

INTERNATIONAL JUSTICE AND POLITICS IN LIBYA: A LOST OPPORTUNITY FOR THE INTERNATIONAL CRIMINAL COURT AND FOR A LASTING PEACE IN LYBIA

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ABSTRACT:*Libya is in a state of civil war, with rival militias battling for control of different parts of the country. In the three years since Muammar Gaddafi was toppled by Libyan rebels and Nato airstrikes, fighting between militia has plunged the country into civil war and seen Tripoli fall to Islamists. The involvement of Qatar, Egypt and the UAE risks a wider regional war . The daily situation appears so far from the so said Arab's Spring perspectives and illusions that in Libya involved the International Criminal Court also.*

In fact, in a dramatic turn of events, both extraordinary and brutal, the beginning of 2011 pushed the excesses of the Arab Spring in Libya onto the agenda of the ICC. The effects of the Court on developments in conflict and post-conflict Libya speak to the sharp tensions between the pursuit of justice and the politics of law.

The situation in Libya is remarkable for the way peaceful protests deteriorated into indiscriminate bloodshed as well as the clarity and extent of the threat to civilian lives by the Gaddafi regime.

War crimes; attacks against civilians; mass rapes: this is a synthesis - if you can summarize- of the several and serious human rights violations perpetrated during the revolt against the Gaddafi regime in Libya, a very important country for the Mena area.¹

After forty-two years of oppression and nine months of revolution, Libya liberated itself from Muammar Gaddafi's reign on October 23, 2011. In February 2011, the people of Libya rose up against their government, led by Muammar Gaddafi, who responded with anger, violence, and mass murder. For the following months, armed conflict pervaded Libya that threw into chaos. Libyans finally came face to face with the opportunity so to turn the page on their oppressed past and to begin a new chapter as a free and democratic society.

The Libya case, under examination before the International Criminal Court, the African Court on Human and Peoples' rights, and the national courts in Libya, is certainly an exemplary case for the international justice development.

This is for the countless challenges, innovations and issues characterizing the Libya case, but also for the shortcoming of the international justice, later resulting purely instrumental for political strategies and interests which have nothing to do with the justice aims.

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¹ This representative series of crimes were denounced in First Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSC RESOLUTION 1970 (2011) May 4, 2011 , par. 25 and 26. See also "Head of the Executive Committee of the TNC-Libya Mahmoud Jibril meets the ICC Prosecutor", ICCOTP-20110629-PR691. Available at: www.icc.cpi.int

In the Lybia case many unimportant challenges were lost by the International Criminal Court, but also by all the international political system, for the achievement of a clearer and more effective international criminal justice. For the first time the International Justice could assume the role of instrument for conflict resolutions: but it lost this opportunity. For the first time it could clarify the concept of country "ability", condition sine qua non for the supremacy of the national justice: but it lost this opportunity also. For the first time the international justice could have the opportunity of promoting solutions to ensure a widest applicability and lasting respect for Justice through the approach of a "positive complementarity" in favor of the States willing to uphold the national justice, but unable to do so in accordance with appropriate standards: but it lost also this opportunity. The International Criminal Court could face all these significant and important challenges and opportunities not only for the Lybia case, but for the general human rights protection system.

KEYWORDS: *civil war, human rights violations, the ICC's intervention in Lybia, lack of cooperative justice*

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1. THE ICC' INTERVENTION IN LYBIA. THE UN RESOLUTION 1907: A POISONED CHALICE TO ICC?

1.1 The first UN Security Council resolution with which a country was unanimously referred to the International Criminal Court.

With resolution No.1970, dated February 26, 2011, the Security Council, under Chapter VII of the United Nations Charter, referred to the Office of the Prosecutor of the International Criminal Court, in accordance with article 13 (b) of the Statute of the Court², in order to lawsuit and pursue the serious crimes committed during the clashes between Gaddafi's regime and insurgents³. With the same referral the Libyan authorities, all the States, even if no currently parties to the Rome Statute, and the international organizations, were asked to cooperate with the International criminal court fully.

The resolution, proposed by France, Germany, United Kingdom and United States, was adopted after a controversial discussion: the Libyan Ambassador at the United Nations, Mr Abdurrahman Mohamed Shalgam, who had defected from the Gaddafi regime, appealed to the Security Council to act, as well as with regard to Libya, also with regard to the situation in China, India and Russia; on the other hand, Russia assured his support provided that the resolution would not be used by countries as a pretext for an

² Article 13 of the Rome Statute says: "Exercise of jurisdiction": The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15".

³ <http://www.un.org/News/Press/docs//2011/sc10187.doc.htm>. 1970. The resolution of the UN Security Council was adopted unanimously by the UN Security Council and, in addition to condemning the use of force by the regime of Muammar Gaddafi against the protesters participating in the Libyan uprising. It has also imposed a series of international sanctions against the Libyan Government .

intervention in Libya. For many States, this was the most experienced fear and risk: perhaps with good reasons.

Up to date, The UN resolution represents the first and only international attempt of the application of the “*Responsibility to Protect*” principle: in the case of a State breaches the obligation to protect its citizens and practices against them international crimes (genocide, war crimes and crimes against humanity),- if all the peaceful and diplomatic instruments result ineffective-, the international community is authorized to use all necessary measures to put end to these violations, including the use of collective force authorized by the Security Council. Also, The resolution 1970, adopted while in Libya there was an ongoing bloody conflict, is the first legally binding instrument through the international community has recognized the International Criminal Court an active role during the conflict.

1.2 Other features that characterize the resolution 1970

First, we must highlight the speed of the procedure: a few days, exactly 11, elapsing from the start of the Libyan uprising on 15 February 2011 up to the UN resolution. A timing unusual. Also it is unusual unanimous vote: fifteen out of fifteen. And we must consider that three of the five permanent members - USA, Russia and China - have not yet ratified the Rome Statute: for this feature, it was hoped that this resolution would open new perspectives for a different attitude of the three states before the International Criminal Court and its jurisdiction⁴.

But the doubt, or maybe now the certainty, is the unanimous approval of 1970 UN Resolution represents a political opportunity simply.

Speaking about the content, the Resolution is characterized by a specific list of the measures to be taken against Libya and by the clarity of language of its Preamble that lists the charges against Gadhafi and his Government: extended and repeated violations of human rights, violence against peaceful demonstrators, incitement to hostility and violence against the civilian population, which constitute crimes against humanity punishable under International Law on human rights, the International Humanitarian Law and International Criminal Law.⁵

With the same clarity and precision, the resolution contains all the applicable sanctions against Gaddafi's Libya, including embargo on the weapons import/export, as well as restrictions on the movement of members of the Gadhafi family and other people mentioned in a special list, and the freeze of their funds⁶.

Of course, without the referral by the Security Council, the Office of the Prosecutor of the International Criminal Court could not carry out any investigations, nor the International Criminal Court could have any jurisdiction. In fact, Libya is not part of the

⁴ A. Papisca, "Security Council resolution 1970/2011 for the affirmation of international legality in Libya", in "human rights", March 23, 2011. An anticipation of this openness to the International Criminal Court is already expressed in the report on ' National Security Strategy ' of 2010. Please note that the Bush Presidency had severely hampered the operation of the Court.

⁵ In the preamble there is the acknowledgment of the sentence previously expressed by the Arab League, the African Union and the Secretary General of the Organization of the Islamic Conference.

⁶To oversee the implementation of sanctions is set up a special committee consisting of all members of the Security

Statute of Rome, and it has never ruled on a "ad hoc" acceptance of the jurisdiction of the court pursuant to Art. 12, par.3 of the Statute⁷

The International Criminal Court has indeed jurisdiction only over crimes committed on the territory or by people from States-parties.⁸ The only exception to this principle of competence "*ratione loci*" is in case of a "referral" adopted by the UN Security Council under Chapter VII of the UN Charter: in this case the Court jurisdiction becomes potentially universal, being able to practice before any State⁹

Still, it is significant the sequence of dates after the referral dated 26 February 2011, a sequence characterized by a timeliness that, although commendable, raises strong doubts

On 3 March 2011, the Prosecutor with his own Statement announces the opening of an investigation into crimes against humanity committed in Libya since 15 February 2011, as part of the violent repression of peaceful demonstrations against the regime¹⁰

Few days later, on March 17, 2011, another significant fact. The Security Council adopts the resolution number 1973, with which it is asked for "an immediate ceasefire" and the international community is authorized to establish a no-fly zone in Libya and "to use all necessary means to protect civilians and enforce a ceasefire." In fact, it authorizes the military intervention by NATO forces in Libya¹¹.

The 1973 resolution passed with ten votes in favor and five abstentions, including China, Russia -that had also expressed reservations about the implementation of the no-fly zone¹² - Germany¹³, Brazil and India.

⁷ We must remember that, under Article 12, par. 2, of the Statute of Rome, the ICC has jurisdiction only if the crimes were committed: 1) in the territory of a State Party or 2) by citizens of a State Party or 3) in the territory of a State not party that, with respect to the particular case, has accepted the jurisdiction of the Court, or 4) by citizens of a State not party expressed the afore mentioned acceptance of jurisdiction

⁸ Article 12 (3) ICC Statute Available at: <http://www.studiperlapace.it/>

⁹ Conjunction with Articles 12 (2) and 13 (b) ICC Statute. Available at: <http://www.studiperlapace.it/>

¹⁰ Statement of the Prosecutor on the Opening of the Investigation into the Situation in Libya, available on the website of the ICC, www.iic.cpi.int

¹¹ The resolution of the Security Council has been proposed by the United States, France, Lebanon and the United Kingdom. Ten members of the Security Council voted in favor (Bosnia and Herzegovina, Colombia, Gabon, Lebanon, Nigeria, Portugal, South Africa and the permanent members France, United Kingdom and United States), while five countries (Brazil, Germany, India and permanent members China and Russia) abstained from voting; no member has expressed its opposition and Russia and China, although they may veto, have not exercised this mean.

¹² "The Libya case, the countries opposed to military intervention," TG online March 20, 2011. Specifically, Russia, worried about the civilians life, called on the international coalition not to launch attacks on non-military and "non-selective" targets; The Chinese foreign minister reiterated China's firm opposition to the use of force in general and in Libya in particular, fearing loss of life. Yang Jiechi said, "China does not agree with the use of force in international relations". In relation to other countries, Turkey has shown its opposition to the "no-fly zone" asking to review the NATO role after the UN resolution 1973, mainly in the light of civilian deaths that the bombings in progress may cause; the President of the Republic of Cyprus, Demetrios Christofias, said the opposition of Cyprus to the use of its base at Akrotiri for takeoff of military aircraft of the British Royal Air Force (RAF); The Arab League has criticized the international coalition air strikes, which have gone beyond their stated goal of imposing a "no-fly zone." A goal "different from what is happening in Libya," said the Secretary General of the League. "What we want is to protect civilians, not bombard others," he said, recalling that Resolution 1973 states the prohibition of any kind of "invasion and occupation"

¹³ The German Chancellor Angela Merkel added: "Germany shares the aims of this resolution. Our abstention should not be confused with neutrality." In "Enough hypocrisy. Let's call war by its name," *"Il Giornale"*, March 19, 2011

In other words, all the States members of the Security Council expressed agreement on military intervention since the establishment of a no-fly zone¹⁴ necessarily imply the use of weapons by the intervening military forces, as clearly represented by the EU High Representative for Common Foreign and Security Policy, Catherine Ashton. "For the EU, the use of military assets is related to the humanitarian assistance mission, given also the minimum capacity of the EU in this area" or by General Secretary of NATO, Rasmussen, "there is an urgent need of : a firm support and a clear UN mandate for an international action " ¹⁵.

On the other hand, the 1973 Resolution refers explicitly to the paragraph 26 of 1970 Resolution by which the Security Council declared itself ready to consider the adoption of further appropriate measures, where necessary, in order to facilitate and support the return of humanitarian agencies and make available humanitarian assistance.¹⁶ In fact, the Security Council expresses its determination to ensure "the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance along with the security of humanitarian personnel"¹⁷

So, can we consider it an *humanitarian intervention* really?

To answer this question, it is important to remember that the government of Muammar Gaddafi, at 12:45 on March 18, 2011, announced to impose an immediate cessation of military activities in response and deference to the UN resolution. But despite it, the military intervention begins on March 19.

The 1973 Resolution betrays the hopes placed on the international will to use the International Justice as an instrument of peace.

But, beyond the disillusionment, the question that arises is another. Was the first resolution of the Security Council, the 1970 one, adopted for actual needs of justice or as mere encouragement to legitimize the use of force against Gaddafi and his regime, like a sort of "poisoned chalice" that the Security Council would be offered to the Court?

2. THE LACK OF A COOPERATIVE JUSTICE AND THE FAILURE OF THE PRINCIPLE OF COMPLEMENTARITY

2.1 The Trial Chamber decision

Of course, even after 1973 resolution, the ICC Justice proceed expeditiously.

On 16 May 2011, the Prosecutor submitted to the Pre-Trial Chamber a request for a warrant of arrest for crimes against humanity, specifically for the crimes of murder and persecution, against Colonel Gaddafi, his second son Saif Al-Islam, and Al-Senussi, Gaddafi's son in law of and chief of the Libyan intelligence during his regime.

¹⁴ The no-fly zone is a zone in which there is a ban on the land passage by armed vehicles and armed personnel

¹⁵ For both statements, see "Enough hypocrisy. Let's call by its name, "Il Giornale", March 19, 2011

¹⁶ Also, the 1973 Resolution refers " the condemnation of no small (serious) violations of human rights and international humanitarian law that have been and are being committed in the Arab Jamahirya Libyan, expressed by the League of Arab States, the African Union and the Secretary General of the Organization of the Islamic Conference.

¹⁷ Available at: www.icc.cpi

On 27 June 2011, the Pre Trial Chamber I determined the existence of "reasonable grounds" because the three suspects be tried for the crimes against humanity of murder and persecution, under art. 7, par. 1, letter a) and h) of the Statute of Rome.¹⁸

With his indictment, the Pre Trial Chamber accepted the Prosecutor's reconstruction only partially¹⁹: in fact Muammar Gaddafi, Commander in Chief of the Libyan armed forces with powers similar to those of the Head of State, and his son, with functions of Prime Minister without formal investiture, they both conceived and orchestrated a plan to prevent and suffocated by all means the protests of civilian population against the regime. They have also contributed substantially to the implementation of this plan by giving orders and providing the necessary resources: in execution, the Libyan security forces have conducted an extensive and systematic attack against civilians who were demonstrating or were perceived as opponents to the regime, in the whole country and especially in the city of Benghazi, Misurata and Tripoli, from 15 to at least February 28, 2011. Hundreds of civilians were killed or wounded, and hundreds more abducted or otherwise detained and tortured as political opponents. As for Al-Senussi, according to the judges there are reasonable reasons to believe that he has implemented the above crimes, as he ordered the forces under his command in Benghazi to attack protesters. As Chief of the Military Intelligence, Al-Senussi not merely carried out the order of Gaddafi, but he had the power to define when and how the crimes committed in the city, from 15 to, at least, 20 of February.

After the three warrants of arrest being adopted²⁰, on July 4, as required by the Pre-Trial Chamber I, a request for arrest has been notified to the government of Tripoli; to the States neighboring Libya, namely Algeria, Chad, Egypt, Niger, Sudan and Tunisia; to all States Parties to the Rome Statute; to States members to the Security Council who are not parties to the Statute.

Only four months between the 1970 resolution and the Trial Chamber decision: a lightning timely compared to the normal times of the international justice. A timely that was considered a successful example of the ICC activities, but which ended with an impasse and disillusion.

In fact, till now the above mentioned warrants has not carried out, despite Resolution 1970 imposed on the Libyan authorities, and to all States and regional/ international organizations concerned, to cooperate fully and provide all necessary assistance to the Court and the Prosecutor, pursuant to Part IX of the Statute. It is a very negative signal considering that the credibility of the ICC plays on the cooperation by the States and its functioning, in the absence of the accused, is blocked.

Colonel Muammar Gaddafi was killed in Sirte by rebels October 20, 2011; his son Saif Al-Islam was arrested on November 19 2011 and since then has been held in Zintan, about 90 miles south-west of Tripoli; Abdullah Al-Senussi was captured in Mauritania, and his extradition has been requested by Libya, the International Criminal Court and France.

¹⁸ ICC-01/11-15 27-06-2011 1/7 CB PT

¹⁹ According to the Prosecutor the Rais had to be judged as indirect perpetrator, while his son and Al-Senussi as indirect co-perpetrators.

²⁰ Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, ICC-01 / 11-01 / 11-2; Warrant of Arrest for Saif Al-Islam Gaddafi, ICC- 01 / 11-01 / 11- 3; Warrant of Arrest for Abdullah Al-Senussi, ICC-01 / 11-01 / 11-4).

But the lack of authority of the ICC is clearer considering the political reactions by the States obliged to cooperate. The States Parties to the Rome Statute are obliged to perform any request for arrest concerning individuals living in their territory, under Article 89, par. 1, of the Statute. Obligation strengthened by the provision of resolution 1970, section 5, for which the Security Council "Urges all States" to ensure full cooperation with the Court and the Prosecutor.

States, neighboring Libya, parties to the Rome Statute are Chad, Niger and Tunisia, which has acceded in June 24, 2011. Algeria, Egypt and Sudan are not parties to the Statute. With regard to Sudan, in particular, the International Criminal Court issued two warrants against the same Sudanese President Omar Al Bashir, the first on March 4, 2009 for crimes against humanity and war crimes (Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02 / 05-01 / 09-1) and the second on July 12, 2010 for the crime of genocide (second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02 / 05-01 / 09-95): not only those mandates were not performed, but Al Bashir is still in power, with full functions as President also attending several international summit and ceremonies. On this point, it must be underlined the significant reaction of the Heads of State and Government of the Member States of the African Union during the seventeenth session of the Assembly of the Union in Malabo, Equatorial Guinea, on June 30 and July 1, 2011: they decided to not cooperate with the execution of the warrant of arrest issued by the ICC against the Colonel and asked the Security Council to suspend all activities of the Court with respect to the crimes committed in Libya, according to art. 16 of the Rome Statute.

With regard to the Government of Tripoli, the issue is even more problematic. The 1970 Resolution provides that: "the Libyan Authorities shall cooperate fully and provide any assistance to the Court and the Prosecutor" (par. 5): the expression "the Libyan Authorities" should be related not only to the authorities of the regime, but also to the National Transitional Council (CNT), build on March 5th. In fact, at least initially, the National Transitional Council expressed its willingness to execute the warrants of arrest and to deliver the Rais, his son and his son in law to the International Criminal Court. But thereafter it changed.

2.2 The exception of "complementarity" known as "same-person, same-conduct"

On January 23 and subsequently April 2, 2012, the Government of the Libyan National Transitional Council, presented two instances in order to postpone the delivery of Saif Al-Islam, in accordance with Articles 94 and 95 of the Statute of the ICC. Both instances were rejected.

On the following May 1, 2012, the National Transitional Council presented the third instance in which disputes the admissibility of the case on Saif Al-Islam Gaddafi, saying that, on the basis of the principle of complementarity, the ICC should have recognized, in accordance with the art. 17 of the Statute, the primacy of national jurisdictions.

This is not the first case in which it is discussed before the ICC the exception of "complementarity" known as "same-person, same-conduct". The first time it has been put in place in the Lubanga case, when the Pre-Trial Chamber came to an unexpected and innovative conclusion, stating that "*because a case can not proceed, it must be demonstrated that the national proceedings have to judge the same person and the same*

behavior before the international Criminal Court". So, in the Lybia Case, if the initial test on the complementarity principle was negative, it should not proceed to the second question on admissibility, under art. 17 par. 1.

The prevailing interpretation of how the principle of complementarity defines the ICC's relationship with national criminal jurisdictions can be called "passive complementarity": the ICC is effectively a "safety net" in place for those rare cases where no national court system is willing and able to investigate allegations of serious international crimes." Under this interpretation, the ICC is a "last resort court," a court modestly designed to fill the gaps where domestic courts are inadequate or fail in their responsibilities, and "an additional [or substitute] forum [within the international system] for dispensing justice."²¹ As shorthand for the principle itself is the "unwilling or unable" feature of the Rome Statute's admissibility analysis under article 17. In contrast with the "passive" vision of complementarity, Professor William Burke-White introduced this view and termed it "proactive complementarity: according this interpretation the ICC should use the principle of complementarity to "participate more directly in efforts to encourage national governments to prosecute international crimes themselves."²² Proponents of this proactive complementarity concept contend that it fulfills the principle's basic purposes and the Court's fundamental goals more effectively than its passive counterpart. By involving domestic states in investigations and prosecutions to the greatest extent possible, proactive complementarity allows the party with the best access to evidence, witnesses, and local knowledge to participate in an investigation and trial.²³

After, The International Criminal Court adopted a more flexible interpretation of the complementarity principle: in fact, in the two judgments on the admissibility concerning Kenyatta (plus others) and Ruto (plus others) proceedings -promoted "motu proprio" by the prosecutor under art. 15 of the Statute-, was specified that, for the complementarity principle, it is sufficient the investigations cover "*substantially the same conduct*" carried out by the ICC. But it didn't give any details of what the word "substantially" means.

It appears that the ICC has contemplated some of the same ideas of the proactive approach.

²¹ Julie B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, 4 LOY. U. CHI. INT'L L.REV. 107, 109 (2006).; Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115, 130-31 (2010)

²² William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV.INT'L L.J. 53, 76-82 (2008) (describing the statutory basis for complementarity in terms of the Rome Statute's admissibility criteria). In effect, Burke-White argues, conceptualizing the Court in such a way would expand the ICC's role beyond its classic formulation as just another fixture in the international justice community and ultimately create a "tiered system of prosecutorial authority."As the leader of that system, the ICC would then be in a position to cooperate with domestic courts from the beginning stages of an investigation and help them prosecute international crimes. Such a policy, he urges, is not only legally consistent with the existing framework of the Rome Statute, but would also allow the Court to maximize its resources as well as its broader impact on the international criminal justice community.

²³ It is estimated that the ICC, given its resources, can only conduct two to three trials per year. Lisa J. Laplante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence*, 43 J.MARSHALL L. REV. 635, 636 (2010).

2.3 The overall management of the Libyan case

The articulated third instance presented by the Libyan government revolves around the following argument: "In accordance with the principle of complementarity under Article 17 of the Rome Statute, Libya respectfully believes that this case is inadmissible because its national judicial system is actively investigating Gaddafi and Al Senussi for their alleged responsibility for multiple acts of murder and persecution integrating crimes against humanity. Such acts committed as part of a widespread or systematic attack against Libyan civilians include crimes committed in Tripoli, Benghazi and Misurata during the period from 15 February 2011.

The argument contained in the instance, which is submitted pursuant to art. 19 par. 2 letter. B), says: "This application (of the art. 17) requires the Pre-Trial Chamber to give full effect to the principle of complementarity which is at the center of the Statute of the ICC. The Statute states that "each State" - including Libya - has "a duty ... to exercise its criminal jurisdiction on those responsible for international crimes". Libya seeks to enforce this duty and it is making every effort to take national measures, as required by the Statute of the ICC and the intentions of its drafters. This is a unique opportunity for the Court to affirm the "positive complementarities" [positive complementarity] and to encourage other states emerging from conflict to put in place genuine national proceedings"

For the new Libyan authorities of the National Transitional Council it is a very significant signal to celebrate the process in Tripoli. In fact, "the political face of the revolution", has undertaken a comprehensive reform of the entire steering system and the celebration of the processes against the accused becomes, therefore, a significant opportunity to demonstrate to be able to manage this transition in an appropriate manner and in accordance with the international standards, and to be a State worthy of the name: "the national proceedings concerning those matters conform to the commitment of the Government of Libya for a transitional justice post -Conflict and national reconciliation. This reflects the genuine will and ability to bring to trial those involved in the direction of building a new and democratic Libya, governed by the rule of law. To deny to the Libyan people this historic opportunity would be contrary to the object and purpose of the Rome Statute, which grants primacy to national systems".²⁴

Under the principle of complementarity, ex art. 17, par. 1, letter. a) of the Rome Statute, the Court must declare a case is inadmissible, when it is under investigation or proceedings by a State which has jurisdiction, except that the State is "unwilling" or "unable" to carry on the investigation or prosecution [...].²⁵

As far as concerns the first parameter "unwilling", Libya has clarified very clearly to be absolutely "willing"; even about being "able", able to conduct investigations properly and prosecute, the Libyan government has tried to reassure the Court: "The Libyan government has no intention of removing those individuals to justice, to allow impunity or celebrate against these people a quick process that does not meet minimum international standards of due process. Libya is committed to achieving the highest international standards in terms of the conduct of investigations of a trial. To this end, this opportunity

²⁴ Third instance presented by the National Transitional Council to the ICC.. Available at www.icc.cpi.int

²⁵ art. 17, par. 1, letter. a) of the Rome Statute

will give the Libyan people, who has long suffered, the unique opportunity to take charge of their own past, to avoid impunity and to build a better future based on the respect for the rule of law and fundamental human rights.²⁶

On the other hand, what is the question? Certainly there is the concern of the huge challenge that a new Libyan government should address exercising jurisdiction over such a delicate process and about which few certainties have been provided about the respect for the jurisdictional rights of the accused. The fear is about a rough national justice.

Given the unanimous First Pre Trial Chamber decision to reject the instance on 31 May 2013, the following June 7 the Libyan government appealed on the basis of four reasons including the error of law in considering the "same person, same conduct" principle, and the error in fact and in law considering Libya unable to get delivery of the accused, find the necessary evidence and to conduct proceedings in accordance with the requirements of Article. 17, par. 3 of the Statute.

2.4 The decision of the Appeals Chamber

It is useful to focus in particular on the decision of the Appeals Chamber, by a majority of four judges to one, the Judge Anita Ušacka: she attached her dissenting opinion to the final decision, while the President of the Court, Judge Sang hyun Song, has attached a separate opinion concerning the complementarity exception.

Since the decision on the admissibility of the case has been confirmed because the proceedings don't cover the same acts and therefore they don't meet the (pre) requirement by art. 17 of the Statute, the Appeals Chamber concluded deeming not necessary to conduct any examination on the fourth ground of appeal, that is the error in fact and in law in considering the Libya's inability to trial the accused.

That plea was however addressed by the President of the Appeal Chamber with his Separate Opinion. Considering the Pre-Trial Chamber had respected the logical path on the division between the ability to play a genuine process and ability to obtain delivery of the accused and the collection of evidence, the President concluded that there had been any error of law, since the requirements of par. 3 art. 17 would have been properly considered. According to the President, in fact, a national judicial system is unavailable and inaccessible not only when there has been his "total or substantial collapse", but also when in the concrete circumstances of the case, the national authorities cannot effectively arrest and guaranteed to the justice the persons accused of committing crimes. As far as concerns the ability of the Libyan central government to guarantee the transfer of Saif Al-Islam Gaddafi by Zintane, the matter -according to the President-, is whether in the absence of the accused it is possible to complete the proceeding before the national court in Tripoli. For the President it is not "unreasonable" to give a negative answer. Consequently, as there are no errors or profiles of "unreasonableness", the international procedure would be permissible, not because the domestic case and the international case are not identic under par. 1 of Art. 17, but because of the inability of the Libya Government to conduct the process correctly, as required under par. 3 art. 17 of the Statute.

²⁶ Third instance presented by the National Transitional Council to the ICC. Available at www.icc.cpi.int

The principle of complementarity under art. 17, of which "same conduct, same person test" represents the first explanation, affects primarily on the jurisdiction and on its determination, but also indirectly impacts on the codification of the principle of the primacy of domestic jurisdiction on the international one: this principle has a crucial political meaning since it represents the main incentive for accepting and participating by several States in the process of the International Criminal Court.

Because the primacy of domestic jurisdiction can be invoked, the State concerned must have started investigations or proceedings, which could also have already ended with a final decision, and demonstrate or have demonstrated the willingness and ability to lead the case in a correct way. The international action can be permanently set aside only when the domestic jurisdictions involved have actually shown to comply with the standards of paragraphs 2 and 3 of article. 17 of the Rome Statute.

In the dissenting opinion attached to the decision of 21 May 2014, the judge Usacka, who was judge in the above specified Kenyans cases²⁷, recalls that in these latter cases because of the Kenya's failure in demonstrating the identity of the case and people, the Appeals Chamber didn't explain the effects of "the same conduct" principle and of that adverb "substantially" as a discriminating the national jurisdiction.²⁸

This vacuum would be filled in the Libya case by the First Pre-Trial Chamber: in its decision of May 31, 2013 it concluded that "it would not be appropriate to require that the investigations carried out by Libya cover exactly the same conduct of murder and persecution mentioned in decision under Article. 58 ", but in any case, " the Chamber will have to check [...] if the prejudiced domestic investigation has to object the same behaviors that have justified the issuance of the warrant of arrest and the decision under art. 58²⁹

Following the examination of the matter, the Appeal Chamber draws the same conclusions of the Pre-Trial Chamber considering that the domestic process in Libya is not subject to the same case with respect to the international one. In fact, although Libya has shown that a number of investigative measures have been adopted with respect to certain *discrete aspects* relating to the Gaddafi's behavior, as circumscribed in the

²⁷ Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2013 entitled «Decision on the Admissibility of the case against Saif Al-Islam Gaddafi», Appeal Chamber, (ICC-01/11-01/11)

²⁸ Situation in the Republic of Kenya, The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled «Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute», Appeals Chamber, (ICC-01/09-02/11), 30 August 2011, §§ 39-42; Situation in the Republic of Kenya, The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Harap Sang, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled «Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute», Appeals Chamber, (ICC-01/09-01/11), 30 agosto 2011, §§ 39-42.

²⁹ Situation in Libya, The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2013 entitled «Decision on the Admissibility of the case against Saif Al-Islam Gaddafi», Appeal Chamber, (ICC-01/11-01/11), Dissenting Opinion of Judge Anita Usacka, 21 maggio 2014, § 18. Available at: www.icc.cpi

proceedings before the International Criminal Court, an overall assessment of such evidence don't suppose the existence of the "same conduct"³⁰

The Appeal Chamber argues that, pursuant to art. 17, par. 1, letter a) of the Statute of the Court, the admissibility of a case must be declared when the "circumstances" on which the national authorities are investigating are the same or when there is still a *large overlap* between these. This coincidence has to be checked from time to time, thus confirming the actual existence of a "jurisdictional conflict" between national and international authorities, on the basis of the burden of the State to prove that the case on which it is investigating or proceeding "sufficiently mirrors" the international one. In this sense, the "circumstances" and the "conduct" of the accused would represent the parameters of the particular judgment required by the art.19 of the Statute.³¹

So in conclusion, the evaluation is based on a "mechanical comparison of the charges," opening, however, a number of concerns on an "overly restrictive" interpretation of the Statute that are the result of an unrealistic approach to complementarity and that is likely to limit substantially the primacy of the domestic jurisdiction.³²

The uncertainty around the proper meaning of "substantially the same conduct" pushes even the President of the Appeal Chamber, Judge Sang-Hyun Song, to attach to the decision a separate opinion in which it states that an "overlap between the circumstances cannot determine whether the national and international investigations have the same underlying conduct. In fact, if national authorities are required to "cover up" exactly the same acts of murder and persecution resulting in the warrant of arrest against Gaddafi, the task of the national investigators would be impossible because of a too high burden. According to the President, therefore, the Appeal Chamber should have upheld the first ground of appeal of the Libyan government evaluating the evidence "as a whole". The opinions of Judge Usacka and of the President lead to the conclusion that it would be preferable the International Criminal Court to adopt a model of complementarity, rather than being based solely on the "same person / substantially -the same conduct" test, and to refer to several criteria to be evaluated in different ways depending on the specific circumstances of the case and in the light of the need to ensure an effective fight against impunity by checking the "genuine will" of the state to engage in investigations and

³⁰Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2013 entitled «Decision on the Admissibility of the case against Saif Al-Islam Gaddafi», Appeal Chamber, (ICC-01/11-01/11)

³¹ Situation in Libya, The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the appeal of Libya against the decision of the Pre-Trial Chamber I of 31 May 2013 Entitled "Decision on the Admissibility of the case against Saif Al-Islam Gaddafi," Appeal Chamber (ICC-01 / 11-01 / 11), May 21, 2014, §§ 71-76. In this way, the Appeals Chamber has basically accepted the arguments of the prosecutor Bensouda, who had shown that the adverb "substantially" reportedly went to the substance" of criminal behavior, so that a case would be "substantially the same" only where the differences between the facts and the circumstances under investigation state and international are minimal and are "inextricably linked together in time, space and by Their subject-matter

³² W.A. Schabas, First Prosecutions at the International Criminal Court, in «Human Rights Law Journal», 2006, pp. 35-36. Cfr. C. Kress, The Principle of Complementarity under the Rome Statute of the International Criminal Court, A Legal Opinion Submitted to the Israeli Independent Public Commission to Examine the Maritime Incident of 31 May 2010, headed by Supreme Court Justice Jacob Turkel («Turkel Commission»), p.45, <http://www.turkel-committee.com/files/wordocs/Manuskript>

prosecutions against individuals accused of the commission of crimes within the jurisdiction of the Court³³

That conclusion complies with the ICC Office of the Prosecutor point of view: "in consequence of the principle of complementarity, the efficiency of the Court does not depend on the number of cases its organs examine. On the contrary, the absence of trials before the Court would be the greatest success, as the effect of the smooth operation of national institutions".³⁴ One of the priorities of the Prosecutor Office, under Moreno Ocampo, was to be in fact the pursuit of "a positive approach to complementarity", according to which "instead of contesting their jurisdiction, we try to encourage national courts as long as possible."³⁵ For these considerations, according to the Office of the Prosecutor, it should be adopted a "positive approach" to complementarity, encouraging, where possible, domestic "genuine" proceedings, which makes use of the network between national and international institutions; which participates in a system of international cooperation and that will result also in the effort of the Office of the Prosecutor to encourage, wherever possible, "genuine" procedures, even in the case of "situation countries", ie countries in which preliminary investigations are being conducted, without the Office is involved directly in technical or financial and capacity building activities.³⁶

³³ Dissenting Opinion of Judge Anita Ušacka, cit., §§ 39-55. Available at: www.icc.cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf. The conclusion would instead come before the Pre-Trial Chamber, according to Judge Ušacka, relied on an erroneous interpretation of Article 17, par. 1, letter a) of the Statute, capable of jeopardizing the very raison d'être of the principle of complementarity. If it is true, in fact, that the term "case" refers to proceedings relating to the commission of crimes within the jurisdiction of the Court, the three main aspects of these crimes are conducting material, its consequences and other circumstances specific to that connected. Making the pipe would be only one and not the only parameter on which to verify the sameness of cases state and international. Investigations or proceedings state will therefore focus, according to the judge Ušacka, not so much on the same act or omission charged against the accused, as the same "case", understood as a set of those elements, the latter due to a crime within the jurisdiction of the Court

³⁴ L. Moreno-Ocampo, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003, http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf.

³⁵ L. Moreno-Ocampo, Prosecutor of the Statement to the Diplomatic Corps, 12 February 2004 at http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf. After the first 3 years of operation then, the Office of the Prosecutor would have gone into these statements of principle in the first report on prosecutorial strategy, in which among other things states that this strategy is based on three main principles: the positive complementarity, the selection of investigations and proceedings, the maximization of the impact of these. About complementarity, the Office would have highlighted that under the Statute by States to have the primary responsibility in relation to the prosecution of crimes within the jurisdiction of the Court, so that the intervention of the prosecutor should be exceptional; a Court which bases its operation on the principle of complementarity certainly ensure international legality through the creation of a system of international justice interdependent" and able to "reinforce each other."

³⁶ The Office of the Prosecutor, prosecutorial Strategy 2009-2012, 1 February 2010, The Hague, Part II: The Principles, §§15-17, to 'address <http://www.icc-cpi.int/NR/RdOnlyRes/66A8DCDC36504514-AA62D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>. In the same way, however, had already expressed a group of independent experts, that the Report on complementarity, compiled at the invitation of the same Prosecutor's Office, had taken over as the approach to complementarity should be informed to the two principles of cooperation and supervision, and reflected in the encouragement of state actions against the recognition of a presumption of good faith to the authorities that show cooperative attitude. See: Informal Expert Paper: The principle of complementarity in practice, ICC-OTP 2003 (ICC-01 / 04-01 / 07- 1008-Anxa), § 3

The instrument of an active cooperation with the national authorities will be remembered by the same Judge Usacka, as a means to achieving the overall aim of the ICC Statute - that is, the fight against the impunity³⁷ However, as we analyze the overall management of the "Libyan case", all the principles above mentioned appear not been translated into a consistent action. The important debate on the definition of the principle of complementarity under examination in Libya case, fits in the overall management of the "situation" in Libya, as led by the Security Council.

2.5 The "criminal policy" of the Court

We must consider all the historical events and policies in order to understand not only the role of the international justice in the management of conflicts and respect for human rights and, above all, in the management of the democratic transitions process, but also and especially, in order to understand the "criminal policy" of the Court.

It must remember, as above stated, the timing of the action of the Office of the Prosecutor of the Court. The fastest preliminary investigation in the history of the Court, based mostly on the analysis of video and oral statements: already on May 16, 2011, there is a request to the Pre-Trial Chamber of the emission of three warrants of arrest, and the following June 27, -just after four months from the resolution of the Security Council and in the midst of civil conflict-, the First Pre-Trial Chamber issued the warrants of arrest.

Beyond the concerns of such hyperactivity, unusual for the Court, there is the consideration of how the same hyperactivity has effectively prevented from pursuing a negotiated settlement of the crisis, on which a political transition could be led: this is the reason, among other ones, the African Union, at the meeting of June 30 and July 1, 2011, expressed "deep concern" with respect to the management of the situation by the Prosecutor of the international Criminal Court, calling on its States members not to cooperate in the execution of the warrants of arrest.³⁸

(Guiding Principles), <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF>. It certainly would have an important role the international networks of which they are an active part of the NGOs and international organizations (especially regional ones, as the OSCE) - as suggested by JI Turner in "Transnational Networks and international Criminal Justice", in "Michigan Law Review," 2007, p. 985. But especially in the cited prosecutorial Strategy 2009-2012, which in §§ 59-69 identifies it as one of the objectives of the Office of the Prosecutor, for which this persecution could use some of its divisions, including Jcccd, Jurisdiction, Complementary and Cooperation Division. See also W. Burke-White, Implementing a Policy of Positive Complementarity in the Rome System of Justice, in "Criminal Law Forum," 2008, p. 59; W.W. Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, in "Harvard International Law Journal," 2008, p. 55

³⁷ Dissenting Opinion of Judge Anita Usacka, cit., §§ 68

³⁸ African Union, Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc.EX.CL / 670 (XIX), June 30-July 1, 2011, § 6 at [http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_\(XVII\)](http://www.au.int/en/sites/default/files/Assembly_AU_Dec_363-390_(XVII)) Perhaps for this reason that, found the inaction of the parties to the conflict to (order) to execute the arrest warrants, the prosecutor in the final months of 2011 would have started a rapprochement with the National Transitional Council - declared itself the "sole representative of Libya" since March 5, and recognized as a legitimate government by the same UN General Assembly September 16 that would give him the seat due to Libya (September 20 also 'African Union has recognized as the legitimate representative of the country). Already in its second annual report to the Security Council, the prosecutor (who under par. 7 of resolution 1970/2011 is required to report every six months on the actions taken) would then give account of how the Libyan authorities were cooperating and had forwarded an official invitation L. Moreno-Ocampo, Prosecutor of the International Criminal Court, Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011), §11, http://www.icc-cpi.int/NR/rdonlyres/3FD60A16-9BE7-4BD3-A12D-65D93E96B455/28392/Statement_ICCProsecutorLibyaReportto_UNSC021113

Following the death of Mohammed Gaddafi on October 20, 2011 and the capture of Saif Al-Islam Gaddafi November 19, on November 23 the National Transitional Council sent to the Court a letter in which it expressed its intention to cooperate with the international agency international, recognizing the value of its decisions as the obligations arising from the resolution 1970/2011, but emphasizing, on the other hand, Libya had "primary jurisdiction with respect to the proceedings against Saif Al-Islam Gaddafi" and had the full "will and ability to pursue it in accordance with state law"³⁹

This initiative could be seen as the start of negotiations that presumably could have led to a real agreement on the basis of Article 94 of the Statute if the national authorities had admitted that the crimes for which the accused would have been pursued in Tripoli were different from those for which the ICC had issued the warrant of arrest.

But on November 23 they issued another statement which reiterates how the warrants of arrest issued on June 27 were binding.⁴⁰ Indeed it could not be otherwise, since once there is the request of warrants of arrest and the decision on them, only ICC judges become competent on them.

In other words, the Moreno-Ocampo's request of arrest warrants after only three months of investigation, has effectively turned a "no way out" procedure, preventing the involved parties to negotiate a different solution based on the "positive complementarity" principle indirectly invoked by judge Usacka in his dissenting opinion and theorized, since 2006, by the same Office of Prosecutor in its strategies. Perhaps, on this "positive complementarity" principle, an agreement could have been reached for the first time under Part IX of the Statute, and in particular art. 89, par.4 and 94⁴¹

On the contrary, after the exclusive competence of the Pre-Trial Chamber and its decision on the warrants of arrest, there was nothing else more to do for the Libyan transitional government and the domestic proceeding. In the same time, as the whole mechanism of the ICC is based on the cooperation of States with the Court, in the absence of such cooperation, the Court cannot proceed in the absence of the people accused.

But there is a further consideration. And it concerns one of the appeal reason not considered by the Appeal Chamber, but only by the President: namely the item on capacity of Libya to make a genuine process. Also compared to the consideration extended by Judge Song, some observations should be emphasized. Pursuant to art. 19 of the Statute, the State that intends to assert the primacy of its domestic jurisdictions is required to challenge the admissibility of the case "as soon as possible". On this point, it must be observed that the instance of inadmissibility by Libya was filed on May 1, 2012 when the national authorities were investigating on the same individuals against whom it

³⁹ NTC, *Letter dated 23 november 2011*, Gaddafi and others (ICC-01/11-01/11-34) www.icc.cpi.int

⁴⁰ Position expressed in a formal act, but with respect to which he would not recorded an official reaction of the Libyan government (cfr. Situation in the Libyan Arab Jamahiriya, The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Prosecutor's Submissions on the Prosecutor's recent trip to Libya, (ICC-01 / 11-01 / 11), November 25, 2011, §§ 8 and 10)

⁴¹ Whose actual applicability to the case see C. Stahn, Libya, the International Criminal Court and Complementarity. A test for "Shared Responsibility", in "Journal of International Criminal Justice," 2012, pp. 341-34

had been issued the international warrant of arrest. Also, the preliminary hearing before the national court was held in Tripoli on September 13, 2013 only.⁴²

In accordance with the practice of the Court, the Appeals Chamber rejected the request of the Libyan government to present new evidence demonstrating the national proceeding progress, the sameness of the case, noting that the "admissibility of a case must be determined on the basis of the facts as they existed at the time of the proceedings relating to the dispute"⁴³

Consequently, the Appeals Chamber did not take into account the progress of the proceedings against the Gaddafi government, nor the recent amendments to the Code of Criminal Procedure of Libya by which they authorized the national case already begun and against al-Senussi and other 37 former senior officials of the regime.⁴⁴

Again it must be emphasized the unusual rapidity of the Prosecutor Moreno-Ocampo action has addressed the international procedure. But even more important is to analyze the legitimacy of the decision taken by the First Pre-Trial Chamber - and signed by President Sang - regarding the Libya ability to conduct the proceedings against Gaddafi government.

According to several experts, the Statute of the Court would declare a State "unable" or "unwilling" only when the domestic proceedings make harder the condemnation and therefore jeopardize the fight against the impunity (Heller, 2006): in this sense the same prosecutor Moreno-Ocampo, during a visit in Libya, would have said *We are not an human rights Court. We are not checking the fairness of the proceedings. We are checking the genuiness of the proceedings*⁴⁵.

Conversely, others believe that under par. 3 art. 17 in conjunction with par. 3 art. 21, whereby the law application and interpretation by the Court should be consistent with international human rights standards generally accepted, it should be concluded that an unfair trial, in which the rights of defense are violated, cannot qualify "genuine" within

⁴² We have also to observe that While the ICC has issued only three warrants of arrest for crimes against humanity, at the national level they are already taking several trials against prominent figures of the regime including the Libyan Prime Minister from 2006 to 2011.

⁴³ The Appeals Chamber in §§ 41-42 of the decision of 21 May, mentions two previous cases: 1) Situation in the Democratic Republic of the Congo, 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, Appeal Chamber, ICC-01 / 04-01 / 07-1497 (OA 8), 25 September 2009 §§ 56-57; and 2) Situation in the Republic of Kenya The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility', Appeals Chamber, (ICC-01 / 09- 01/11 OA), 28 July 2011, §10

⁴⁴ The presence of the accused is provided through video conferencing, as well as provisions of the procedure of the new code. This system has been denounced by Amnesty International among others as would violate the right to fair trial of the accused (see. Libya: Trial of former al-Gaddafi Officials by video link to farce, Press release, April 14, 2014 - at <http://www.amnesty.org/en/for-media/press-releases/libya-trial-former-al-gaddafi-officials-video-link-farce-2014-04>

⁴⁵ Statement made during the visit of November 2011 and reported by Al-Jazeera, video available at <http://www.aljazeera.com/news/africa/011/11/2011112395821170909>

the meaning of par. 1 of Art. 17. These violations are expression of an unavailability of the judicial system for the accused and of its substantial collapse⁴⁶.

Others are on an intermediate position: considering the demands of not justify "show trials" but also the importance to not transform proceedings before the International Criminal Court into an instrument of stigmatization-, they suggest that it might be more appropriate to describe as not "genuine" only those national proceedings completely "illusory", because the sentence are predetermined or fundamental jurisdictional rights are violated (Megret & Samson, 2013).

The idea of the Libya inability was funded only on factual evidence, such as the failure to transfer the accused, rather than on legal items, such as violations of the right to fair trial, including through amendment of the Code of Criminal Procedure. It denotes a lack of awareness regarding the effects of the decisions as well as leaving unresolved the question of amenability of serious human rights violations to the unavailability of state judicial system. The conclusions may have a negative impact on the general attitude of the Libyan government and the African countries, who increasingly feel the international organization such as a foreign body or even an enemy to "fight".

3. THE LACK OF COORDINATION WITH OTHER REGIONAL JURISDICTION: THE LYBIAN CASE BEFORE THE AFRICAN COURT ON HUMAN AND PEOPLE RIGHTS

With reference to the case Saif Al Islam Gaddafi, despite having the opportunity, the judges of the International Criminal Court did not want to take a clear position on the important issues above mentioned; neither wanted to consider the order issued by the African Court on Human and Peoples rights, dated March 18, 2013, that had sent to Libya a series of provisional measures for the end of the violation of Saif Al Islam rights: among these, in particular, the order to allow him to appoint a defender, to receive visits from his family; to not adopt any behavior that could compromise his physical or mental health.⁴⁷

In fact the ICC is not the only Court involved in the Libya case. Important steps have been adopted by the by the African Court, which for a long period had been existing only on paper . On march 25, 2011 The African Court issued, an ordinance as part of the pending case "African Commission on Human and Peoples' Rights vs. Great Socialist People's Libyan Arab Jamahiriya" It 'an order issued by the African judges after being appointed on 16 March 2011 by the African Commission which had received numerous complaints from non-governmental organizations for repeated violations of the African Charter on Human and Peoples' Rights. The Commission has decided to refer the case to

⁴⁶ J. O'Donohue, S. Rigney, "The ICC must consider fair trial concerns in determining Libya's application to prosecute Saif Al-Islam Gaddafi", in «Ejil Talk», all'indirizzo <http://www.ejiltalk.org/the-icc-must-consider-fairtrial-concerns-in-determining-libyas-application-to-prosecute-saif-al-islamgaddafi-nationally/>.

⁴⁷ African Court on Human and Peoples' Rights, *In the matter of African Commission on Human and Peoples' Rights v. Libya*, Application No. 002/2013, 18 march 2013

the Court after having recognized the massive and systematic violations committed by government forces against the Libyan population.

So, we must take some considerations. Libya is not a State party to the Protocol establishing the African Court. The Article 5 of the Protocol of Ouagadougou, after establishing in paragraph 1 that the African Court may be called upon by the African Commission; or by a State Party which has submitted or against which it was presented a communication before the African Commission, or by a State Party whose citizen is a victim a violation of human rights or an intergovernmental organization African, states in paragraph 3, that "the Court may entitle relevant Non Governmental Organizations (NGO) with observer status before the Commission, and individuals to apply directly cases before it, in accordance with Article 34 (6) of this Protocol" At the same time, the said Article 34, paragraph 6, provides that the Court cannot declare itself competent to receive cases submitted by individuals or NGOs against a State Party which has not made the required declaration of acceptance. To date only five states -Burkina Faso, Ghana, Malawi, Mali and Tanzania- have made such a declaration, with the consequent paralysis of the African Court.

However, what happened to the Libya case corresponds to a precise interpretation of the art. 5 and art. 34 of the said Protocol. In fact the Court may know, in any case, the appeals filed by individuals or NGOs thanks to the role of "filter" played by the African Commission that, on the basis of the above mentioned Article 5, paragraph 1, and Articles 84, paragraph 2 and 118, paragraph 3, may threaten individual communications, -addressed to it-, to the African Court so that it can intervene to put end to the violations denounced. In this way, even a State that has never accepted the African Court jurisdiction - like Libya - may be before it as a result of such an action.⁴⁸

The second issue concerns the ordinance: the African Court adopted it without giving excessive motivation, ordering Libya to "*immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other International human rights instrument to which it is a party*". With the same ordinance the Court imposed, also, to present a report within 15 days about the actions brought by the implementation of the precautionary measures. The lack of motivation is certainly a weak for the African Court with probable negative consequences on the role that the African Court can assume in the development of a regional jurisdiction.

In fact, since the African context and the very wide African Court competence *ratione materiae*, under Article 3, paragraph 1, and Article 7 of its Protocol, it is expected a large development of the precautionary measures decisions in the context of the African human rights protection system. In the light of this provision, as well as the International Court of Justice and the ECHR Court, also the African Court is supposed to prevent its precautionary measures remain unrealized.

But the Libya case is also a political case, both for the work of the African Court both for the work of the International Criminal Court.

⁴⁸ In this way, the African Commission, is not anymore a super partes organ but it becomes a claimant before the African Court in the place of the true claimant not allowed to be part in the proceeding.

With regard to the African Court, it should be considered the fragile democratic conditions of many African countries, and the fearsome lack of impartiality of the African Commission whose decisions are determined on the basis of political expediency. These dangers is in the Libya case, in many ways rather exemplary for the development of the regional justice of the African continent. And 'in fact it is indicative that the African Commission has considered Libya case after the high level of popular protests exasperation, and after it was already certain that the UN Security Council would adopted resolutions against Libya and while France was preparing to intervene militarily. The above mentioned Ordinance was adopted after the UN Security Council Resolution 1973/2011 and after the French intervention.

4. CONCLUSIONS

There are serious doubts on the work of the International Criminal Court and for all the missed opportunities. The Appeals Chamber decision is the inevitable consequence of several events on which we can move more than a criticism.

Certainly, several doubts concern UN Security Council action: if at first it was compact in adopting the resolution number 1970, then it became cautious and uncaring of the complaints of the Office of the Prosecutor, with the effect of "weaken" the political role initially assigned to the Court, whose jurisdiction seemed to be used in order to put forward for the first time the principle of so said "Responsibility to Protect".

For this reason, the resolution 1970 is rightly considered a "poisoned chalice"⁴⁹ served to the prosecutor Moreno-Ocampo in order to politicize its function and the international justice, with the consequence to penalize a more fruitful collaboration with the States involved in international processes.⁵⁰

The timing of the UN referral and then the proceedings before the ICC developed a general hope on the international justice as an alternative to concrete and effective military protection to civilians. Such hopes have been largely disregarded in the course of events in which the intervention of the International Criminal Court appeared not only increasingly fragile but, above all, instrumental for other purposes different from the justice aim.

The application of a "complementarity" system based on the "hyperactivity" of the Prosecutor has substantially prevented a cooperation under the Rome Statute Part IX. Also, The instance of the arrest warrants has given to the judges every "power management" of the case, making almost impossible, from then, a consensual division of work between the international body and the national authorities. The decisions of the First Pre-Trial Chamber and the Appeals Chamber have prevented the development of the

⁴⁹ M. Kersten, "Negotiating Peace in Libya: What Happens to Justice ?", in "Justice in Conflict", July 26, 2011, at <http://justiceinconflict.org/2011/07/26/negotiating-peace-in-libya-what-happens-to-justice>

⁵⁰ In this regard, it seems useful to recall how the in it Strategy 2009-2012 the Office of the Prosecutor had indicated, among the general objectives, the completion of a minimum of three processes (and the start of at least one other), the continuation of investigations at 7 situations, and the start of a maximum of 4 new investigations on cases related to those or to new situations. These numbers show among other awareness regarding the limited financial resources, as well as available human resources, and was one of the reasons for the desire to pursue a more fruitful cooperation with the countries concerned by international proceedings

“positive complementarity” theory emerging in the first two "strategies" presented by the Office of the Prosecutor. In fact, the more rigid and formal interpretation of the Art. 17 leaves little for a cooperation between international and national authorities.

The issues regarding Libya’s social, political, and legal stability were on the ICC agenda as it was involved by the Security Council of the United Nations. But all the doubts on this involvement and, overall, on the way the juridical case was led by the ICC are even more stronger before the deep and dangerous crisis Lybia is living now.

The Libyan case is still open and it is a more relevant challenge for all the international community. The social revolt, the resurgence of the internal conflict, also through the use of terrorist actions⁵¹, developed in the summer of 2014, leaves many questions and doubts on the missed opportunities by the International Criminal Court and the role it could exercise not only for giving a response to the violation of human rights, but also for being an instrument of conflict resolutions

The diplomatic solution to the Libyan conflict gave outcomes never been wanted by anyone: namely, a war of aggression under the guise of humanitarian intervention. It gave an appearance of international legitimacy to a war of aggression totally contrary to the Charter of the United Nations, in particular to the paragraph 7 art.2: “no state can intervene by force to resolve internal issues in another State”. Received the referral, the Office of the Prosecutor has proceeded with great rapidity to declare guilty of crimes against humanity eight Libyans, including, in addition to Gaddafi, also his son Saif al-Islam and the intelligence chief Abdullah al Senoussi.

"The evidence are enormous," the Prosecutor declared solemnly, without even indicating the reasons for its certainty.

But, as it is said “De minimis not curat praetor”.

And the doubts that the Security Council gave a “poisoned chalice” to the ICC Prosecutor and that the rapid and hyperactive ICC intervention was overall a political instrument is now a certainty.

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⁵¹ In late April of 2014, in Tripoli extremist groups have set up two kidnappings of diplomats, Ambassador of Jordan and a senior representative of Tunisia, then trying to get in exchange for their liberation to some extremists detained in those countries (see. Why Libya's Militants Are Kidnapping Diplomats - And Why We Can not Give in, in "Foreign Policy", May 2, 2014, Most serious accidents were in the months before the diplomatic missions of Sweden, Egypt, France and especially the US ambassador to Libya, Chris Stevens, killed (along with other 3 members embassy staff) the September 11, 2012 (see. Chris Stevens, US ambassador to Libya, killed in Benghazi attack, in "The Guardian", September 12, 2012, at <http://www.theguardian.com/world/2012/sep/12/chris-stevens-us-ambassador-libya>

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