“TRIED BY ANOTHER COURT” IN THE CONTEXT OF ADMISSIBILITY CHALLENGES: The Prosecutor v. Saif Al-Islam Gaddafi

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Introduction and Summary

This article summarizes an April 5, 2019 decision of Pre-Trial Chamber I of the International Criminal Court (ICC) in *The Prosecutor v. Saif Al-Islam Gaddafi*, (Gadaffi) whereby Gaddafi challenged the admissibility of the case brought against him for crimes against humanity. Relying largely on existing jurisprudence from other international tribunals, the Chamber interpreted the Rome Statute such that an ICC case may be inadmissible only if a *final* judgement had been reached by another court regarding the same matter. A verdict which can be appealed will not suffice. The Chamber also concluded that amnesty provisions cannot render a trial court decision “final”.

Factual Background

On June 27, 2011, an arrest warrant was issued for Saif Al-Islam Gaddafi – the second son of the former Libyan leader Muammar Gaddafi – by the ICC for charges of crimes against humanity against the Libyan people, namely torturing and killing civilians. In November 2011, Gaddafi was captured in southern Libya by the Zintan militia and flown by plane to Zintan. He was tried in absentia by the Tripoli Criminal Court (although it seems he did on occasion participate by video conferencing) and was sentenced to death on 28 July 2015. He remained in the custody of the *de facto* independent authorities of Zintan until his release in June 2017. (here)

On 6 June 2018, Gadaffi challenged the admissibility of the case against him on the grounds that he was convicted by a national court for substantially the same conduct as alleged in the proceedings before the ICC (para. 5).

Issues

The Pre-Trial Chamber considered three issues in the context of this admissibility challenge.

Is an admissibility challenge contingent on surrender to the Court?

The first, put forward by the Prosecutor, was whether an admissibility challenge is dependent on the person's arrest and surrender to the Court. The Chamber concluded that the relevant articles of the Statute (i.e. 17, 19) did not impose such a precondition and concurred with the Defence position that '[i]t is not a condition of making an admissibility challenge that [the suspect] must surrender himself to the Court' and that '[n]o such requirement is expressly or impliedly contained in Article 19' (paras. 22-23).

Does "tried by another court" refer to a final arbiter?

The second issue revolved around whether Gaddafi had been tried previously by the Libyan national courts for the 'same conduct' as set out in the ICC's Warrant of Arrest. Article 17(1)(c) of the Statute lists various circumstances in which a case is inadmissible, including where "[t]he person concerned has already been tried for conduct which is the subject of the complaint". Article 20(3) then goes on to say that "[n]o person who has been tried by another court for conduct also proscribed under articles 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct" (subject to certain exceptions which are not relevant here). The burden of proof lies on the challenging party who must provide the Court with evidence of a sufficient degree of specificity and probative value' (para. 32).

The Defence sought an expansive interpretation of "tried by another court" in article 20(3), such that the ICC would be precluded from trying Gaddafi's case if there existed any verdict on the merits or any decision on conviction or acquittal by a trial court, regardless of whether it was a court of final arbiter. In this regard, the Defence noted that article 20 did not expressly require that the decision in other proceedings be a final one. The Chamber disagreed, relying on jurisprudence from *ad hoc* tribunals interpreting the Statute of the International Criminal Tribunal for the former Yugoslavia, the Statute of the International Criminal Tribunal for Rwanda, and the Statute of the International Residual

Mechanism for Criminal Tribunals. In all these cases, there was no express reference to a final conviction or acquittal, but such a requirement was nevertheless read in (para. 39). Accordingly, the Chamber concluded that what is required by article 20(3) of the Rome Statute is a judgment with a *res judicata* effect (i.e., a case in which there has been a final judgment and is no longer subject to appeal) (para. 36).

In further support of its conclusion, the Chamber noted that article 21(3) of the Statute explicitly requires that the 'application and interpretation of law […] must be consistent with internationally recognized human rights […]'. The Chamber cited various international human rights treaties to reinforce its conclusion that article 20(3) envisages a prohibition on a second trial only where there is a final decision or a final judgment of acquittal or conviction (paras. 45-47).

Applying its interpretation of the law to Gaddafi, the Chamber concluded that he had been tried and convicted on July 28, 2015 by a first instance Tripoli Court and that such a decision was typically appealable. Moreover, as indicated in the submission of the Libyan Government, the judgment had been rendered *in absentia*, and in such circumstances, Libyan national law provided that once the person was arrested, the trial should start anew (para. 48). These factors demonstrated that there had not been a final judgment of conviction and therefore Gaddafi could not rely on having been "tried by another court" in article 20(3) to have his case declared inadmissible (para. 53).

The effect of amnesty laws on the need for a final decision

The Defence also argued that an amnesty granted by Libyan Law No. 6 of 2015 took away the possibility of an appeal by Gaddafi, thereby rendering the existing judgment of the Tripoli Criminal Court a final one for the purposes of article 20(3) (para. 55). The Chamber disagreed with this contention for two reasons. Firstly, the Libyan amnesty law did not apply to persons charged with crimes involving murder and corruption, as in the case of Gaddafi (paras. 56-59).

Secondly, and more importantly, the Chamber concluded that granting amnesties and pardons for serious acts such as murders constituting crimes against humanity, is incompatible with internationally recognized human rights law (para. 61). The Chamber's conclusion was based on a thorough review of the jurisprudence of various international tribunals, including the Inter-American Court of Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, the UN Human Rights Committee, as well as various ad hoc tribunals (paras. 62-76).

These cases reinforce that amnesties and pardons are inconsistent with States' positive obligations to investigate, prosecute and punish perpetrators of grave crimes. Clemency encourages *de jure*, as well *de facto* impunity. In addition, amnesties and similar mechanisms deny victims the right to truth, access to justice, and to seek just compensation and other remedies (para. 77). Therefore, even if the amnesty law (i.e., Law No. 6 of 2015) applied to Gadaffi (which it does not), such a law would be considered incompatible with international law, including internationally recognized human rights norms (para. 78).

Conclusion

This case focused on whether Gaddafi's trial by a first level Libyan court could render the charges against him before the ICC inadmissible. Based on established jurisprudence of various international bodies, the Chamber concluded that article 20 required a decision or verdict from which no appeal was available and therefore Gaddafi's challenge failed. Had the Chamber's decision been otherwise, it still would have had to consider other factors such as whether the national trial had been in respect of the same conduct, whether the national proceedings were for the purpose of shielding the suspect, and whether the national proceedings lacked sufficient independence or impartiality. (arts. 17 & 20) Given the Chamber's conclusion that Gaddafi had not been finally tried by another court and that all these criteria are cumulative, the Chamber chose not to delve into the remaining elements. (para. 79)

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