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What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation

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Facts

On May 31, 2010, Israeli Defense Forces (IDF) intercepted an eight-boat humanitarian flotilla en route to the Gaza Strip. In the course of boarding and taking control of the vessels, the IDF killed ten people and injured approximately fifty. In addition, there were allegedly hundreds of incidents of outrages upon personal dignity, and possibly torture. One of the boats was registered to the Union of the Comoros, a state party to the International Criminal Court (ICC), which referred the situation to the Court. The Prosecutor opened a preliminary examination to determine whether a reasonable basis exists to investigate.

Prosecutor's Decision Not to Investigate

On November 6, 2014, the Prosecutor announced her decision not to investigate the “Flotilla Incident” on the grounds that the situation does not meet the gravity threshold for admissibility. [1] The gravity threshold is contained in article 17(1)(d) of the Rome Statute and states that a case is inadmissible where it “is not of sufficient gravity to justify further action by the Court.”[2] Although the provision refers to the admissibility of a “case,” in deciding whether to open an investigation the Prosecutor must determine the gravity of the likely cases in the situation—the “situational gravity.” Neither the Rome Statute nor the treaty’s drafting history provides guidance regarding which cases or situations meet the gravity threshold.

The Prosecutor’s sixty-one-page report explains that after conducting a preliminary examination of the situation, the Prosecutor found that a reasonable basis exists to believe that war crimes within the Court’s jurisdiction were committed. It nonetheless concludes that the situation is insufficiently grave to merit ICC investigation.[3] In making this determination, the Prosecutor considered:

- (i) whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes committed within the incidents which are likely to be the focus of an investigation.[4]

In assessing the gravity of the crimes the Prosecutor took into account the four factors the Court commonly uses in making gravity determinations: “the scale, nature, manner of commission of the crimes, and their impact.”[5]

With regard to the scale of the crimes, the Prosecutor asserted that ten people were killed and fifty to fifty-five people were injured, some seriously. In addition, an unknown number of people were victims of outrages upon personal dignity. Nonetheless, the Prosecutor concluded:

“[I]t has to be acknowledged that the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office.”[6]

With regard to the nature of the crimes, the Prosecutor noted that the killings and serious injuries are grave breaches of the Geneva Conventions, but asserted that the outrages upon personal dignity committed do not amount to torture or inhumane treatment. With regard to the manner of commission of the crimes, the Prosecutor found that the crimes were not systematic or the result of a plan or policy and were confined to one vessel. Finally, the Prosecutor concluded that the crimes did not have a significant impact beyond the immediate victims and their families. Based on the “small number of victims” and “limited countervailing qualitative considerations,” the Prosecutor concluded: “the flotilla incident does not fall within the intended and envisioned scope of the Court’s mandate.”[7]

Pre-Trial Chamber Decision

The Comoros appealed the Prosecutor's determination of insufficient gravity and, on July 16, 2015, the Pre-Trial Chamber (PTC) issued a decision asking the Prosecutor to reconsider her refusal to investigate pursuant to Article 53(3).[8] Applying a standard of "independent judicial oversight," the PTC found that the Prosecutor had considered the appropriate factors in determining the gravity of the situation, but had applied them incorrectly.

First, the Prosecutor erred in failing to consider whether the persons likely to be the objects of investigation would include those most responsible for the crimes. The PTC took the position that this criterion does not concern leadership roles, but rather responsibility for the crimes at issue. Thus, the Prosecutor's statement that the evidence failed to show the involvement of senior leaders was unavailing. If the investigation is likely to include those most responsible for the crimes—and the judges saw no reason to conclude otherwise—the factor is satisfied.

Second, the PTC disagreed that the scale of the crimes was insufficient to meet the threshold. According to the PTC, "ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhumane treatment" is a factor "militating in favor of sufficient gravity, rather than the opposite." [9]

Third, with regard to the nature of the crimes, the PTC held that the Prosecutor's determination that the mistreatment suffered did not amount to the war crimes of torture or inhumane treatment was premature and that further evidence of the severity of the treatment is required to make that determination.[10]

Fourth, the PTC reviewed the evidence regarding the manner of commission of the crimes in some detail and concluded the Prosecutor failed to properly account for certain evidence, in particular evidence that live fire may have been used by the IDF prior to boarding the vessel. According to the PTC, the lack of clarity in the evidence on this and other issues weighs in favor of an investigation, not against.[11]

Finally, with respect to the impact of the crimes, the PTC held that the Prosecutor wrongly determined that there was insufficient evidence of impact beyond the direct victims, and, in any event, such wider impact is not required to meet the gravity threshold.[12]

Judge Kovacs' Dissent

Judge Kovacs disagreed with the majority on several grounds. In his view, the Prosecutor enjoys a margin of discretion in deciding which cases merit the Court's attention. Indeed, he emphasized that the PTC was not compelled to conduct a review at all.[13] He also opined that the PTC should have used an abuse of discretion standard rather than "a stringent review, which clearly interferes with the Prosecutor's margin of discretion." [14] Judge Kovacs found the Prosecutor's gravity findings reasonable.[15] Focusing particularly on the number of victims in comparison to those in other situations before the Court, he concluded that "the gravity threshold was far from being met." [16]

Significance of the Decision: Teeing up the Debate on Prosecutorial Discretion and the ICC's "Mandate"

The decision, which the Prosecutor has appealed, is one of the most important to issue from the ICC because it addresses two questions at the heart of the ICC's role in promoting global justice: (1) how much discretion does the Prosecutor have in determining which situations come before the Court; and (2) what is the scope of the ICC's mandate. Both of these questions were left unresolved when the Rome Statute was negotiated. The states participating in the negotiations held different views on these issues, with some arguing for a strongly independent Prosecutor and a broad institutional mandate, and others preferring a more limited role for the Prosecutor and the Court as a whole. The result was ambiguous statutory language such as "insufficient gravity" and "interests of justice" that the Court must now interpret.

In this first judicial decision on what it means for a situation to be sufficiently grave to merit ICC investigation, the Prosecutor and judges have teed up the debate on these issues. First, with regard to prosecutorial discretion, the majority took the position that the Prosecutor has no discretion to determine which situations are sufficiently grave, but is instead constrained by "exacting legal requirements." [17] The Prosecutor's determinations are owed no deference, but are subject to "independent judicial oversight." [18] According to the majority, the Prosecutor's discretion with regard to which situations to investigate is limited to her ability to determine that an investigation would not be "in the interests of justice." [19] In contrast, the Prosecutor and dissenting judge consider that the Prosecutor has significant discretion in determining which situations are insufficiently grave to merit investigation.

If the majority's view that the gravity threshold is a matter of "exacting legal requirements" survives appellate review, the Prosecutor may have a limited ability to influence which situations move to the investigation stage, at least when situations are referred to the Court. [20] Thus far, the Prosecutor has adopted a very restrictive interpretation of the "interests of justice" provision and has never cited that provision to justify a decision not to investigate. [21] Of course, she could reconsider her interpretation and indeed could even decide that the relative gravity of different potential situations is a relevant factor in determining the interests of justice. [22] This would effectively combine the inquiries and get around the Court's restrictive approach to the gravity threshold. But the Prosecutor's view of when an investigation is in the interests of justice is not the last word. Unlike the review of gravity decisions, if the judges disagree with the Prosecutor on the interests of justice, her decision is rendered ineffective. [23]

Second, resolution of the debate about what "sufficient gravity" means will help to determine the scope of the ICC's mandate. The majority's approach implies such a low level of required gravity that virtually anytime a crime within the Court's jurisdiction is committed the gravity threshold is likely met. The Appeals Chamber has already adopted such a gravity threshold with regard to the admissibility of particular cases within a situation. In the *Lubanga* and *Ntaganda* cases, the PTC had adopted a high case gravity threshold and the Appeals Chamber reversed, finding that such a threshold would contravene the ICC's jurisdictional provisions and threaten to undermine its preventive mission. [24] A similar decision in the context of situational

gravity would have the virtue of consistency in the way the Court interprets the gravity threshold for cases and situations. It would also keep within the Court's mandate all war crimes, crimes against humanity, and acts of genocide, enhancing the Court's ability to prevent such crimes.

Some commentators fear that a low situational gravity threshold will result in an ICC that is overwhelmed with investigations.^[25] The Prosecutor would be forced to either neglect some situations or spread resources so thin that no situation gets a thorough investigation. Such an outcome could be averted if the ICC follows the suggestion of the majority and allows the Prosecutor significant discretion to decide when investigations are in the interests of justice. While the judges would have clear judicial oversight over such decisions, they could defer to the Prosecutor's expertise in allocating investigative resources to help determine the overall interests of global justice.

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[1] Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, ¶ 3 (Nov. 6, 2014), *available at* http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53 (http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53)(1)-Report-06Nov2014Eng.pdf [hereinafter Comoros Article 53(1) Report].

[2] Rome Statute of the International Criminal Court, art. 17(1)(d), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[3] Comoros Article 53(1) Report, *supra* note 1, ¶ 148.

[4] *Id.* ¶ 135.

[5] *Id.* ¶ 136.

[6] *Id.* ¶ 138.

[7] *Id.* ¶ 142.

[8] Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, Case No. ICC-01/13, Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation, ¶ 50 (July 16, 2015), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf> (<http://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf>) [hereinafter Comoros PTC Decision].

[9] *Id.* ¶ 26.

[10] *Id.* ¶ 30.

[11] *Id.* ¶ 36.

[12] *Id.* ¶¶ 47–48.

[13] Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, Case No. ICC-01/13, Decision on the Request of the Union of the Comoros to Review the Prosecutor’s Decision not to Initiate an Investigation, Partly Dissenting Opinion of Judge Peter Kovacs, ¶ 2 (July 16, 2015), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc2015870.pdf> (<http://www.icc-cpi.int/iccdocs/doc/doc2015870.pdf>).

[14] *Id.* ¶ 8.

[15] *Id.* ¶ 14.

[16] *Id.* ¶ 23.

[17] Comoros PTC Decision, *supra* note 8, ¶ 14.

[18] *Id.* ¶ 15.

[19] *Id.* ¶ 14.

[20] The Prosecutor has greater discretion in deciding which situations to investigate based on her *proprio motu* powers.

[21] Policy Paper on the Interests of Justice, ICC-OTP (Sept. 2007), *available at* <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf> (<http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf>).

[22] For discussion see Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *Fordham Int’l L. J.* 1399, 1412–1413 (2008).

[23] Rome Statute, *supra* note 2, art. 53(3)(b).

[24] See Situation in the Democratic Republic of Congo, Case No. ICC-01/04-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58” (July 13, 2006), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf>.

[25] Alex Whiting, *The ICC Prosecutor Should Reject Judges’ Decision in Mavi Marmara*, Just Security (July 20, 2015, 11:14 AM), <http://justsecurity.org/24778/icc-prosecutor-reject-judges-decision-mavi-marmara/> (<http://justsecurity.org/24778/icc-prosecutor-reject-judges-decision-mavi-marmara/>).

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