

How Should the ICC Office of the Prosecutor Choose its Cases? The Multiple Meanings of ‘Situational Gravity’

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The ICC has been tasked with prosecuting international crimes of supreme “gravity”.¹ It remains unclear, however, just what this term should be understood to mean. Different understandings yield quite different priorities for investigation. Situations in four places have been found to be sufficiently grave: the Democratic Republic of Congo, Northern Uganda, Darfur region of Sudan and Central African Republic. The Office of the Prosecutor (OTP) has also begun preliminary investigations in Chad, Kenya, Afghanistan, Georgia, Colombia and, most recently, Gaza. How should the Court’s scarce resources be distributed among the wide array of crimes throughout the world that might legitimately become the focus of its scrutiny?

In a recent contribution to the debate,² Prof. Kevin Jon Heller observes that the OTP has interpreted situational gravity to mean one thing only: mass atrocities. These are situations in which thousands of people are killed, displaced from their homes, raped, or at least forced as children into becoming soldiers,³ who in turn commit many atrocities.

There is much to be said for this focus by the OTP. First, a new, young court might well do better to concentrate its limited resources on handling one species of crime really well,

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¹ Rome Statute of the International Criminal Court, Art. 53. Available here: http://www.haguejusticeportal.net/Docs/Miscellaneous/Rome_Statute_01-07-2000.pdf. The Statute’s preamble also speaks of “the most serious crimes of concern to the international community.”

² Kevin Jon Heller, “Situational Gravity Under the Rome Statute,” forthcoming in *Future Directions in International Criminal Justice*, Carsten Stahn & Larissa van den Herek, eds. (T.M.C. Asser/Cambridge 2009); also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270369.

³ William Schabas voices the doubts of many here, preferring that “child soldier recruitment...is arguably closer to the *mala prohibita* than the *mala in se* end of the spectrum,” and therefore “might not seem to everyone to be significant enough for the first trial of the ICC.” Schabas, “Prosecutorial Discretion v. Judicial Activism at the International Criminal Court,” 6 J. of Int’l Crim. Justice 731, 760 (2008).

developing the law on that thoroughly, rather than tackling everything within its jurisdiction at once. A utilitarian moralist would further observe that, in prejudicing overall human welfare, there's nothing like death in large numbers. No one cares as much about losing his right to vote, say, as about losing his right to life. Finally, a single-factor test – focused here on raw numbers of victims of extreme violence – is simply easier and less controversial to apply to any given case than a multi-factor test.

Multiple-factor approach to situational gravity

Heller recommends, however, that we should interpret the concept of situational gravity to mean something rather different. First, it should mean “systematicity,” in the sense that the misconduct in question was highly organized, part of a systematic plan or policy. Targeted killings of terrorist leaders by Israel and by the U.S., for instance, reflect a self-conscious policy. Yet this policy causes comparatively few civilians deaths.

Second, Heller would have the OTP focus on harms evoking great “social alarm,” wording he draws from the Pre-Trial Chamber in *Lubanga*, though later rejected by the Appeals Chamber.⁴ By this he means the extent of global concern over a particular type of crime, because that crime affronts widely shared, fundamental values, whether or not it causes many deaths.⁵ Attacks on United Nations peacekeepers, for instance, or “disappearances” of persons would be examples of such wrongs. Certain crimes also cause special social alarm because they are widespread, occur in many countries, like torture and election fraud. Election fraud is often effected by way of widespread, officially-endorsed violence at the polls, amounting to crimes against humanity (persecution, among others), hence within the Court's jurisdiction.

Third, Heller contends that, other things equal, state crime is graver than the crimes of rebel groups, which now dominate the OTP's *proprio motu* docket. States commit far more illegal violence than insurgents, he observes, even in some of the countries, like the Democratic Republic of the Congo, where the OTP has focused on indicting rebel leaders. The ICC was designed chiefly to overcome the unwillingness of states to punish their own leaders after all. Virtually all states would like to see punished those who rise up

⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006 (No. ICC-01/04-01/06), para. 46 Available here: <http://www.haguejusticeportal.net/eCache/DEF/10/314.html>. The Appeals Chamber rejected the Pre-Trial Chamber's test of situational gravity. It also held that the disputed gravity of a situation has no significance in determining the admissibility of a particular case. Still, the meaning of situational gravity remains central to the Court's direction – and a question still largely unresolved by the Court.

⁵ The OTP has not expressly endorsed “social alarm” as a relevant criterion of case selection, but has at one point employed a formulation largely consistent with this consideration. “Criteria for Selection of Situations and Cases,” unpublished draft document of the OTP, June 2006.

against them in rebellion. When they claim they are unable to prosecute, it is often simply because they would prefer that others do so.

Consequences of Heller's approach

What would change, exactly, if we were to use this three-part, qualitative test of situational gravity, instead of the OTP's current, single-factor, quantitative test?

Suddenly, the focus would no longer be exclusively on Africa, Heller asserts, where most mass atrocities occur. This geographical shift would contribute to the Court's legitimacy in that continent, where it is now under much attack for "neocolonialism". The OTP might instead go after Britain, Heller notes, for alleged use of torture by its troops in Iraq, a practice that may have reflected something of a "policy," hence systematic. Misconduct of this kind raises great social alarm, globally, he adds. It is also state-sponsored. All three of Heller's criteria for situational gravity are thus satisfied.

He makes several cogent observations in favor of his proposal. First, it enables the ICC to form alliance with elements of civil society, even elements of the state itself, in gathering information on official wrongdoers. The incapacity to induce states to cooperate with international criminal tribunals has been a huge obstacle to their success. State cooperation with international investigations of mass atrocity is especially difficult because such misconduct tends to implicate almost all of the state apparatus, leaving no likely allies there. Mass atrocity also tends to occur in societies with weak civil societies, often because such organizations – like human rights NGOs – are repressed by an authoritarian state.

The rather different crimes on which Heller's test would focus, however, regularly occur even in democratic countries. Here, important elements of the state are not complicit and civil society is strong enough to assist OTP investigations. In the U.S., for instance, the federal courts – which are quite independent of the President – were crucial in addressing recent allegations of torture in that country, Heller notes. In Brazil and parts of Central America, the Catholic Church was vital in gathering data on disappearances conducted by the military regimes during the 1970s and 80s, data essential to later criminal investigations.

An exclusive focus on mass atrocity also signals repressive states that they are effectively free to engage in other crimes, equally within the ICC's jurisdiction, since these will not receive priority. A wider purview by the OTP would put more malefactors on notice that they might be investigated, increasing deterrence of these other wrongs.

Another arguable advantage of Heller's approach is that it may better advance law's "expressive" purposes. These are to articulate a condemnation of the full range of core international crimes in the Rome Statute, even when these do not result in mass deaths and displacements. Criminal law is not only about deterring future wrong, or exacting retribution. It is also about forming – and periodically reinforcing – a moral consensus among the law-abiding and so enhancing social solidarity among them.⁶ In this case, that means helping to construct a genuine international community, one that cares about its most fundamental norms, all of them, in more than name.

One or two prosecutions of mass atrocity are enough to express the world's moral condemnation of such acts, Heller says. There are many other violent international crimes also worthy of global reprobation. Given its limited resources, in relation to the range of wrongs it might plausibly pursue, the ICC will always be largely "symbolic" – even if they may someday also become true deterrents.

The ICC is thus condemned to "symbolism." This simply means, however, the Court should concentrate its efforts on making symbolic gestures of the right sort: articulating and affirming the international community's deepest concerns. If its function is largely expressive, then why shouldn't the Court symbolize a wider range of wrongs than mass atrocity, which – though among the world's deepest concerns – is not exclusively so?

Consider, for instance, attacks on UN peacekeepers. These attacks kill very few people. Yet such violence directly challenges the moral authority of the international community itself and its humanitarian missions. That is no small matter.

Limits of a qualitative approach

All this said, several criticisms may be raised to Heller's view of situational gravity under the Rome Statute. First, a multi-factor test like his is more readily open to the charge of political manipulation than any single-factor test. Closely related, the data are more reliable on numbers of fatalities and people displaced, living in refugee camps, than about most of the crimes Heller prefers to prioritize, as he concedes. We may disagree whether the dead in Darfur number 200,000 or 400,000. But in either event, there are plenty of lifeless bodies to which the OTP can clearly point. Data on disappearances, by contrast, are notably much less reliable, since by definition there are no bodies to count.

Moreover, in a given situation, each of Heller's three factors – systematicity, social alarm, and state responsibility – will often point in different directions, requiring a weighting of each. Any such weighting of qualitative factors will be controversial. For instance, recruiting of child soldiers causes great social alarm, because it is very widespread in

⁶ Émile Durkheim, *The Division of Labor in Society*, G. Simpson trans. 70-75 (1933) (1893).

many conflict zones. But the worst offenders are rebel groups, not states. Thus, one factor favors OTP investigation, another opposes it. One could solve this problem by reformulating Heller's test into a numerical formula, assigning *a priori* weights to its several factors. But agreement on any such mechanical formula is unlikely. It is probably also undesirable, since it introduces more rigidity into the case-selection process than anyone would want.

Yet Heller's approach, with its greater indeterminacy in how to handle any given situation, allows more opportunity for political manipulation, in which he himself might gently be accused. This is because partisan considerations, extraneous to the law, will surely lead many to highlight one factor and downplay another, depending on whether we regard the state in question as friend or foe.

Second, Heller explicitly pitches his approach on the grounds that it will lead, frankly, to prosecuting white people, like the British for torture in Iraq. Yet here we find precisely the sort of political manipulation to which was just alluded. Torture is practiced regularly by over half the states on earth, according to the most reliable human rights NGOs. Why pick Britain?

Racial "balance," if you will, is achieved here (to the admitted satisfaction of many),⁷ but by way of considerations beyond the reach of even Heller's three factors – none of which speaks openly of geographical diversity, much less racial. Does Britain really deserve to be singled out – because it was once a world power – when the same offense is much more common and flagrant in dozens of other states – inhabited (felicitously for their rulers, in this case) by "people of color"?

What fundamental value is law "expressing" when this is the signal it's really sending in investigating British conduct in Iraq? And how would Heller's approach to situational gravity affect the ICC's legitimacy in the *developed* world, where the morality of racism in reverse is not widely accepted?

How may one assert, for that matter, that torture is an international crime evoking peculiar "social alarm," when many states practice it so regularly? Even if we could agree that social alarm is relevant to situational gravity, in other words, there will be great disagreement over what counts as best evidence of such alarm: formal, official pronouncements of disavowal, or tangible state practice as *de facto* endorsement. A similar point could be made regarding the recruiting of child soldiers, regarded as "regional custom" in much of Africa.

⁷Those sympathetic to Heller's agenda here—among early readers of his piece in draft and listeners at his talks – privately counsel that he should not parade his "political" intentions so transparently. These will be clear enough, however, to anyone of modest *savoir-faire*.

Social alarm is also readily susceptible to distortion by way of the so-called “CNN effect” or “Al Jazeera effect.” The mass media tend to highlight certain international crimes over others. This results not necessarily from political bias, but simply because cognitive heuristics lead us all to focus our attention on the most visibly palpable of wrongs.⁸ Yet these are not necessarily the most grievous. For example, the deaths of Palestinian children in Gaza make for compelling television footage. But the close, causal connection of their deaths to Hamas’ decision to locate forces and munitions among civilian populations is not nearly so visually salient, and so causes less “social alarm” in global opinion.

Is Hamas in Gaza to be regarded, in any event, as a state or as a rebel group? If it is merely a rebel group, Heller’s test would disfavor investigation. But if Hamas is better viewed as a *de facto* state or quasi-state – because Israel withdrew its forces from Gaza two years ago – then the test would favor prosecution. Again, vagueness in Heller’s legal test leads to indeterminacy over how to apply it and allows friend vs. foe-type political considerations, *sub rosa*, to affect legal arguments for or against ICC inquiry.

Furthermore, if targeted killings (as Heller contends), should become a focus for ICC investigations – because systematic and state-sponsored – this will immediately ensure that neither Israel nor the U.S. would ratify the Rome Statute. Both states regularly employ targeted killings of terrorist leaders and make no apologies for this. In fact, the policy is enormously popular in both countries, across partisan lines. In the U.S., Barack Obama even made his commitment to targeted killings a focal point of his television campaign advertising.

When law “expresses” more than it dares admit

Finally, it is deceptive to present the new approach to situational gravity in upbeat, affirmative terms, as a free-standing normative argument about what the ICC is really for, as reflecting its true purpose, properly understood. The real appeal of Heller’s proposal surely lies more in the greater ease with which it accommodates the unfortunate political constraints under which the ICC must today labor. Few but international lawyers would be surprised to learn that the OTP simply doesn’t have enough power to induce cooperation from the highly recalcitrant states targeted for inquiry into mass atrocities, like Sudan, especially when the Security Council will not wholeheartedly support the Prosecutor, as there.

⁸Heller himself has written convincingly on the importance of such influences in decision-making. Kevin Jon Heller, “The Cognitive Psychology of Mens Rea,” 99 J. of Crim. L. & Criminology (forthcoming, 2009).

The ICC may well have enough power to investigate the other sorts of crimes Heller's approach highlights, for reasons mentioned. But as in any "reverse engineering," we are working backwards. We start with the finished "product" we are given – here, an international legal system that cannot effectively reach the perpetrators of many, perhaps most mass atrocities. That unpleasant reality jeopardizes the Court's efficacy, given the Prosecutor's current priorities. In so doing, it also weakens the ICC's perceived legitimacy – in the simple sense that the Court naively promises a species of better, global future on which it apparently cannot deliver.

If the ICC cannot soon hope to deter most mass atrocities, the argument goes, then at least it can symbolically express the world's moral condemnation of other international crimes. This sounds more like a prudent concession to practical *realpolitik*, however, than a strong, independent argument for what the ICC is really about, what it is truly for. Here, the most high-minded of legal theory seems merely to be following practice, like the tired owl of Minerva, not seeking really to guide it, as such theory – including Heller himself – claims to do.

What message is the law "expressing" *then*, in doing that? Not a very pleasant one, once the veils of theoretical euphemism are torn away: that we must make a virtue of necessity, and tidy up the unpleasantness with fancy theory? With Heller's test of situational gravity, is the law not really expressing the sad fact of its own impotence in the face of mass atrocity, its acquiescence when confronted with the raw power of unrepentant states and their murderous leaders? And if this is the true signal being sent by this recommended refocusing of OTP priorities,⁹ then what will *that* do the Court's legitimacy in world opinion?

In any event, Heller's proposal offers much food for thought. Not least among its other many virtues, it offers a shining example to social scientists of how they may rightly take a prominent place at the table where the field of international criminal law is now coming into being.

⁹ Recent discussion of law's expressive functions, to which Heller alludes, defines the social meaning of such expression not so much in terms of speakers' intentions as of recipients' responses, which determine whether any real communication between the two has taken place. See, e.g., Elizabeth Anderson & Richard Pildes, "Expressive Theories of Law: A General Restatement," 48 U. Pa. L. Rev. 1503, 1571-73 (2000). Thus, the true social meaning of prosecutorial priorities is not for the OTP to determine unilaterally; the world's reaction to such decisions is equally pertinent.