



*The Impact of Cooperation on the Rights of Defendants before the
International Criminal Court.*

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SUMMARY

This dissertation has investigated the ICC cooperation law and practice in relation to defendants' rights, and in light of the unique structural limitations and constraints that characterise the ICC's functioning. The central questions of this study as presented in the introduction were formulated as follows: *does the unique structure of the Court influence and shape cooperation with States and international organizations? And do the law and practice of cooperation reduce the rights of the defendants before the Court?* This research has shown that the specific context in which the ICC operates influences the way in which cooperation proceedings play out in practice, with a negative impact on the rights to liberty of suspects and accused, and on their right to equality of arms with the Prosecution. The first part of this study has set out the institutional and jurisdictional context in which cooperation plays out at the ICC, setting forth the background against which the selected rights of defendants have been subsequently assessed.

Chapter II addressed the ICC dependence on cooperation from an institutional, a normative and a political dimension. The ICC's institutional setting is different from that of its *ad hoc* predecessors. Unlike the *ad hoc* Tribunals, the Court is an independent international organization that does not have the backing of the UN Security Council. In addition, its jurisdiction is not related to one geographically limited area/conflict, but can potentially cover crimes committed in every part of the world after the entry into force of the Rome Statute. As a consequence, thus, the ICC mostly intervenes in the midst of a conflict, where many other political actors are involved and conflicting interests are at stake.

Having been established by a treaty, the ICC cooperation regime is 'weak'. The Prosecutor has very limited powers to access the territory of States without their consent and the Court has no power to compel witnesses to testify before it. Moreover, the normative framework of cooperation leaves out matters that are crucial for the effective enjoyment of defendants' rights; most prominently, the obligation of States to allow interim released persons on their territory.

The Chapter has endeavoured to demonstrate that the real weakness of ICC cooperation proceedings does not lie in the legal framework, but rather in the political realities that inevitably condition their unfolding. In this regard, the Chapter has reflected on the concept of Prosecutorial independence in a state-dominated enforcement system, and has provided an overview of the Court's investigations so far in connection with the actor that has

prompted them (a State Party, the Security Council, or the *proprio motu* initiative of the Prosecutor). The Prosecutor has encouraged States Parties' referrals in the expectation that the referring State would subsequently be cooperating with the investigation. To date, five States Parties have followed the Prosecutor's suggestion and referred to the Court the commission of crimes occurring on their territory (Uganda, DRC, CAR, Ivory Coast, Mali). In these instances, the self-referring government has generally been cooperative with the Prosecutor's investigation. Conversely, the Court has faced insurmountable obstacles in the situations referred by the Security Council (Sudan and Libya) and in one instance of investigation started *proprio motu* by the Prosecutor (Kenya), where the government in power fiercely opposes the Court's intervention. Be that as it may, referrals of conflict situations by States Parties and the Security Council have ultimately resulted in one-sided prosecutions, which reflect the preferences of the referring actor.

Ultimately, this overview has shown that, regardless of the cooperation norms enshrined in the Statute, the effectiveness of the ICC investigations is largely dependent on whether the broader interests of the requested State coincide with those of the Court, and, should that fail, on the support of the international community. Regrettably, so far the latter has been lacking, and the Security Council has maintained a disappointing inaction towards the ICC's denunciations of non-compliance by Libya and Sudan. The political priorities of the international community are volatile and shifting. Inevitably, its willingness to enforce the Court's cooperation requests is informed by political calculations: if the interests of the Prosecutor in having certain alleged perpetrators arrested are not in line with those of the international community, cooperation from the latter will hardly be forthcoming. As a result, the Chapter concludes that, in a state-dominated enforcement system, ICC investigations and prosecutions remain tied to a political process that is, by nature, selective and often inefficient.

Chapter III has explored cooperation in connection with the jurisdictional regime of the Court. Together, these regimes represent the two fundamental pillars upon which the ICC system is based. Under the principle of complementarity, genuine domestic investigations and prosecutions have priority. The Court is allowed to step in only in case national authorities remain inactive towards international crimes or, where there are domestic proceedings, those authorities appear unwilling or unable to genuinely conduct them. In the absence of an autonomous enforcement system, however, complementarity reveals the conceptual paradox by which the Court depends on the cooperation of States that are 'inactive', 'unwilling' or 'unable' to prosecute international crimes. The Chapter has

examined the consequences of the ‘complementarity paradox’ for the rights of defendants and it has done so while accounting for, on the one hand, the relationship between the suspects and their State of nationality and, on the other hand, the relationship between such State and the Court.

First, it considered the position of the Libyan suspects Saif Gaddafi and Abdullah Al-Senussi, exponents of the recently overthrown regime of Muammar Gaddafi. The newly established government opposes the investigation of the Court in that it is eager to try the defendants in Libya without any interference and in violation of their basic rights. As a result, it has challenged the admissibility of the cases before the Court. As has been seen, Libya’s refusal to surrender Gaddafi and Al-Senussi combined with the misuse of its prerogatives under the complementarity regime resulted in gross violations of the suspects rights, who are still unlawfully detained in Libya. The Court, on its part, was surprisingly acquiescent towards Libya and, through a narrow interpretation of the Statute, validated its late and abusive admissibility challenges, resulting in the illegitimate postponement of the execution of Libya’s surrender obligations.

Second, the Chapter has considered the position of suspects whose State of nationality has welcomed the intervention of the Court, agreeing to have them tried before it. This scenario has been addressed within a broader criticism of the prosecutorial policy of ‘positive complementarity’, by which the OTP has legitimised and encouraged a ‘partnership’ between the Office and the States concerned by the complementarity evaluation. As has been seen, in many instances this partnership has resulted in encouraging referrals from territorial States, followed by a careful planning on whether and how to divide labour with them. This, however, has come to the price of directing the investigation towards persons disfavoured by their self-referring government, whose rights had been violated in the context of national proceedings.

The Chapter has examined the jurisprudence of the Court on admissibility, stemming from two decisions concerning the investigation in the DRC: the Pre-Trial Chamber’s decision issuing an arrest warrant against Thomas Lubanga and the Appeals Chamber’s ruling on the admissibility challenge raised by Germain Katanga. Despite the fact that national proceedings were on-going against the suspects, the Court has found the cases to be admissible due to the ‘inaction’ of the DRC. In Lubanga, such inactivity has been found due to a very narrow interpretation of the meaning of ‘case’ for the purpose of the Statute (the case investigated by the DRC authorities did not encompass the same conduct which was the subject of the case before the Court); in Katanga, the inactivity of the DRC originated from

its decision to close its national investigation and relinquish its jurisdiction to the benefit of the Court. *Inter alia*, the Chapter has shown that, although admissibility challenges were largely conceived as a safeguard for the protection of the sovereignty of States, in the cases where governments entertain a cooperative relationship with the Court, proceedings under Article 19 have been used primarily as an instrument of protection of defendants' rights.

The Chapter concluded that the Court has adopted an interpretation of admissibility that is extremely obsequious towards the interests of States. By so doing, they have *de facto* sanctioned the policy of 'positive complementarity' of the Prosecutor and have refrained from questioning the most problematic aspects of the practice of consensual burden sharing between the OTP and national authorities.

The second part of the study has addressed the impact that cooperation occurring in the above context has on the rights of suspects and accused. Chapter IV addressed the impact of cooperation on the right not to be subject to arbitrary arrest and detention (i.e., *habeas corpus* rights) and on the Court's practice on interim release. With respect to the former, the Chapter assessed whether the law and practice of the Court sufficiently acknowledge the position of suspects detained by national authorities throughout part of the ICC investigation, and the risks to their liberty that the division of labour between the Court and States entails.

The Chapter has found that, although the legal framework set forth by the Statute represents an improvement if compared to the *ad hoc* Tribunals, the actual safeguards for the right to liberty are still not sufficient in view of the structural characteristics of the ICC and the mode in which cooperation plays out in practice. The legal framework of the Statute is based on the assumption of a clear separation between national proceedings and proceedings of the Court, which often does not correspond to reality. In addition, the steps that lead the Prosecutor to focus on a specific person as the subject of the investigation are largely unregulated, in that practices on designating suspects are a matter of unpublished internal policy. Moreover, there is no significant judicial oversight of the Prosecutor's activities until the issuance of an arrest warrant or a summons to appear, and thus, no protection of the rights of the persons targeted by the investigation until that moment. This lack of protection is exacerbated by the great discretion with which the Prosecutor is endowed with respect to the time frame of the investigation.

The Chapter has examined the challenges to jurisdiction raised by three accused: Thomas Lubanga and Germain Katanga in the situation in the DRC, and Laurent Gbagbo in the situation in Ivory Coast. The investigation into both of these situations had resulted from

a self-referral of the accused's State of nationality; in addition, Lubanga, Katanga and Gbagbo were all political opponents of the government that submitted the referral to the Court. In all these three cases, defendants had already been in the custody of national authorities when the Prosecutor applied for an arrest warrant against them. In challenging the jurisdiction of the Court, the defendants alleged that their initial detention by national authorities had been unlawful and motivated by political reasons. They lamented several violations of their basic rights and requested the Court to take responsibility by dismissing its jurisdiction. In particular, they alleged serious misconduct on the part of the Prosecutor who, despite of being aware of their unlawful detention in the DRC throughout great part of his investigation and long before he applied for an arrest warrant, did not intervene to bring it to a halt. On the contrary, s/he took advantage of the situation to have them transferred smoothly before the Court upon the issuance of the arrest warrant by the Pre-Trial Chamber, and in collusion with the DRC government. Moreover and regardless of the Prosecutor's negligence, defendants requested the Court to take responsibility for the violations of their rights based on the 'abuse of process' doctrine and the concept of 'constructive custody' borrowed from the *Brayagwiza* jurisprudence of the ICTR. According to this notion, once the warrant of arrest is issued, the accused falls under the constructive custody of the ICC with the consequence that 'ant continuing illegality becomes the shared fruit and responsibility for the DRC and the ICC'.

The judges were firm in dismissing the Defence complaints. They held that violations of defendants' rights, however serious, can be said to constitute an abuse of process only insofar as they can be attributed to the Court and that, as a general rule, the responsibility of the Court towards a suspect begins with the issuance of an arrest warrant. Therefore, violations of *habeas corpus* rights occurred prior to that moment can be supervised by the Court only upon the proof of 'concerted action' between the Prosecutor and national authorities in the commission of such violations. This approach is regrettable, as it fails to address the necessity of protecting the rights of persons who have been targeted by the Prosecutor long before the latter seeks an arrest warrant against them. Article 57 of the Statute bestows the duty to 'provide for the protection (...) of persons who have been arrested' upon the Pre-Trial Chamber. A meaningful protection of arrested persons necessarily implies that the judges supervise the violations of suspects' rights occurring in the course of the investigation and irrespective of a concerted action between national authorities and the Prosecutor, which should nonetheless be considered as an aggravating factor.

This study has advocated for the imposition of a duty of diligence on the Prosecutor when s/he becomes aware of national proceedings involving a person whom s/he has targeted for the purpose of the investigation. This duty of diligence and transparency should be clearly spelled out in the Statute, along with specific rules governing the cooperation between the Prosecutor and states before the issuance of an arrest warrant against a person who is already in the custody of national authorities. Melinda Taylor and Charles Jalloh have exhaustively elaborated on the content of this duty, arguing, in particular, that the Prosecutor should notify the presence of detained suspects to the Pre-Trial Chamber. This would indeed represent a viable way to more carefully supervise the cooperation of the Prosecutor with national authorities for the purpose of transferring suspects to the Court, and would enable the judges to better assess the timeliness with which the Prosecutor requests the issuance of an arrest warrant. The latter, should request an arrest warrant from the Chamber in a timely manner, and should be held accountable in case s/he does not do so without providing a valid justification.

As part of the analysis on the right to liberty, the Chapter has also considered the Court's practice in relation to the right to be released pending trial. Departing from the precedent of the *ad hoc* Tribunals, the Rome Statute enshrines an advanced protection of this right. However, it does not obligate States to accept provisionally released defendants on their territory. Given this situation, it is imperative that the Court intensifies its efforts to convince States that they should accept provisionally released persons through the signature of a specific agreement. It must be reminded that interim release agreements do not establish an obligation on the part of the signatory State to accept detainees. Rather, they make such acceptance conditional upon an assessment to be made on a case by case basis by national authorities. This notwithstanding, they seem to be the only available step in the direction of making interim release before the Court a reality.

Chapter V examined the equality of arms between the Prosecution and the Defence with respect to the access to States cooperation. Traditionally, inequality goes in favour of the Prosecution and to the detriment of the Defence. This premise, however, does not always hold true, especially at the ICC, where either the Prosecution or the Defence can be hampered in their work depending on whether the State favours or disfavors the defendant. As has been seen, when the ICC intervention has been imposed by the Security Council or the *proprio motu* initiative of the Prosecutor, exponents of the government of the country are often on trial. One would think that, in these instances, the State-supported Defence would be given better access to evidence than the Prosecutor, which would be the one to suffer from a

disadvantage and unequal treatment. To a certain extent, this is true. However, the practice has shown that States usually try to derail the ICC investigation or prosecution all together. In other words, their goal is not supporting one side over the other, but rather, de-legitimising the Court's proceedings in their entirety so as to bring them to a halt. In this respect, the case studies in the situation of Sudan were very illustrative. Although the Prosecution was also impeded access to Sudan's territory and obstructed in its work, these impediments prejudiced the Defence more than its counterpart. Whilst the OTP had the possibility to conduct the major part of its investigations outside the country, the Defence argued that it could not build its case without accessing the crime scenes.

The Chapter has also scrutinised the Court's practice in assisting the Defence with its investigations. As has been seen, the Court may issue cooperation requests on behalf of the Defence provided that such requests are relevant and sufficiently specific. According to the Chamber, Defence requests are 'specific' only when they identify with utmost clarity the documents, the persons or the information sought. The specificity requirement is particularly burdensome in the pre-trial phase, where there has not yet been any disclosure from the Prosecutor and defence investigations aimed at identifying and interviewing potential witnesses might be essential to challenge the Prosecutor case at the confirmation hearing. Moreover, the Chamber deems it 'necessary' to issue an order only if counsel shows that all his/her attempts to obtain the documents have been exhausted. By demanding that the Defence exhaust every possible option before turning to the Chamber, including through a request to the Prosecutor, the Court imposes a big burden on the Defence, and, *the facto*, obliges the Defence to reveal its strategy to its counterpart.

Finally, the Chapter has explored the disclosure system of the Court as an instrument at the disposal of the Defence to counterbalance the greater advantage of the Prosecution in the collection of evidence. The Court has proved to be sensitive to Defence needs, and has indeed interpreted and applied the disclosure norms of the Statute with the goal of counterbalancing the disadvantage of the Defence in accessing cooperation. In a landmark judgment in *Lubanga*, the Appeals Chamber has made clear that, when seeking the cooperation of peacekeeping missions and local informants in the field, the Prosecutor must balance the need for confidentiality with the accused right to have access to exculpatory evidence as soon as possible. The Chapter, however, has criticised the tendency to see the prosecutorial duty of impartiality in the conduct of the investigation and the ensuing disclosure obligations as the default response to the difficulties that the Defence experiences due to non-cooperation. Entrusting the Prosecution with the protection of the rights of the

accused may be risky and very difficult to implement in practice. It is therefore imperative that the attention remains focused on the necessity of providing cooperation to Defence teams and on the importance of Defence investigations for the fairness of proceedings before the Court.