

Due Process Checks in International Criminal Law

Caleb Chan*

Dear Editor,

The principle of complementarity, which governs the admissibility of cases to the International Criminal Court (ICC), has recently been getting a lot of attention. The discussion may have been sparked by the capture of Saif Gaddafi by Libyan militias in 2011.¹ Detained without access to legal advice and eventually convicted *in absentia*,² his trial prompted questions as to whether national judicial proceedings which blatantly violate human rights standards should be able to preclude the jurisdiction of the ICC.

The complementarity debate has largely been concerned with the proper interpretation of Article 17(1)(b) of the Rome Statute.³ This Article provides that a matter is inadmissible before the ICC if a state has investigated the person

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¹ Saif al-Islam Gaddafi is a son of Muammar Gaddafi. He was captured and detained by militia in Zintan, and subsequently sentenced to death in a widely criticised trial in Tripoli in 2015. The charges related to his alleged orchestration of a campaign of murder, torture and bombardment of civilians during the 2011 Libyan civil war. Gaddafi was reportedly released from prison in April 2016. The ICC has called for his arrest and surrender on charges of crimes against humanity since 2011. See International Commission of Jurists, 'Saif al Islam Gadhafi Must be Arrested and Surrendered to the International Criminal Court' (7 July 2016) <<https://www.icj.org/saif-al-islam-gadhafi-must-be-arrested-and-surrendered-to-the-international-criminal-court/>> accessed 2 March 2017.

² See *Situation in the Libyan Arab Jamahiriya in the case of Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 (3 February 2012) <https://www.icc-cpi.int/CourtRecords/CR2012_02551.PDF> accessed 2 March 2017.

³ Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998) (Rome Statute). See Frédéric Mégret and Marika Giles Samson, 'Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials' (2013) 11(3) *Journal of International Criminal Justice* 571; Ruti Teitel, 'Local Injustice: Why We Shouldn't Forget about Saif Gaddafi' (*I-CONnect*, 16 October 2012) <<http://www.iconnectblog.com/2012/10/local-injustice-why-we-shouldnt-forget-about-saif-gaddafi/>> accessed 3 March 2017.

concerned but decided not to prosecute, unless that decision ‘resulted from the unwillingness or inability of the State genuinely to prosecute.’ In this letter I would like to approach the topic from a different angle. Instead of concentrating on the text of Article 17, I argue that - adopting the position of Kevin Jon Heller⁴ - an amendment should be made to the Rome Statute to provide that states wishing to retain control over cases which concern international criminal law, must show that their trials adhere to the international standards of due process.⁵ As long as states are able to oust ICC jurisdiction with trials which are, for example, predetermined or procedurally unfair, the crisis of legitimacy which currently besets the ICC will persist.

It is true that some scholars argue that Article 17 already contains a minimum standard of trial.⁶ The thought is that the collocation in Article 17(2) that a state’s unwillingness to prosecute must be evaluated ‘having regard to the principles of due process recognised by international law’, means that investigations must meet certain standards if they are to preclude ICC admissibility. However, this view is not widely held.⁷ The consensus rather is that, as the former Chief Prosecutor of the ICC, Luis Moreno-Ocampo, put it in 2012, ‘we [the Court] are not a system to monitor fair trials ... we are a system to ensure no impunity’.⁸ Thus, it is generally understood that a failure to live up to international human rights standards will not give rise to the Court’s jurisdiction.

I think there is a strong case for extending the scope of ICC jurisdiction. Firstly, it will serve to improve the legitimacy of the ICC in the eyes of those who believe it lacks impartiality. Leaders from Africa, especially, have criticised the work of the Court, claiming that it has focused disproportionately on that continent at the expense of international crime elsewhere.⁹ While the evidentiary basis for such allegations is weak,¹⁰ they have nonetheless compromised the Court’s reputation. As Luban argues, the ICC cannot operate in a vacuum outside the ‘political’ because the fulfilment of its functions are heavily dependent on the support of States Parties.¹¹ For example, the ICC has no

⁴ Kevin Jon Heller, ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’ (2006) 17 *Criminal Law Forum*.

⁵ *ibid*.

⁶ See Carsten Stahn, ‘Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court’ (2005) 3 *Journal of International Criminal Justice* 696, 713.

⁷ See Heller (n 4).

⁸ Quoted in Teitel (n 3).

⁹ See Richard Steinberg (ed), *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff 2016) pt VII.

¹⁰ *ibid*.

¹¹ David Luban, ‘After the Honeymoon: Reflections on the Current State of International Criminal Justice’ (2013) 11(3) *Journal of International Criminal Justice* 505.

policing mechanisms of its own and the enforcement of its arrest warrants relies on the willingness of States Parties to perform their obligations in good faith. South Africa's decision not to arrest the visiting Sudanese President al-Bashir¹² and the intimidation of witnesses in the prosecution of the Kenyan President leading the ICC to drop the case,¹³ illustrate the extent to which the functioning of the Court is affected by political concerns.

By inserting a due process clause into the Rome Statute, the geographic scope of ICC prosecutions might increase. Jurisdictions which may seek to shield individuals from ICC jurisdiction by putting them on trial while lowering or eliminating standards of due process would no longer be immune from ICC scrutiny. And if such individuals were released by the relevant domestic authority, a modified rule of complementarity would enable the ICC to take jurisdiction immediately on the ground that the trial was not conducted in conformity with international human rights standards. This may enable the ICC to investigate or prosecute higher profile cases, such as those which relate to the UK's involvement in Iraq.¹⁴

It might be argued that an amendment to Article 17 to include a due process requirement would result in increased uncertainty when it comes to the functioning of the Court. After all, the ICC was originally set up for a narrow and specific purpose: to prevent impunity for international crimes, the corollary of which is that if a wrongdoer is being tried in a domestic context then there is no additional role for the Court. Any expansions of the Court's jurisdiction will depart from States Parties' understanding of how the ICC was to function when they submitted to its jurisdiction. However, it should be noted that Article 121 explicitly authorises amendments to be made, and by virtue of ratifying the Rome Statute, States Parties have accepted the possibility of future changes to its provisions. Further, an amendment of the Rome Statute made in accordance with Article 121 requires the consent of two-thirds of the States Parties. This will provide a fresh mandate for the Court to exercise its additional function.

¹² 'South African Court Rules Failure to Detain Omar Al-Bashir was "Disgraceful"' *The Guardian* (London, 16 March 2016) <<https://www.theguardian.com/world/2016/mar/16/south-african-court-rules-failure-to-detain-omar-al-bashir-was-disgraceful>> accessed 3 March 2017.

¹³ Owen Bowcott, 'ICC Drops Murder and Rape Charges Against Kenyan President' *The Guardian* (London, 5 December 2014) <<https://www.theguardian.com/world/2014/dec/05/charges-humanity-charges-kenya-president-dropped-uhuru-kenyatta>> accessed 3 March 2017.

¹⁴ See Samuel Oakford, 'International Criminal Court Investigates Human Rights Abuses by British Forces in Iraq' *The Intercept* (New York, 8 July 2016) <<https://theintercept.com/2016/07/08/international-criminal-court-investigates-human-rights-abuses-by-british-forces-in-iraq/>> accessed 3 March 2017.

In any case, privileging the original intent of the Rome Statute risks undermining the whole purpose of the international law project. As Luban persuasively argues, international law is about moral projection and transformation; the radical restructuring of how 'ordinary men and women regard political violence against civilians'.¹⁵ In particular, the creation of various international courts and tribunals has been marked by a transformation of the rhetoric used to describe the nature of war, moving from a discourse of sacred sacrifice towards one of moral stigma, violence and criminality.¹⁶

In other words, the ICC has an instrumental function as well as simply a judicial one: it is involved in a process of norm projection. Implicit in its mission is the deployment of law to project an alternative vision of politics. Empowering the ICC to scrutinise the fairness of national judicial proceedings, so that due process violations can no longer be regarded as justifiable or permissible in the international community, would go a long way towards achieving this vision.

Yours faithfully,

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