

The Coyote and the Road Runner: The ICC, Gaddafi and the pursuit of international justice

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Abstract

The International Criminal Court at its inception was touted to be the international community's means of bringing the perpetrators of the world's most heinous crimes- genocide, crimes against humanity and war crimes (and now also the crime of aggression) - to justice. Following the operation of earlier ad hoc tribunals set up by the United Nations (UN) Security Council in the aftermath of the atrocities committed in the former Yugoslavia and Rwanda in the 1990, the international community, having witnessed the efficacy of international justice, set about establishing a permanent 'world court' from which no criminal, irrespective of political power or status could hide. Flash-forward to the present, however, and the dream of the ICC, for many, is woefully unrealised. The ICC has been tried repeatedly in the court of public opinion and has been found wanting. Discussions of its effectiveness, or lack thereof, in delivering justice to victims and being a deterrent for the commission of international crimes consistently reference its limited number of convictions, high cost and lack of an independent enforcement mechanism among its weaknesses. This article discusses the ICC's ongoing case against Saif Al-Islam Gaddafi, who was once hailed as the heir apparent of controversial Libyan leader Muammar Gaddafi. It discusses the legal arguments in favour and against the ICC apprehending and prosecuting Gaddafi, whose continued evasion – with the help of Libyan authorities – of the court has been described as a glaring display of its impotence. Specific focus is given to the complementarity principle as applied by the ICC in determining the admissibility of the case, and whether recent developments in Libya have effect on the Courts claim of admissibility.

Keywords

ICC, Saif Al-Islam Gaddafi, Admissibility, Complementarity, international criminal justice

I. Introduction

The International Criminal Court's (ICC) entanglement with Libya and the case of Saif al-Islam Gaddafi began after the United Nations Security Council (UNSC), in accordance with chapter VII of the UN Charter and Article 13(b) of the Rome Statute, issued Resolution 1970 levying sanctions against Muammar Gaddafi's regime and referring him and Saif Gaddafi, to the International Criminal Court (ICC), accusing them of committing crimes against humanity during the civil unrest and uprising of early 2011.¹

Subsequent to UNSC referral and investigations by the Prosecutor's Office, the Pre-Trial Chamber I (PTC I) of the ICC issued a warrant for the arrest of Saif al-Islam Gaddafi on 27 June 2011. The warrant claimed it 'necessary' under article 58(1) of the Rome Statute² to arrest Gaddafi, who, despite not holding an official position within his father's regime, it claimed, 'exercised control over crucial parts of the State apparatus' and 'had the powers of a de facto Prime Minister'.³ The warrant also named, pursuant to article 25(3)(a) of the Rome Statute, Gaddafi as criminally responsible as an indirect co-perpetrator of 'murder as a crime against humanity, within the meaning of article 7(1)(a) of the Statute; and persecution as a crime against humanity, within the meaning of article 7(1)(h) of the Statute'.⁴

The Court issued a Surrender Request on 4 July 2011, asking for Libya's cooperation in arresting and surrendering Gaddafi to the Court.⁵ Yet, Saif remained a fugitive until his capture by rebel forces on 19 November 2011, while attempting to flee the country. His capture and subsequent detention in the province of Zitan, sparked an international debate about the conduct of his trial. Concerns were raised about whether the younger Gaddafi was to be

¹ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970

² *Situation in the Libyan Arab Jamahiriya* (Warrant of Arrest for Saif al-Islam Gaddafi) ICC-01/11 (27 June 2011), [17]

³ *ibid.*, [12]

⁴ *ibid.*, [16] and Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (hereinafter, Rome Statute)

⁵ *Situation in the Libyan Arab Jamahiriya* (Request to the Libyan Arab Jamahiriya for the arrest and surrender of Muammar Mohammed Abu Minya GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI) ICC-01/11-01/11 (4 July 2011)

prosecuted domestically or transferred to the International Criminal Court (ICC) in honour of the arrest warrant. Initially, the interim government in Tripoli expressed its intention to undertake domestic prosecution of the accused, rather than surrendering him to the ICC. To this end, it formally challenged the ICC's exercise of jurisdiction and the supposed admissibility of the case to the Court, pursuant to article 19(2)(b) of the Rome Statute, claiming that its national judicial authorities were actively investigating the accused in order to bring him to justice.⁶ However, the Court rejected Libya's claims and defended the admissibility of the case, claiming that it was acting in accordance with the principle of complementarity.

In spite of the ICC's ruling, however, Gaddafi was never transferred to stand trial in The Hague. He remained in the custody of his capturers until his reported release in 2017. Gaddafi's exact whereabouts are yet to be confirmed. In fact, many question if he has indeed been released. Nevertheless, his rumoured freedom has serious implications for his ongoing legal battle at the ICC, and whether or not his case remains admissible before the Court.

II. To complement or to take over: ICC jurisdiction

The Preamble and Article 1 of the Rome Statute firmly establish the principle of complementarity as the cornerstone of the ICC. This principle subsumes two fundamental and often contrasting principles of international law; the notion of State sovereignty and the attendant principle of primary jurisdiction of States, and the international duty to collectively combat impunity for the commission of international crimes.⁷ Therefore, rather than eclipsing the national criminal jurisdiction of States Parties over those responsible for committing international crimes, the ICC's jurisdiction is complementary to it.⁸ Furthermore, as regards the issue of admissibility of cases before the Court, Article 17 of the Statute specifically mentions having regard to paragraph 10 of the Preamble and Article 1, thereby reiterating that States enjoy primary jurisdiction, while the ICC assumes jurisdiction only when States' domestic courts are unwilling or unable to conduct investigations and prosecutions or otherwise

⁶ Michele Tedeschi, 'Complementarity in Practice: The ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions' (2015) 7 *Amsterdam Law Forum* 76

⁷ Nidal Nabil Jurdi, 'The Complementarity Regime of the ICC in Practice: Is it Truly Serving its Purpose? Some Lessons from Libya' (2017) 30 *Leiden Journal of International Law* 199

⁸ Rome Statute (n 5)

refrain from taking action.⁹ As such, where it is evidenced that a state is genuinely willing and able to prosecute an alleged offender, nationally, said case will be inadmissible before the ICC.

Therefore, at first instance, the case against Gaddafi, when considered in accordance with the Court's clearly outlined complementarity position vis-à-vis national jurisdiction and compounded by Libya's apparent 'willingness' to undertake investigations and prosecute Gaddafi, appeared inadmissible before the ICC. Yet, the PTC, in its Gaddafi Admissibility Decision¹⁰ responding to Libya's challenge under article 19(2)(b) found that the case was admissible before the ICC.

In determining the admissibility of the case before the Court, the PTC applied the two-limb test set out in article 17(1)(a) of the ICC Statute and reaffirmed in the *Lubanga* case. The test is premised on (i) whether the case being investigated or prosecuted by a State with jurisdiction at the national level, is (substantially) the same case at the Court level, (ii) whether the concerned State is 'unwilling or unable genuinely to carry out the investigation or prosecution'. In response to the question of 'sameness', Libya argued that 'its investigations covered exactly the same incidents and conduct as those contained in the ICC warrant of arrest and were... broader in terms of time and subject matter than the ICC Prosecutor's investigation, and... had produced a very wide range of significant evidence'.¹¹ Nevertheless, the Chamber citing the jurisprudence in the *Lubanga* case, that to prove inadmissibility, national proceedings must 'encompass both the person and the conduct which is the subject of the case before the Court'¹², held that Libya fell 'short of substantiating... that the same conduct is the subject of domestic investigations'.¹³ It also found Libya to 'be unable genuinely to carry out the investigation or prosecution against Mr Gaddafi' for reasons including but not limited to the Libyan authorities' inability to secure Gaddafi's transfer from his place of detention into State custody to stand trial; the lack of capacity to obtain necessary testimony; the inability of judicial and governmental authorities to exercise full control over certain detention facilities and to provide adequate witness protection; as well as significant practical impediments to securing legal representation for Gaddafi. It was also ruled that Libya's national system [was] 'unavailable' to Gaddafi within the terms of article 17(3) of the Statute'.¹⁴

⁹ Jurdi (n 8)

¹⁰ *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (Decision of the Admissibility of the Case against Saif al-Islam Gaddafi) ICC-01/11-01/11 (31 May 2013)

¹¹ *ibid.*, [33]

¹² *ibid.*, [74]

¹³ *ibid.*, [116]

¹⁴ *ibid.*, [205]

The Decision, although challenged by Libya, was upheld by the Appeals Chamber (AC), by a four to one decision. The AC upheld the PTC's admissibility ruling that the conduct for which Libya was investigating Saif Al-Islam Gaddafi was not 'substantially the same' as the conduct for which the ICC sought to prosecute him¹⁵, thereby giving the court authority to adjudicate the case, over Libya. Further, having found that the case being investigated by Libya was different to that of the ICC, the AC did not address the issue of Libya's inability to undertake domestic proceedings.

Ironically, Gaddafi himself, in an unsigned statement requesting that he be tried by the ICC, is reported to have said that while he would have 'liked to have been tried in Libya by Libyan judges under Libyan law in front of the Libyan people', the conduct of his case could not, in his estimation, 'be called a trial'. He argued that he, along with the victims in Libya and the wider international community have a right to the truth, which a trial conducted by Libyan authorities would not honour because said trial would neither be conducted fairly nor impartially. Nevertheless, there are those, one of the appeals trial judge included, who opine that because the ICC is by nature a court with supporting authority, it should have been guided by a 'complementarity scheme' that gives a 'strong presumption in favour of national jurisdictions', in order to enable, rather than defeat, domestic proceedings'.¹⁶ The AC dismissed the claim and reaffirmed the PTC ruling that while complementarity may express a preference for national jurisdiction, it does not mean that all cases must be resolved in favour of domestic investigation.¹⁷

III. Recent developments and lasting impacts

Admittedly, the case against Gaddafi has effectively demonstrated what is probably the foremost weakness of the ICC regime; its lack of an independent enforcement mechanism.¹⁸ In that, for all its decisions about whether or not it has leave to litigate a case against an accused, it still (and despite a UNSC Resolution) relies exclusively on State cooperation to obtain custody of those it wishes to bring to Justice. Article 86 of the Rome Statute provides that all

¹⁵ *Prosecutor v Saif Al-Islam Gaddafi* (Judgement) ICC-01/11-01/11 OA 4 (21 May 2014)

¹⁶ *Prosecutor v Saif Al-Islam Gaddafi* (Judgement) ICC-01/11-01/11 OA 4 (21 May 2014), [76]

¹⁷ *ibid.*, [78]

¹⁸ This includes the Court's focus on Africa (see for example W. Chadwick Austin & Michael Thieme, 'Is the International Criminal Court Anti-African' (2016) 28 *Peace Review - A Journal of Social Justice*, Issue 3, 342 but also its track record in acquittals (see Leila Sadat, 'Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in *Prosecutor v. Jean-Pierre Bemba Gombo*' <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>)

States Parties have an obligation to cooperate fully with the Court, cooperation which according to Article 89(1) includes a duty to arrest and surrender such persons being sought by the ICC. However, in the case of Libya, the obligation to cooperate with the Court arises not solely from this provision, as it is not party to the Rome Statute, but from the UNSC referral Resolution 1970 which conferred ongoing authority over the situation in Libya, to the ICC. Nevertheless, despite continuous engagement with Libya to surrender Gaddafi from 2011 until present, as well as seeking the assistance of the UNSC to induce compliance with its orders¹⁹, Gaddafi remains outside the ICC's reach.

Now that he is presumed to be a free man, the ICC remains resolute in its pursuit to apprehend and prosecute him. The ICC Prosecutor in a statement on 14 June 2017 called on the authorities in Libya, the UNSC and all States Parties to the Rome Statute to assist in its efforts to apprehend the accused, including, for those in a position to do so, to immediately arrest and surrender Mr Gaddafi to the ICC. Moreover, seeing that Libya is bound to cooperate with the Court by virtue of Resolution 1970, if Gaddafi is indeed released and in Libya's jurisdiction, the country has a legal obligation to surrender him to the Court, seeing that under Article 19(4) the admissibility of a case may be challenged only once. Hence, it is apparent that Libya has no further recourse to challenge the admissibility of the case.

However, there are some, most notably a member of Gaddafi's legal team, who maintain that the case is no longer admissible before the court on account of the fact that Gaddafi was tried *in absentia* by the Court of Assize in Tripoli in 2015 and sentenced to death for his crimes during the revolution.²⁰ Admittedly, while such proceedings could have implications for whether or not a further admissibility challenge can be mounted on Gaddafi's behalf, the probability of success is unlikely. In that, pursuant to article 20 of the Rome Statute, a person cannot be tried twice for the same crime, therefore Gaddafi's legal team could arguably seek to have the case declared inadmissible per the principle *ne bis in idem*. However, article 20 (3) outlines exceptional circumstances wherein the case would still be admissible. This includes where the case was not 'conducted independently or impartially in accordance with the norms of due process recognised by international law and conducted in a manner... inconsistent with

¹⁹ *Prosecutor v Saif Al-Islam Gaddafi* (Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council) ICC-01/11-01/11-577 (10 December 2014)

²⁰ 'Saif Al-Islam Gaddafi' (*Coalition for the International Criminal Court*) <www.coalitionfortheicc.org/cases/saif-alislam-gaddafi>

an intent to bring the person concerned to justice'.²¹ Hence, seeing that the United Nations and several other international human rights organisations have renounced the trial in Libya as being motivated by vengeance, rather than justice, it would appear that it has no bearing on admissibility before the court. Furthermore, if one considers the implications of Gaddafi's detention and subsequent trial as it regards arguments of equality of arms and equal protection and a defendant's overall entitlements of access to justice and a fair trial- seeing that he is reported to have been held for extended periods in isolation, interrogated without counsel present and almost completely denied access to pre-trial and trial proceedings²² -the trial in Libya has no legitimate standing in international law.

Moreover, claims that his release was in accordance with an amnesty law passed in 2016, have caused some to question whether this amnesty applies to his ongoing ICC case. Indeed, if Gaddafi is covered under the amnesty it would constitute a barrier to any future prosecutions for crimes alleged to have been committed by him during the revolution, as well as a pardon for the crimes for which he was found guilty and sentenced to death. However, the Office of the General Prosecutor in Tripoli has denied that such protections were afforded to Gaddafi. Moreover, that the body which passed the law is not recognised by the international community further undermines the influence of the pardon. Also, it remains that a national amnesty law has no automatic binding effect upon the ICC. In fact, various sources of international law and UN policy, deem amnesties impermissible, where they prevent the prosecution of individuals for war crimes, genocide, crimes against humanity or gross violations of human rights.²³ Therefore, it appears highly unlikely that said amnesty law would succeed in rendering the case inadmissible before the ICC.

In that, for the ICC to agree to be bound by state amnesties for crimes within its jurisdiction, contravenes the very purpose of the ICC; to end impunity for these crimes. Moreover, seeing that the court is currently weathering a severe public relations storm and has been for some time, it may choose to make an example of Gaddafi. However, owing to what Gaddafi is reported to have suffered during his detention, there is the question of whether his alleged isolation and torture in captivity will affect how he is treated by the court. In that, if the reports are found to be true, Gaddafi himself is a victim of a heinous international crime.

²¹ Rome Statute (n 5)

²² 'Saif Al-Islam Gaddafi' (n 20)

²³ United Nations High Commission on Human Rights (UNCHR), *Rule of Law Tools for Post Conflict States: Amnesties* (UNCHR 2009) <www.ohchr.org/documents/publications/amnesties_en.pdf>

Nevertheless, it would appear that the 2011 arrest warrant issued against Gaddafi remains valid, and with it, the admissibility of his case before the ICC. Consequently, Libya has a legal obligation to surrender him to stand trial in The Hague, irrespective of purported national trials or amnesty laws. Certainly, one can expect the ICC Prosecutor to staunchly oppose dismissing the case against Gaddafi, if only to defend the court's credibility in the face of this years-long display of impotence. Still, in light of its mandate to end impunity for such serious international crimes, to forfeit Gaddafi's trial would be an even more significant blow to its already precarious credibility. Moreover, that the Court remains dependent on State cooperation to assert its authority, it remains to be seen whether it will achieve success in its pursuit of Gaddafi. For, not only is he generally unaccounted for, but it is glaringly obvious that, despite agreements to the contrary, the Libyan government will do its best to keep Gaddafi away from the ICC. What is apparent, nonetheless, is that whichever way the story unfolds there will be lasting implications for the procedural conduct of the court, as well as how it is perceived by the world. It seems, at least for the foreseeable future, that like Wile E Coyote, the ICC is caught in a chase that will either prove its purpose or establish the parameters for outrunning its justice.

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