deployed when there are sound reasons to believe its engagement can be especially effective in catalyzing change in the country where atrocities occurred.

Localized Understandings of Gravity

Earlier I argued that it is important to apply the concept of gravity with as much consistency as possible to guide the selection of situations that warrant the Court's engagement.[4] But there are compelling reasons for the Prosecutor to shift to a more localized understanding of gravity once she undertakes an investigation. Having reached the point where the Court's intervention has been found to be justified in light of global priorities, finite resources, and strategic analysis, the Prosecutor's approach going forward should be guided above all by the interests of survivors. If the past two decades of experience with global justice have taught us anything, it is that there is no universal template for victims' experience of justice.

Beyond ''Gravity'': For a Politics of International Criminal Prosecutions

By Frédéric Mégret[*]

No issue is seemingly more anxiety-inducing for international criminal lawyers than the complexities of prosecutorial discretion. Even as the discipline seeks to transform itself into a well-ordered, technically oriented enterprise, it has to confront the vertigo that the law it produces is the result of apparently dizzyingly unconstrained prosecutorial decisions.

International criminal law is ultimately entirely dependent on a process of determination of who of the thousands, if not tens of thousands, of people who commit international crimes every year should be among the half dozen who stand before international criminal justice. Seeing this reduction as broadly uncontroversial underestimates the huge local sensitivity to the distributive effects of prosecutorial decisions, both inter- and intra-situation.

To make matters worse, this has always been a very sensitive point for the ICC specifically, which has conceived of itself as an anti-politics—an attempt to transcend the endless limitations of the inter-state world, power politics, and diplomacy. Where ad hoc tribunals were imperfect laboratories at best, created by the Council to prosecute a particular set of cases, the ICC would preexist the crime that it would eventually have jurisdiction over, and would have very significant control over its jurisdiction.

In this context, the notion of gravity serves as a device, perhaps the least controversial one, to diminish anxieties about the ICC's inherent selectivity and therefore highly political nature. It must be that it is the ''gravest'' crimes that the Prosecutor is going after, because the alternative is too unpleasant or complicated to contemplate. But what are the ''gravest'' crimes, and can such a fundamentally subjective notion be legalized?

It is true that the last decades have witnessed significant shifts in the relative hierarchy of international crimes. This is most manifest in the emergence of so-called ''core crimes'' as particularly grave and eligible for specific international repression, and the attendant relegation of various transnational crimes to relatively secondary status. Even that distinction is hardly

[4] The criteria for determining gravity identified in the ICC's jurisprudence are not as rigid as my argument may at times imply. Nonetheless, maintaining the same criteria for each potential situation serves an important function, even if it is one that seems largely rhetorical: it enables the Court to answer the charge of political selectivity with legally defined criteria.

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uncontroversial, and there is much ambiguity about where a range of crimes might fit (terrorism being the best example). Moreover, significant shifts have occurred within the core crimes category, most notably from an emphasis on predominantly inter-state offenses (crimes against peace as the ''mother of all crimes'') to cosmopolitan ones (crimes against humanity).

However, these changes operate at the most general structural level. More importantly, we certainly have no reason to believe that they are consensual. For example, they might be deemed to reflect a particular domination of the public over the private, for example, and a very problematic emphasis on intra-state violence at the expense of inter-state violence. Within the core crimes category (which is the category within which prosecutorial choices must be made), moreover, there seems to have been very little appetite to draw up a hierarchy. Genocide, crimes against humanity, and war crimes are typically treated as similarly grave, and when the first two are exceptionally treated as marginally graver than the third, it is on the basis of very poorly articulated normative premises.

Indeed, the international criminal lawyer's normative world is bizarrely flat—one in which genocide, crimes against humanity, and war crimes are presented as equally reprehensible, with little sense of hierarchy. Even when some crimes are hinted at as being graver (''mother of all crimes,'' ''crime of crimes''), it is often unclear why, as if the international community were only capable of transcending its traditional normative aloofness by creating international crimes and then backing off before the moral challenge of ranking offenses. This, then, is the paradox of international criminal justice: it is, on the one hand, based on the idea that there is a degree of absolute consensus about certain values and the need to protect them, but, on the other hand, that consensus seems to be based on a rather superficial agreement and tends to break down when confronted with the world's reality.

One of the problems, of course, is that international criminal justice is really more about international criminal *law* than about *justice*. Such is the historical (and paradoxical and ambiguous) investment in positivism, that international criminal lawyers typically lack a sophisticated theory of which crimes are graver and why. There is room for rigorous ethical-normative work here, work that would, despite the ad hoc and reactive nature of the international penological ''system''—and its domination by impoverished positivist modes of thought that tell us little beyond the fact that treaties and customs are what they are—reconstruct it theoretically as the coherent defense of certain values. Crimes committed in positions of political or state power might be considered to be graver because of the particular responsibilities that come from political association; crimes committed against an undefended civilian population in times of peace might be considered more shocking because they cannot even draw on the excuse of the heat of battle; crimes that involve an element of discrimination (whether genocide or persecution as a crime against humanity) might be seen to be particularly threatening of the idea of humanity, and so forth.

But we should not fool ourselves that this is work for philosopher kings. Intelligent, sophisticated accounts of international criminal law can be offered that enlighten the debate. Ultimately, however, the reason why it is difficult to come up with a strict hierarchy of international crimes is simply because it is so difficult to find consensus in a fundamentally pluralist system. People will disagree on whether recruiting child soldiers is one of the worst crimes possible or a complex phenomenon of adapting to security needs in broken societies; whether torture in Abu Ghraib is less of a crime than killing in Ituri; or whether sexual violence in Rwanda is better conceptualized as a form of assault on dignity, or torture, or war crime, or crime against humanity, or genocide. There are judges who will consider that

a militia fighting to defend a legitimate government is more excusable than ragtag rebels who commit the same crimes (and who no doubt encounter some popular echo despite being at odds with the humanitarian orthodoxy). There are some, such as Ben Ferencz, who continue to promote the idea that aggression is the worst possible crime, where others consider that idea *passé*. And there are those who consider that the gravest crimes happen to be those left outside the Court's jurisdiction (economic crimes, crimes against the environment, terrorism, etc.).

The problem is made even worse as soon as one leaves the relative safety of crime-as-category to look at actual instances of crime. International crimes are really only very broad umbrella notions that can encompass all kinds of behavior, making cross-crime comparisons very difficult. Which is graver: killing or transferring children? Sexual violence or murder? Killing a lot of people from a distance, or torturing one individual in person and sadistically? To this dimension must be added the extremely complex issue of modes of participation. One might think that we have more of an idea of those who are ''principally responsible,'' and indeed gravity may work better on that vertical axis of relative responsibility. For example, it may tell us that international criminal justice is more interested in internationally prosecuting the Miloševićs than the Erdemovićs of this world. However, even there essentially contestable decisions will have to be taken in a context where reasonable (and unreasonable) people will disagree about whether executioners, mid-ranking officers, song writers, financiers, or politicians are more responsible (and therefore should more or less be the objects of the Prosecutor's solicitude). Again, different people will have different theories in different contexts about the malevolence and weight of criminal participation, based on irreducible theories of moral agency and responsibility.

Of course, none of this prevents prosecutors from simply ''going ahead,'' as they must. The question is whether resort to an at least aspiringly incontrovertible standard can be made in a way that is normatively coherent and socially legitimate. After a while, one may begin to suspect that ''gravity'' is merely a fig leaf for what is really a form of unaccountable discretion—one that basically allows prosecutors to make dramatic decisions about the destinies of individuals and the future of nations without engaging in the politics that this should entail. ''Gravity'' is largely in the eye of the beholder. Indeed, at least when it comes to the choice of cases, there is much evidence that it is less gravity that is the decisive criterion than more opportunistic considerations such as the availability of a state referral, not to mention the detainability of an accused. As to the attempt to reduce gravity to a quantitative concept (the ''body count'' approach), it will only convince certain Western audiences horrified by the number of casualties in peripheral African armed conflicts. Worse, it risks being part of a very concrete politics that minimizes the collateral casualties of, for example, technologically sophisticated Western wars.

Moreover, even if one can come to an agreement that certain crimes are relatively less grave, some will still argue that they are, at least, based on an understanding of the Court's priorities, *grave enough*. Gravity, at the very least, should take into account broader social perceptions about what is shocking and morally alarming. In fact, gravity should not stand in the way of a deeper reflection about what it means to pursue justice through such a device as the ICC. Here, there are a number of alternative, more policy-oriented takes on what should be the priorities of international criminal prosecution that take the reflection to another level. For example, prosecutorial discretion might emphasize the needs of victims and target crimes whose prosecution might have the most corrective impact for a variety of those who

have suffered. Or prosecutorial discretion might emphasize the need to develop underdeveloped areas of international criminal law. Or international criminal justice might be conceived as ''speaking truth to power'' in a way that would favor politically difficult targets to make a point about the international rule of law. Or it could target situations where it can most help attain some significant external goal such as peace or reconciliation. Or international criminal justice could be about ''giving to each their due,'' focusing on what crimes it is that any particular international constituency most commits and prosecuting those to make an example.

The implications for what the work of international prosecutions should be are very different. They require an acknowledgment that the prosecutor is involved in precisely the sort of issues of high and low politics that international criminal justice has always been uncomfortable with. The debate on the proper politics of international criminal justice is one that will always be difficult, but it is one from which the ICC can only benefit. At any rate, it is a debate that is already raging outside the Court and will not go away. A realistic politics of international criminal justice can emerge, but in order to do so it needs to be verbalized, contestable, and contested. The one point that always struck me as reasonable in some U.S. critiques of the ICC is the difficulty of setting up universal institutions of international criminal justice without some degree of democratic accountability. Rather than the low-profile diplomatic processes of prosecutor designation that have dominated historically, prosecutors should be encouraged to run for office based on an explicit *politics* of international criminal justice. More conservative or prudent strategies (focusing on state referrals as a first step towards establishing legitimacy and authority, for example) would have a chance to be aired out, just as more ambitious and radical strategies (democratic, counter-hegemonic) could be mooted. Moreover, room could be made for forms of political accountability of prosecutors such as, for example, vigorous hearings conducted by the Assembly of State Parties. Ultimately, a savvy international prosecutor is one who, like all good politicians, realizes that not everything needs to be said but that the art of politics requires confrontation.