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What next for Saif Gaddafi, Libya and the ICC?

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By Teddy Nicholson.

On Monday 21st January a deadline that it now appears was not only arbitrary but also purely notional elapsed. This was the deadline for the current Libyan government to tell the International Criminal Court what they were going to do with the two remaining indictees of the 'Tripoli Three' – Saif al-Islam Gaddafi and Abdullah al-Senussi. This has spurred a discussion over whether they should be tried at The Hague or in Libya. The mainstream debate has been marked by a remarkable rigidity of thinking, with only two points that seem to be absolutely clear: one, that Libya has a legal obligation to hand them over to the ICC and two, that this is almost certainly not going to happen. This has led to remarkably pessimistic conclusions about the future of the ICC, Libya and the international rule of law framework.

These opinions are highly conditioned by historical and political narratives, and while the ICC has spent much of its short history engaged in rather simplistic 'order vs justice' debates, in particular when it comes to the fraught issue of Sudan, that is not what is at play here. The historical story that is being told as a forewarning by those who support the ICC is the comparison with the trial of Saddam Hussein following the invasion of Iraq.

The Saddam Hussein trial has gone down in the collective memory of the international justice community as the archetype of international justice done badly. Not only was it marred by massive procedural irregularities including lack of independence, failures to disclose key evidence and violations of the defendant's right to question witnesses, it administered the death penalty. Shortly after Saddam was executed, Human Rights Watch [stated](#) that this was "a significant step away from respect for human rights and the rule of law".

This is the story being told currently of what a trial of Saif Gaddafi and al-Senussi in Libya could look like. Writing recently in the Guardian, Polina Levina [argued](#) that the Iraqi Special Tribunal was, in effect, a show trial, and that this is potentially what awaits the two indictees in Libya, and most importantly, that this kind of trial does not deliver justice.

This point is being supplemented by a powerful legalist argument that, under Security Council Resolution 1970, Libya has an obligation to cooperate with the ICC. This means that the current government is legally required to hand over Gaddafi and Senussi to the ICC. There have been significant legal debates around whether Libya is required to issue a formal challenge of admissibility before the Court, or whether the Prosecutor can simply drop the case. Kevin Jon Heller [argues](#) convincingly that the latter would be unlawful, and that Libya still has a clear obligation to hand them over before making a challenge to bring them back again, and this seems to be largely accepted as the legal reality, despite what the Prosecutor says.

This combination of legal certainty coupled with the fact that key ICC member states (UK and France most of all) are not putting pressure on Libya to hand them over, has led to the previously mentioned [pessimism](#) about the situation.

However, there is another way to conceptualise the issue, one which was on full display in December at the UN during the Assembly of States Parties (ASP) to the ICC meeting, where the buzzword on everyone's lips was complementarity. This is the doctrine, enshrined in the Rome Statute, that the ICC steps in only when states are unwilling or unable to investigate and try international crimes themselves – ICC jurisdiction is complementary to national jurisdiction.

The idea being advanced in New York, both among states and the NGO community, is that we should stop looking at the ICC in isolated terms, and start thinking about the Rome Statute as a broad system of international justice where complementarity is thought about in positive, not negative, terms. Normally, advocates of the ICC tend to think of complementarity negatively – as something which prevents the ICC from trying a case – the ideal of international justice is a trial in the sanitised courtrooms in The Hague, the notional polar opposite of the Iraqi Tribunal. This is largely a hangover from the days of the ICTY and ICTR (the latter is not in The Hague, but the point stands), which both had primary jurisdiction over crimes rather than the complementary jurisdiction of the ICC.



ICC chief prosecutor Luis Moreno-Ocampo arrives at a news conference in The Hague, June 2011. Warrants were issued for the arrest of Muammar Gaddafi, his son Saif al-Islam and Libyan intelligence chief Abdullah al-Senussi on charges of crimes against humanity.

The alternative view, of positive complementarity, is that the ethos of the ICC should be to presume in favour of states leading the response to international crimes. This is arguably closer to the letter of the Rome Statute which does place the ICC as a court of last resort. Furthermore, notions of positive complementarity are designed to use the promise/threat of the ICC as a way to improve national justice systems. At the ASP meeting in New York, the most quoted line from Luis Moreno Ocampo was "The ICC will succeed when it has no cases." Ocampo may have meant by this that it will succeed when there are no crimes being committed for him to prosecute, but the way it is interpreted is to say that the ICC will succeed when states are all prosecuting and trying these crimes themselves.

This is marking a change in emphasis in the political community surrounding the ICC, away from the more missionary, legalist notions of doing justice primarily in The Hague. This has led to a debate starting to open up somewhat to other possibilities. Mark Kersten, [writing](#) in the middle of last year, was one of the first commentators to anticipate this debate and propose an ICC trial in Libya. Levina, in the Guardian article previously mentioned, [acknowledges](#) that an admissibility challenge would not necessarily be a bad thing, in order to have the trial in Libya.

The institutional response is slow coming. It may be unfair to criticise the ICC for a legalist response, as it is a legal institution governed by an international treaty, and that does not offer it much room for manoeuvre. However, the institutions of the Court should try to find the political and legal space to endorse and participate in a trial of the two suspects. The worst possible outcome is for the ICC to allow itself to get into an open confrontation with the Libyan government that they are bound to lose.

By allowing a trial on Libyan soil and becoming part of the process, the ICC would be able to ensure that there is not a repeat of the Iraqi fiasco, and the death penalty is not administered. That last point is by far the hardest challenge, but if it can be resolved with the support of the states who backed the original referral, then the Court would come out of this process strengthened in the eyes of its supporters and perhaps even able to use this cooperation to lay the groundwork for the far greater prize – a Libyan signature added to the Rome Statute.

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