the competent Libyan authorities comply with their duty to cooperate, but also a test of whether the accused could be tried under conditions that preserve the rights of the defence guaranteed by law.

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It is striking that the ICC treated one of the two Libyan cases as inadmissible before the Court, thereby giving priority to domestic prosecution in the al-Senussi case, while treating the other as admissible before the ICC. The Libyan situation thus represents a distinctive challenge and an important test of complementarity, and the source concludes that the case exposes a relatively narrow interpretation of that principle.

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