Background

On 26 November 2013 No Peace Without Justice (NPWJ), in the framework of its Libya Project, organised a side-event on Complementarity in Libya in the margins of the Twelfth Session of the Assembly of State Parties (ASP) of the International Criminal Court (ICC) held in The Hague from 20 to 28 November 2013.

Complementarity is the fundamental principle underpinning the International Criminal Court, allowing the Court to exercise its jurisdiction only when a State is unable or unwilling to do so. In the case of Libya, the issue of complementarity is more critical since the decision by the Security Council in Resolution 1970 to refer Libya to the ICC and the role of international justice institutions and their relations with local authorities is a key political issue for the future of Libya and its democratic transition.

There are currently two open ICC cases in which admissibility is a central feature, both of which are in the Libya situation: the case against Saif al-Islam Gaddafi and the case against Abdullah al-Senussi. In the Gaddafi case, the admissibility challenge was rejected so unless the ICC decides otherwise on appeal, Mr Gaddafi is going to face trial in The Hague. In the al-Senussi case, instead, the admissibility challenge was approved, so he will face trial in Libya.

The request for justice, both from victims and from the entire Libyan society, remains very strong and the government has reiterated its intention on several occasions to investigate individuals
suspected of having committed crimes under international law (war crimes and crimes against humanity) during the recent conflict. Nonetheless, the country has a long heritage of impunity during the past regime. The legal and judicial authorities still lack comprehensive skills and methodologies for fair and effective prosecutions, which are imperative to avoid future violations and address in a transparent and fair way the thousands of people still in detention since the revolution ended. Strengthening the role and the impartiality of the judiciary, as well as developing outreach campaigns addressed to victims, civil society organisations and society as a whole, remain critical elements to ensure that the Rule of Law and principles regarding fair trial and due process, enshrined in International Conventions, are applied in Libya. The new Libyan authorities are working to transition toward a new jurisdiction which will put an end to impunity, while the two cases before the ICC represent only the tip of the iceberg of the need for justice and accountability that the Libyan authorities have to face.

The NPWJ side event focused on complementarity, through these two Libyan cases, to address the need for justice in Libya and the country’s criminal justice and accountability system can help the democratic transition of the country, still taken hostages by forces that ask only for vendetta and retribution. The questions which the side-event addressed were on the one hand: at what point does complementarity kick in when a State is willing to investigate and prosecute but may be unable to do so?; on the other: what does “inability” mean and what is the responsibility of the rest of the international community?

**Side-event Summary**

1. **Participants**

The side-event was chaired by **Wafa B.H. Omar**, Director of International Programs at the Al-Kawakibi Democracy Transition Center (KADEM) in Tunis. The speakers were: **Fathi Salem Abouzakhar**, Libyan Centre for Strategy & Future Studies; **Rhiannon Smith**, Libya Program Officer for NPWJ in Tripoli; and **Marieke Wierda**, University of Leiden, on leave from being Transitional Justice Adviser at the UN Support Mission in Libya. The meeting was attended by approximately 50 people, including State delegates, ICC officials, representatives of civil society and independent observers.

1.2. **Summary of discussion**

**Presentations**

The meeting started with an introduction by **Ms Wafa Ben Haj Omar**, who presented the aim of the event as being to tackle the issue of complementarity in Libya and how it should work. Following that, **Mr Roberto Bellelli**, representing the Italian Government, expressed the deep strategic interest of the Italian Government to support transitional justice in Libya. He concluded by saying Italy will follow closely the developments in the jurisprudence of the Court in the Libyan cases and that Italy will continue to support the Libyan people.

**Mr Fathi Salem Abouzakhar** addressed the issue of the trials of Mr al-Senussi and Mr Saif al Islam Gaddafi and, more specifically, the difference regarding the two cases in the outcomes of the Court. According to Mr Abouzakhar, if Libya has been found able and willing to try Mr Al-Senussi, Mr Gaddafi should be tried in Libya as well. He called for equality before the law, which means that either the Libyan system can try all, or it can try none. He mentioned that around 8,000 people are still detained because of their link to the previous armed conflict. If those people will be tried in Libya, why not Mr al-Sensussi and Mr Gaddafi? According to Mr Abouzakhar, the Libyan system should be given the chance to prove it can work and try its
own criminals. To that end, he emphasised that Libya should be supported and its national capacity strengthened.

Ms Rhiannon Smith affirmed that complementarity and justice in Libya cannot be resumed and restricted to the two cases pending before the ICC. The situation in Libya needs to be looked at from a general point of view. According to Ms Smith, there is a commitment to change and to achieve accountability and transitional justice in Libya. A lot of work has already been done with local organisations, since they are the ones who are in contact with victims. Ms Smith also reiterated the need for strong outreach activities by the ICC in Libya to ensure that victims and the public at large can better understand the judicial procedures and mechanisms. Regarding the two cases, Ms Smith noted that at first, the ICC arrest warrants were welcomed and were seen to legitimise the revolution. However, over time, the ICC is now not seen in such a good light: its role is seen as largely suspicious, which is mostly due to the lack of awareness and outreach about what the ICC and its role are. Thus, it is essential to raise awareness about the ICC as much as it is necessary to strengthen Libya’s capacity. Ultimately, accountability is better achieved when the trials are visible and well understood by the victims.

Ms Marieke Wierda gave an overview of the Libyan situation and identified challenges and opportunities regarding Libya and its relation with human rights issues and transitional justice. According to Ms Wierda, the ICC has enjoyed a lot of support in the Libyan context, especially during the revolution. The warrants were seen as legitimising the revolution. Nowadays, Libyans are attempting to re-establish their authority; they are willing to try the perpetrators of crimes under international law on their own. However, Libyan society is still facing many challenges. One of the challenges is the re-integration of the brigades into society or into the national army. Furthermore, arbitrary detention is still very much present across Libya and constitutes a real issue in terms of human rights violations. Another challenge is that Libya, as a State, is not in control of all the detention facilities. Some are controlled by brigades that are not necessarily aligned with the State. For instance, Mr Gaddafi is detained by a brigade, which raises the issue of who exercises custody. Finally, torture and inhuman treatment of detainees are a critical problem in Libya. Another issue raised by Ms Wierda concerned Libya’s ability to conduct the trials. The legal system in Libya did not collapse before or after the revolution and the new Libyan authorities have started to reform its laws. However, it still doesn’t have the capacity and ability to try perpetrators of crimes under international law. The international community has a key role to play by monitoring and providing technical assistance to Libya in order for its national capacity to be strengthened.

Discussion

Interventions from the floor focused on the challenges of the Libyan justice system and complementarity. Through all the interventions, the role of the ICC in Libya has been discussed in the matter of the trials of Mr al-Senussi and Mr Gaddafi, taking into account the civil society perspective and the work of field-based NGOs.

Libya is facing many challenges in the matter of justice and there are serious human rights concerns: torture, no access to legal representation, and the impact that the security situation in the country has on justice, so far four judges have been assassinated and lawyers have been intimidated. There is also the incredibly important issue of the death penalty, not to mention the lack of legal representation in the country.

The ICC has to proceed with the cases and, concerning this matter, it has been stated that there is a cooperation agreement between the ICC and Libya, as well as meetings with the Libyan authorities, including the Minister of Justice. The ICC can conduct only a few cases and is not able to take care of the whole situation in Libya. Libya must take care of the rest. Even if one
would wish to question the decision taken by the ICC, however, it was emphasised that an ICC order for the transfer of Mr Gaddafi exists and, as such, should be complied with, even as these other issues are discussed and worked out between the ICC and Libya.

Another main topic of discussion was Muammar Gaddafi’s death and the fact that many detainees are still in prison. Unfortunately, the case of whether Muammar Gaddafi’s death was criminal or not has not been resolved and there has not been any real or conclusive investigation into that. Building on this issue, regarding Libyan justice, there is also another topic that needs to be focused on, namely popular justice. In Libya, there is not one single juridical system but two, the official one and the tribal one. It therefore seems that judges and “street judges” are both operating in the country.

Regarding detainees, participants agreed that the longer people will be detained, the harder it will be to do something about it. Many NGOs have tried to visit the prisons and have released some reports about them. From a Libyan perspective, NGOs are working well in trying to raise awareness in the country on transitional justice, including on detainees. Participants also stressed the need for more support and efforts from NGOs like NPWJ and the international community.

Looking deeper into Libyan civil society, the ICC is not seen in a good light. There is not sufficient awareness on what the ICC is. Libyans see it as an international organisation that is trying to take something away from the country. This is also due to the past 42 years of brain washing by the regime.

On the victims side, participants generally agreed that there is the need to focus more on victims’ participation. If it is difficult for the ICC to enter the country, it would be possible to reach victims outside the country as well, mentioning Tunisia as an example of a country where many Libyans reside and where they could be engaged by the ICC. On the legal side, the Libyan Transitional Justice Law would provide for fact-finding and reparations for victims.

Final remarks highlighted the fact that there is no need to sacrifice two people for the sake of justice. Accountability, impunity and justice rely on the perception of society. Moreover, without cooperation there will not be justice and since the ICC works in difficult societies, it has to be equipped for doing so and ready to work in such circumstances.

Conclusion

The event showed that in order to achieve justice and accountability in Libya, the ICC should carry out its work and the national capacity of the country to try perpetrators of crimes under international law as well as under national law should be strengthened. The event also raised successfully the crucial importance of involving all relevant stakeholders in the transitional justice process, including the State, the international community, NGOs, victims, affected populations and civil society. There is a need to look holistically at a situation: the wisdom of removing two notorious individuals from the country’s justice sector, and the consequent impact that may have for development of and support for that sector, has to be questioned. Nonetheless, it is important to respect the rule of law, which means not only complying with Court orders, but using the principle of complementarity to strengthen the national legal systems so that when a country is willing to investigate and prosecute, the international community and others make all efforts to ensure it is also able to do so.