

Determining whether a case has sufficient gravity to be admissible at the International Criminal Court (ICC)

February 26, 2020

Determining whether a case has sufficient gravity to be admissible at the International Criminal Court (ICC)

By: James Hendry

On February 19, 2020, the Appeals Chamber of the ICC released its decision Al Hassan Admissibility Appeal dismissing the appeal of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Al Hassan) from the Al Hassan Pre-Trial Chamber Admissibility decision which had held that his case, charging him with thirteen charges of war crimes and crimes against humanity, met the requirement under article 17(1(d) that it was sufficiently grave to be admissible before the Court. As the Al Hassan Pre-

Trial Chamber wrote in the impugned decision at para. 50: "…according to the Appeals Chamber [in the Congo Warrants of Arrest Appeal], '[h]ad the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they could have done so expressly'…In law, the purpose of article 17(1)(d) of the Statute is not to oblige the Court to choose only the most serious cases, but merely to oblige it not to prosecute cases of marginal gravity." As Dr Joseph Rikhof notes in his article in this Journal who-are-most-responsible-in-international-criminal-law, the Rome Statute does not set the bar for admissibility at 'senior leaders' or 'those most responsible' for international crimes, but uses the concept of the gravity of the case.

Article 17(1)(d) of the Rome Statute provides: "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where… The case is not of sufficient gravity to justify further action by the Court." Notably article 1 provides that the ICC has jurisdiction "…over persons for the most serious crimes of international concern, as referred to in this Statute…"

The charges

Al Hassan was charged with the crimes against humanity of torture, other inhumane acts, forced marriage, sexual slavery, rape and persecution and the war crimes of torture, cruel treatment, committing outrages upon personal dignity, passing sentences and carrying out executions without due process, directing an attack against protected buildings, sexual slavery and rape committed in Mali in 2012-3 (para. 22).

Facts

The Prosecutor (OTP) alleged that Al Hassan was 'the face of' the Islamic Police in Timbuktu with the Ansar Dine/AQMI which were jihadist groups attempting to establish an Islamic State. He allegedly organized the activities and functioning of the police and was in charge of its administration. Further, he allegedly took part in police patrols and the enforcement of the new rules established by the Ansar Dine/AQMI with which he expressed satisfaction with their effectiveness against the civilian population. He also allegedly helped police officers to marry exerting pressure on families and supported the destruction of mausoleums (paras. 23-4).

Al Hassan's position was that he was a 'low-ranking police administrator' and his grounds of appeal were based on the theory that the Pre-Trial Chamber took a number of irrelevant considerations into account.

Also relevant to the issues on appeal, the Prosecutor also argued the contextual requirements of the charges were made out by allegations that the Ansar Dine/AQMI carried out a widespread and systemic attack on the civilian population of Timbuktu, committed multiple breaches of article 7 carrying out a policy to impose their ideology, the conduct of Al Hassan was part of the attack of which the Ansar Dine/AQMI and Al Hassan were aware and the war crimes were linked to a non-international armed conflict with the Malian Armed Forces of which they were also aware (para. 21).

The nature of the gravity requirement in article 17(1)(d)

The Appeals Chamber restated the test for the gravity requirement. The purpose of the requirement was to allow the Court the discretion to exclude the rather unusual case where the conduct technically meets the elements of a crime but is only of marginal gravity. It emphasized that the requirement was a matter of admissibility rather than jurisdiction. The Appeals Chamber noted the distinction made during the Statute's drafting process: that the gravity requirement was a matter of whether to exercise the Court's jurisdiction of the Court rather than a question of the existence of jurisdiction. They reasoned that the text of article 17(1)(d) and the Preamble state that the crimes within the material jurisdiction of the Court are all of sufficient gravity in principle, but that less grave conduct might be excluded from further action so the Court was not 'overwhelmed with less serious cases' (paras. 53-8).

The various statements by the Appeals Chamber that the purpose of the gravity requirement is to exclude cases of marginal gravity (paras. 53, 56, 58, 59) and that article 17(1)(d) is meant to 'oblige' the Court not to prosecute such cases (para. 59) suggests that there is a presumption against allowing such cases to proceed.

The 'case'

In order to decide the appeal, the Appeals Chamber had to interpret for the first time the parameters of 'the case' for the purposes of the gravity requirement in article 17(1)(d).

The Appeals Chamber held that the same considerations applied to a 'case' under article 17(1)(d) as the Appeals Chamber had decided in respect of article 17(1)(a) in the Gaddafi Admissibility Appeal where it held that a 'case' included both the conduct of the suspect that is the basis for the charges against him and the conduct imputed to him carried out by other perpetrators. Also relying on the Gaddafi case, it added that the 'conduct' defining 'the case' is the conduct of the suspect as well as the conduct described in the incidents under investigation that are imputed to the suspect. An 'incident' is an historical event defined in time and place in which crimes were alleged to have been committed by one or more perpetrators which cannot be determined in the abstract but in all of the circumstances of a case including the context of the crimes and the overall allegations against the suspect (para. 65). This was a matter of consistency in the Statute.

The criteria for a gravity assessment

The Appeals Chamber set out relevant criteria for the assessment of the gravity requirement which was holistic and to be performed on a case by case basis (para. 94). These included:

- quantitative factors (particularly the number of victims) are important but are not determinative;
- qualitative criteria (some 'aggravating or qualitative' factors such as the nature, scale, manner of commission of the crimes including human rights violated as a result, the impact on victims, the role and degree of the accused's participation and discriminatory motives);

- some sentencing factors in Rules 145(1)(c) and 145(2)(b) (including the extent of the damage caused, the nature of the conduct, the means employed, the accused's degree of participation, the degree of intent, the circumstances of manner, time and location, the defencelessness of the victims, cruelty of the conduct, multiple victims and any discriminatory motive (paras. 89-92)). This was because article 78(1) requires the Court to take into account 'the gravity of the crime' in sentencing. The sentencing factors provided useful guidelines for evaluating gravity under article 17(1)(d) and ensured a consistency in the interpretation of the concept of gravity within the Statute (para. 93).

The grounds of appeal

The Appeals Chamber had to determine the issue of the definition of a 'case' to decide the issue of whether the Pre-Trial Chamber had considered vague and broad allegations of criminality as raised by Al Hassan.

The Appeals Chamber rejected the argument that allegations relating to the contextual elements of the thirteen crimes that were not related to his conduct should not have been considered in the gravity assessment. It held that the contextual element of the crimes (such as a widespread and systemic attack against the civilian population for a crime against humanity) were constitutive elements of the crimes themselves and therefore part of the case. The very definition of 'attack' in article 7(2)(a) referred to multiple commission of acts underlying the crimes in article 7(1) pursuant to an organizational policy and a component of crimes against humanity as the Appeals Chamber had earlier decided in its judgment in Ruto at paragraph 31 of that case. Conversely, considering contextual elements that apply to a number of cases arising from the same attack was not duplicative in the sense that they did not inflate the gravity assessment in one of the specific cases in the attack because the Statute does not forbid using such factors within different multi-factor tests such as the one before the Court in this case (para. 72). Last, the reference in the case to 'the crimes at bar' allegedly committed against the people of Timbuktu over a 10-month period as part of a widespread and systemic attack were incident-specific to those attributed to Al Hassan for the purposes of Regulation 52 and his 'case' and not so abstract to be irrelevant for the gravity assessment (para. 73).

The Appeals Chamber had to explore the scope of the quantitative factor in the criteria for determining gravity. It rejected the argument that the Pre-Trial Chamber had erred by considering the number of participating victims in the case. The number, while not determinative of the gravity of the case, did provide an indication of the scope of victimhood in its context (para. 97). The Appeals Chamber noted that in its second Victim Participation decision in this case, the Pre-Trial Chamber had required that in order to participate, victims had to state their identity, the harm they suffered, the causal link between the harm and an incident within the temporal, geographic and material parameters of the case against Al Hassan (para. 98).

The Appeals Chamber noted that the Pre-Trial Chamber did not seem to attach much weight to the number of participating victims and considered also the nature and extent of the crimes, their impact on the victims, the discriminatory motive against the population of Timbuktu on religious and gender

grounds, the vulnerability of the victims, the allegation that the crimes were part of a widespread and systemic attack against the civilian population, the ‘significant role’ attributed to the accused in committing the crimes through his contribution to the Islamic Police and his degree of intent and degree of participation in the crimes (para. 102). Therefore, the quantitative factor was not applied improperly as determinative of the gravity of the case.

The Appeals Chamber also rejected the qualitative factor argument that the Pre-Trial Chamber considered Al Hassan’s role in the Islamic Police in the abstract in assessing his role and conduct for the gravity assessment. The Pre-Trial Chamber had considered the factual allegations made by the Prosecutor. The Appeals Chamber noted that the Document Containing the Charges showed that Al Hassan’s contributions to the crime were not minimal. He allegedly personally flogged individuals, gave orders to the police, took actions against police officers, participated in police patrols and in the arrest and detention of civilians, taking a leading role in the enforcement of the new rules for behaviour (para. 112). Though the Confirmation Decision made after the Admissibility Decision held that he had not made essential contributions to the crimes, this was not relevant for two reasons. First, this finding could not be considered because ICC cases hold that only allegations pre-dating an impugned decision can be considered. Second, in any event, the Appeals Chamber held that a case is not necessarily insufficiently grave because the accused’s contributions were not ‘essential’. This would mean that the modes of liability under article 25 that do not require an essential contribution would automatically lack sufficient gravity for the Court’s attention (para. 115).

The Appeals Chamber also rejected the argument that the Pre-Trial Chamber gave undue weight to the number of charges which led to an unfair result because of the degree of overlap in the alleged conduct. It held that the Pre-Trial Chamber had properly assessed the qualitative factor of the ‘nature and scale of the charged crimes’. Further, the qualitative factors of the extent of the damage and nature of the unlawful behaviour as elements of sentencing incorporated in the gravity assessment included allegations of violation of numerous human rights under the International Covenant on Civil and Political Rights: the rights to physical and mental integrity and dignity, a fair trial, liberty and security of the person, to be treated with humanity when deprived of liberty, the freedoms of thought, conscience, and religion and to be free of discrimination (para. 122). Some of the underlying conduct for the 13 charges did overlap but protected distinct international values (para. 123).

Conclusion

Following the theme in the articles in this Journal who-are-most-responsible-in-international-criminal-law and national-and-international-judicial-interpretations-of-most-responsible-at-the-extraordinary-chambers-in-the-courts-of-cambodia, the Appeals Chamber of the ICC gives its most recent decision involving the determination of whether a case meets the purpose of the Rome Statute to deal with the most serious international crimes by excluding cases based on their gravity. This assessment allows the Court to exclude crimes under the Statute and consequently within its legal jurisdiction for the political reason referred to by the Appeals Chamber in the Report of the International Law Commission on the work of its forty-fourth session (p. 66, para. 58 in the context of discussing a more

expansive jurisdiction *ratione materiae*) that the there should be limits on the numbers of cases to prevent the Court from being overwhelmed.

Please cite this article as James Hendry, “Determining whether a case has sufficient gravity to be admissible at the International Criminal Court (ICC)” (2020), 4 PKI Global Justice Journal 7.

About the author

James HendryJames Hendry is a Co-Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel in the Human Rights Law Section at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.