

2008

The Gravity Threshold of the International Criminal Court

Susana SáCouto

American University Washington College of Law, ssacouto@wcl.american.edu

Katherine A. Cleary

American University Washington College of Law, kcleary@wcl.american.edu

Follow this and additional works at: http://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [International Law Commons](#)

Recommended Citation

SáCouto, Susana and Katherine A. Cleary. "The Gravity Threshold of the International Criminal Court." *American Journal of International Law* 23, no. 5 (2008): 807-854.

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

ARTICLES

THE GRAVITY THRESHOLD OF THE INTERNATIONAL CRIMINAL COURT

SUSANA SÁCOUTO & KATHERINE CLEARY*

THE WAR CRIMES RESEARCH OFFICE
WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

EXECUTIVE SUMMARY	808
INTRODUCTION	816
I. ORIGIN AND PURPOSE OF THE GRAVITY THRESHOLD	817
A. INTERNATIONAL LAW COMMISSION’S DRAFT STATUTE ...	817
B. NEGOTIATIONS ON THE DRAFT STATUTE.....	820
C. ARTICLE 17(1)(D) OF THE ROME STATUTE	822
II. INTERPRETATION AND APPLICATION OF THE GRAVITY THRESHOLD WITHIN THE INTERNATIONAL CRIMINAL COURT	823
A. OFFICE OF THE PROSECUTOR.....	824
1. <i>General Interpretation</i>	824
2. <i>Application</i>	826

* Susana SáCouto is the Director and Katherine Cleary is the Assistant Director of the War Crimes Research Office (“WCRO”) of the American University’s Washington College of Law. The opinions expressed are those of the authors alone. The subject matter addressed herein forms part of a WCRO report, entitled *The Gravity Threshold of the International Criminal Court*, published in March 2008. We are grateful for the generous support of the John D. & Catherine T. MacArthur Foundation, the Open Society Institute and the Washington College of Law, without which this Report would not have been possible. We also wish to thank all those who gave generously of their time to this project, including Professor Robert Goldman, who provided comments on a previous draft, and the members of the WCRO’s International Criminal Court Advisory Committee. We also want to acknowledge the invaluable research assistance of Abdulrahman Omar, L.L.M.

a. Situations.....	826
b. Cases	829
B. PRE-TRIAL CHAMBER I	832
III. ANALYSIS AND RECOMMENDATIONS	837
A. PRE-TRIAL CHAMBER I'S INTERPRETATION OF GRAVITY THRESHOLD.....	838
1. <i>ICC Should Consider Factors Other Than Systematicity or Scale and Social Alarm in Analyzing Whether Conduct Satisfies Article 17(1)(d)</i>	839
2. <i>Focusing on Senior Leaders Suspected of Being Most Responsible Is Prudent As a Matter of Policy, but Is Not Required by the Rome Statute</i>	843
B. THE GRAVITY THRESHOLD VERSUS EXERCISE OF PROSECUTORIAL DISCRETION	850

EXECUTIVE SUMMARY

From its inception, the world's first permanent International Criminal Court ("ICC" or "Court") was envisioned as a body that would preside over only those cases of most serious concern to the international community as a whole. Thus, the Court's subject matter jurisdiction is limited to the international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. Moreover, Article 17(1)(d) of the Rome Statute provides that the Court shall determine that a case is inadmissible where, the case is not of sufficient gravity to justify further action by the Court. This so-called "gravity threshold" has played a critical role in guiding the Prosecutor's selection of both situations and cases. In addition, the first Pre-Trial Chamber to consider the question has affirmed that Article 17(1)(d) imposes a requirement that must be met above and beyond the jurisdictional mandates of the Rome Statute. Yet, because "gravity" is not defined in the Statute, the appropriate scope of the term remains a matter of substantial debate. The aim of this report is therefore to review the underlying purpose of the gravity threshold as understood by the drafters of the Rome Statute, analyze the application of gravity considerations in practice during the initial years of the Court's operations, and offer recommendations aimed at

clarifying both the objectives of the threshold and the factors relevant to its satisfaction.

A. ORIGIN & PURPOSE OF THE GRAVITY THRESHOLD

The idea of including a provision along the lines of Article 17(1)(d) in the statute of the International Criminal Court was first discussed as early as 1992. Specifically, the concept arose in debates regarding the appropriate subject matter jurisdiction of the proposed Court, which was initially much broader than that granted to the ICC in the final Rome Statute, leading to concern that the Court could become over-burdened. The drafters therefore added a provision to the Statute intended to provide the Court with discretion to decline the exercise of jurisdiction on grounds of insufficient gravity. The idea that the Court should have discretion to decline jurisdiction was also seen as an important method by which the Court could manage its case load according to available resources. Thus, even though the subject-matter jurisdiction of the ICC was ultimately limited to “core” international crimes, the “gravity threshold” was maintained in the final draft of the Rome Statute.

B. INTERPRETATION & APPLICATION OF THE GRAVITY THRESHOLD

1. Office of the Prosecutor

The concept of “gravity” has been crucial to the Prosecutor’s selection of investigations to initiate and crimes to prosecute. In assessing the gravity of a situation or case,¹ the OTP has considered

1. In the context of the ICC, the Court’s operations are divided into two broad categories: “situations” and “cases.” According to Pre-Trial Chamber I, “situations” are “generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-tEN-Corr, ¶ 65 (Pre-Trial Chamber I, 17 January 2006). By contrast, “cases” are defined as “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects” and entail

the following factors: the scale of the crimes, the severity of the crimes, the systematic nature of the crimes, the manner in which they were committed, and the impact on victims. In addition, the Prosecutor has made clear that the OTP will generally focus on those individuals who bear the greatest responsibility for crimes within the jurisdiction of the Court.

Gravity has guided the Prosecutor's selection of situations and cases warranting the attention of the ICC not only because of the need to satisfy admissibility requirements, but also as a matter of policy. Thus, for example, gravity was the dominant consideration guiding the selection of his first case in Northern Uganda, where the OTP has investigated crimes allegedly committed by both the Lord's Resistance Army ("LRA") and the national Uganda Peoples Defence Forces ("UPDF"), but has only brought charges against the former. Indeed, the Prosecutor has repeatedly explained his decision by saying that the criterion upon which he selected his first case in Uganda was gravity, noting that crimes allegedly committed by the LRA were much more numerous and of a much higher gravity than the alleged crimes committed by the UPDF. Gravity has also played an important role in guiding the OTP's investigations of the situations in the Democratic Republic of Congo ("DRC") and Darfur, Sudan. However, gravity does not seem to have played as dominant a role in the Prosecutor's selection of cases in the DRC situation as it did in the context of the Ugandan situation. Rather, after identifying certain cases as being sufficiently grave to satisfy Article 17(1)(d), the Prosecutor stressed that he ultimately selected his first case in the DRC situation based on practical considerations involving, among other things, the likelihood of apprehending his suspect.

2. *Pre-Trial Chamber I*

The first judicial interpretation of the gravity threshold under the Rome Statute came from Pre-Trial Chamber I ("PTC I"),² which discussed Article 17(1)(d) at some length in a February 2006 decision. Notably, no other decision of the ICC has addressed the

"proceedings that take place after the issuance of a warrant of arrest or a summons to appear." *Id.*

2. Pre-Trial Chamber I is the panel of three judges appointed to oversee the pre-trial proceedings in the situation in the Democratic Republic of Congo.

gravity threshold, although it has presumably been applied since February 2006, particularly given that PTC I expressly held that the threshold must be met not only in every situation, but also in every case arising from the investigation of a situation.

In its February 2006 decision, PTC I held that, to satisfy the gravity threshold: (i) the relevant conduct must be either systematic or large-scale, and (ii) due consideration must be given to the “social alarm” such conduct may have caused in the international community. Furthermore, the Chamber held that the perpetrator of the relevant conduct must be among the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court. Finally, PTC I made clear that, in its view, the factors identified in its analysis are not discretionary considerations, but rather necessary conditions for meeting the gravity threshold.

C. ANALYSIS & RECOMMENDATIONS

Generally speaking, the application of the gravity threshold by both Pre-Trial Chamber I and the Office of the Prosecutor has been consistent with the intent of the Rome Statute’s drafters, as well as the overall purposes envisioned for the ICC. Nevertheless, there are aspects of both the Chamber’s and the Prosecutor’s interpretation and application of the gravity threshold that are worth fine-tuning in the years ahead.

1. ICC Should Consider, When Appropriate, Factors Other Than Systematicity or Scale & Social Alarm in Analyzing Whether Conduct Satisfies Article 17(1)(d)

Pre-Trial Chamber I’s February 2006 decision is helpful in that it provides guidance as to how “gravity”—a term not defined in the Rome Statute—will be interpreted by the ICC, a court with limited resources that must focus on those crimes that most warrant international prosecution. However, PTC I’s decision *requiring* such systematicity or scale as a condition of Article 17(1)(d) in every case appears to be overly restrictive. This is especially true where, for instance, the number of victims would be relatively small in comparison to other situations, but where the impact was devastating to the community or country concerned. If one considers the 2001

terrorist attack on the World Trade Center in New York, the sheer number of victims may pale in comparison to other incidents of violence, but the impact of the attack on the United States was incomparable to anything the country has witnessed in recent history. Other factors that could be considered relevant to the gravity analysis include: the amount of premeditation or planning; the heinous means and methods used to commit the crimes; the role of the perpetrator in commission of the crimes; and the vulnerability of the targeted group. Furthermore, it is unclear why the Chamber has chosen to look to the social alarm caused by the alleged conduct in the “international community”; the impact on the community or nation where the crimes occurred seems a more meaningful standard, particularly in terms of the Rome Statute’s broader goals of ending impunity and promoting deterrence.

2. Focusing on Senior Leaders Suspected of Being Most Responsible Is Prudent As a Matter of Policy, but Is Not Required by the Rome Statute

While focusing on senior leaders suspected of being most responsible is logical in the context of a limited-resource court such as the ICC, it is not necessarily *required* by the Rome Statute. Indeed, the Rome Statute simply states that the ICC has the power to exercise its jurisdiction over “persons” responsible for the most serious crimes of international concern, without limiting that jurisdiction to any particular class of persons. Moreover, the standard imposed by PTC I is very strict, requiring that the perpetrator be both a “senior leader” and among those “most responsible.” Indeed, as a practical matter, one can imagine situations where the objectives of the Rome Statute would be served through the prosecution of an individual who might not be described as among the “most senior leaders suspected of being most responsible.” As human rights groups and other commentators have pointed out, there may be circumstances under which pursuing those officials further down in the chain of command could have a significant impact for victims on the ground.

This point is well-illustrated by the example of “Comrade Duch,” a former member of the Khmer Rouge who has been indicted by the Extraordinary Chamber in the Courts of Cambodia (“ECCC”) for

crimes against humanity and war crimes allegedly committed at the Tuol Sleng prison, where thousands of people were imprisoned, tortured, and killed between 1975 and 1979. Although Duch was not among the top leadership of the Khmer Rouge, the fact that the murder and torture of civilians was committed on such a widespread basis under his authority at the prison renders him subject to the personal jurisdiction of the ECCC, which includes individuals who were *either* among the “senior leaders” *or* those “most responsible” for the crimes within the jurisdiction of the Court. Pursuing individuals that are either high ranking *or* bear significant responsibility for particular crimes may also, in limited circumstances, be necessary for the implementation of an effective prosecutorial strategy in a particular situation—for instance, for laying the groundwork for cases against those at the very top of a chain of command. Notably, while the Prosecutor of the ICC has stated that he will focus on those bearing the greatest responsibility, he has been careful to acknowledge that, in some cases, the investigation may have to focus on targets other than the highest-ranking officials.

3. Distinguish Between the Gravity Threshold and the Exercise of Prosecutorial Discretion

As discussed above, the Prosecutor seems to apply the concept of gravity at two distinct stages in determining whether to initiate an investigation or pursue a particular prosecution. First, as a matter of statutory obligation, the Prosecutor considers whether the situation or case under consideration will be admissible under Article 17(1)(d). Thus, for example, the Prosecutor determined that he would not initiate an investigation against British forces in Iraq because he did not believe the gravity threshold was satisfied based on the crimes allegedly committed there. Second, the Prosecutor, as a matter of policy, has stated that gravity is one of the most important criteria for selection of the OTP’s situations and cases, as demonstrated by the OTP’s prosecution of LRA forces, but not government forces, in Uganda.

Two related observations flow from this dual-use of gravity. The first is that, if the Prosecutor is not careful to distinguish between considerations of gravity for purposes of determining whether a

situation or a case is *admissible* under Article 17 and considerations of gravity for purposes of determining which situations and cases will be investigated or prosecuted as a *matter of prosecutorial discretion*, the public perception of the Court may suffer. Public perception of the ICC is inextricably linked with establishing the Court's legitimacy, particularly in its early years of operations, and transparency as to how the OTP determines which crimes are admissible and which crimes will be investigated and prosecuted, are in turn essential to promoting public confidence in the ICC's work.

Similarly, the public's trust in the work of the Court would likely be strengthened if the Prosecutor clearly communicated to the public that, once the statutory requirements governing the admissibility of a situation or case are met—including satisfaction of the gravity threshold—the *relative gravity* of crimes may be one factor among many that enters into the Prosecutor's ultimate decision to initiate an investigation or prosecute a case. The need for clarity is illustrated by recent commentary suggesting that the OTP adopted an "inconsistent" approach to the selection of cases in the context of Uganda, where it chose to pursue the "more grave" crimes of the LRA, and the DRC, where it chose to charge Thomas Lubanga as its first suspect due to more practical considerations.

Notably, the Rome Statute—like the statutes of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, as well as the practice of many national jurisdictions—allows the Prosecutor ultimate discretion to choose where to initiate investigations and which cases to prosecute. Indeed, as a practical matter, prosecutorial discretion is a necessary tool for ensuring a court's efficacy, particularly in post-conflict situations, where the number of crimes admissible before a court will far outweigh the resources available to prosecute those crimes. Thus, while the relative gravity of a particular crime may lead the OTP to prosecute one case over another in one context, it may legitimately be persuaded by other factors—such as practical considerations, including the likelihood of apprehending a suspect or the availability of evidence, or strategic considerations such as a desire to shed light on the "complete landscape" of events that occurred within a particular situation—in another context. At the same time, however, the legitimacy of the ICC requires that the OTP communicate as clearly as possible which

factors were in fact relevant to its decisions in each context so that the public may more accurately evaluate those decisions.

INTRODUCTION

The Rome Statute, which established the world's first permanent International Criminal Court ("ICC"), leaves no doubt that the ICC is intended to prosecute only "the most serious crimes of international concern."³ This language appears in the Preamble to the Statute,⁴ as well as in Article 1.⁵ Similarly, Article 5 provides that the "jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole."⁶ Finally, the Rome Statute imposes a "gravity threshold" on the admissibility of cases coming before the ICC. Specifically, Article 17(1)(d) provides that the Court "shall determine that a case is inadmissible where," *inter alia*, the "case is not of sufficient gravity to justify further action by the Court."⁷ This provision is reinforced by Articles 53(1) and (2), which state that, in determining whether there is a "reasonable basis" to proceed with an investigation or a prosecution, the Prosecutor shall consider, *inter alia*, "the gravity of the crime."⁸

As explained in detail below, the gravity threshold has played a critical role in guiding the Prosecutor's selection of investigations to

3. Rome Statute of the International Criminal Court art. 1, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

4. *Id.* pmb1.

5. *Id.* art. 1.

6. *Id.* art. 5.

7. *Id.* art. 17(1)(d).

8. *Id.* art. 53(1)-(2). Art. 53(1), specifically, provides the following:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: . . . (b) The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

Id. art. 53(1). Art. 53(2), in turn, provides:

If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: . . . (b) The case is inadmissible under article 17; or (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

Id. art. 53(2).

initiate and crimes to prosecute, not only because of the need to satisfy admissibility requirements, but also as a matter of policy. In addition, Pre-Trial Chamber I⁹ has offered its own interpretation of the gravity threshold, affirming that Article 17(1)(d) of the Statute is a requirement “in addition to the gravity-driven selection of crimes included within the material jurisdiction of the Court,”¹⁰ and setting forth its process of determining how the threshold is met.

Yet, because the term “gravity” is not defined in the Rome Statute or any of the other governing documents of the ICC, the appropriate role of “gravity” in the ICC remains a matter of debate. Indeed, according to one commentator, “[o]ne of the most contentious issues to be considered before initiating an investigation or prosecution is the gravity of the crimes.”¹¹ This report therefore reviews the underlying purpose of the so-called gravity threshold as understood by the drafters of the Rome Statute, analyzes the application of gravity considerations in practice over the first five years of the Court’s operations, and offers recommendations aimed at clarifying both the objectives of the threshold and the factors relevant to its satisfaction.

I. ORIGIN AND PURPOSE OF THE GRAVITY THRESHOLD

A. INTERNATIONAL LAW COMMISSION’S DRAFT STATUTE

Unlike a number of provisions ultimately included in the final Rome Statute adopted in 1998, the Article 17(1)(d) gravity threshold appeared in nearly identical form in the first Draft Statute of the ICC

9. Pre-Trial Chamber I is the panel of three judges appointed to oversee the pre-trial proceedings in the situation in the Democratic Republic of Congo.

10. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo (Feb. 24, 2006), Annex I (“Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58” (Feb. 10, 2006), formerly under seal), ¶¶ 44-45, available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf [hereinafter *Prosecutor v. Dyilo*].

11. Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L. F. 281, 282 (2006). Murphy further asserts that, despite its focus on the concept of gravity, the Rome Statute provides little guidance regarding how the ICC should apply its gravity standard. *Id.*

produced by the United Nations International Law Commission (“ILC”) in 1994.¹² Indeed, the idea of including a provision along the lines of Article 17(1)(d) in the Court’s statute was first discussed as early as 1992. Specifically, the concept of the provision arose in the context of debates regarding the appropriate subject matter jurisdiction of the envisioned Court,¹³ which was initially much broader than that afforded to the ICC in the Rome Statute, as it included both “core crimes” and “treaty crimes.”¹⁴ As a result, there was some concern that, although the Court was “intended to exercise jurisdiction only over the most serious crimes of concern to the international community,”¹⁵ it could become overburdened by “less serious cases.”¹⁶

12. See *Report on the Commission to the General Assembly on the Work of its Forty-Sixth Session*, 49 U.N. GAOR Supp. (No. 10), U.N. Doc. A/49/10, reprinted in [1994] 2 Y.B. Int'l L. Comm'n 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) [hereinafter *ILC 46th Session Report*] (“The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide . . . that a case before it is inadmissible on the ground that the crime in question . . . is not of such gravity to justify further action by the Court.”).

13. See *Report on the Commission to the General Assembly on the Work of its Forty-Fourth Session*, 47 U.N. GAOR Supp. (No. 10), U.N. Doc. A/87/10, reprinted in [1992] 2 Y.B. Int'l L. Comm'n at 66, ¶ 58, U.N. Doc. A/CN.4/SER.A/1992/Add.1 (Part 2) [hereinafter *ILC 44th Session Report*] (asserting that the Court should “only exercise jurisdiction over the most serious offences”); see also *Summary Records of the Meetings of the Forty-Sixth Session*, [1994] 1 Y.B. Int'l L. Comm'n 25-27, 33, 126, 193, 210, 226-30, U.N. Doc. A/CN.4/SER.A/1994 [hereinafter *Summary Records of the 46th Meeting*] (noting that the ILC envisioned that the Court would exercise jurisdiction only over crimes of such gravity for which “there would be a consensus in the United Nations”); *ILC 46th Session Report*, *supra* note 12, at 21, ¶ 50 (discussing the view presented in the ILC proceedings that the Court should have “limited inherent jurisdiction for a core of the most serious crimes”).

14. Cf. Press Release, Comm. on the Establishment of an Int'l Criminal Court, Crimes Initially Covered by International Criminal Court Should Be Limited to the Most Serious, Sixth Committee Told, U.N. Doc. GA/L/3011 (Oct. 31, 1996) (stating that the ICC’s jurisdiction includes “some treaty-based crimes,” and “an initial list of core crimes” including genocide, war crimes, and crimes against humanity); Daryl Robinson, *Article 7(1)(a)—Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 80, 80-93 (Roy S. Lee ed., 2001) (outlining the elements of the specific forms of crime against humanity).

15. *Summary Records of the 46th Meeting*, *supra* note 13, at 191, ¶ 60.

16. See *ILC 44th Session Report*, *supra* note 13, at 66, ¶ 58 (“In the case of some conventions defining offences which are frequently committed and very

One suggested remedy to this concern was to narrow the subject matter jurisdiction of the court, namely by limiting the Draft Statute to include only “those crimes as to whose magnitude and gravity there would be a consensus in the United Nations.”¹⁷ U.S. ILC member Robert Rosenstock offered another suggestion, asserting that the Court should have discretion to decline to exercise its jurisdiction in certain cases on grounds of insufficient gravity.¹⁸ Rosenstock’s recommendation was noted in the 1994 ILC Yearbook as follows:

The court should be given some discretion in certain circumstances to decline to accept a particular case on specific grounds—for instance, that it *did not consider the case of sufficient gravity to merit a trial at international level* or that the existing national tribunals could handle the matter expeditiously. Such discretion on the part of the court might mitigate the concerns raised with regard to the inclusion . . . of crimes under national law, such as drug-related crimes and, for that matter, the “terrorism” conventions . . .¹⁹

The suggestion that the Court should have discretion to decline jurisdiction in cases lacking sufficient gravity gained broad support among the ILC drafters. The idea was seen not only as a way of ensuring that the Court limited its focus to the most serious crimes, but also as an important method by which the Court could manage its case load according to available resources.²⁰ As a result, the gravity threshold was included in Article 35 of the ILC Draft Statute delivered to the United Nations General Assembly in 1994.²¹ In its commentary to Article 35, the ILC observed that the provision

broad in scope, it may be necessary to limit further the range of offences which fall within the court’s jurisdiction *ratione materiae*. Otherwise there may be a risk of the court being overwhelmed with less serious cases, whereas it is intended that it should only exercise jurisdiction over the most serious offences, namely those which themselves have an international character.”)

17. *Summary Records of the 46th Meeting*, *supra* note 13, at 25, ¶ 41.

18. *See id.* at 27, ¶ 59.

19. *Id.* (emphasis added).

20. *See* UK Discussion Paper on Complementarity ¶ 14 (Mar. 29, 1996), available at <http://www.iccnw.org/documents/UKPaperComplementarity.pdf> (outlining a proposal from the United Kingdom that would allow the ICC Prosecutor to decline even *prima facie* cases under the reasoning that the Court should not take every case that is under its jurisdiction).

21. *See* Draft Statute for an International Criminal Court 1994, reproduced in *ILC 46th Session Report*, *supra* note 12, at 52, art. 35.

allows the court to decide, having regard to certain specified factors, whether a particular complaint is admissible and in this sense it goes to the exercise, as distinct from the existence, of jurisdiction. This provision responds to suggestions made by a number of States, in order to ensure that the court only deals with cases in the circumstances outlined in the preamble, that is to say where it is really desirable to do so.²²

Thus, the overall gravity threshold made a distinction between the *existence* of jurisdiction, and the *exercise* of jurisdiction. According to the ILC commentary, some “members of the Commission believed that it was not necessary to include [A]rticle 35, as the relevant factors could be taken into account at the level of jurisdiction”²³ However, others “pointed out that circumstances of particular cases could vary widely and could anyway be substantially clarified after the court assumed jurisdiction so that a power such as that contained in [A]rticle 35 was necessary if the purposes indicated in the preamble were to be fulfilled.”²⁴

B. NEGOTIATIONS ON THE DRAFT STATUTE

Upon receiving the ILC Draft Statute, the General Assembly established the *ad hoc* Committee on the Establishment of an International Criminal Court, which met twice in 1995. During these sessions, the drafters returned to the idea that the subject matter jurisdiction of the Court should be limited to a few “core” crimes.²⁵ The Report of the *ad hoc* Committee during its fiftieth session explains:

As to the scope of the subject-matter jurisdiction of the court, several delegations emphasized the importance of limiting it to the most serious crimes of concern to the international community as a whole, as indicated in the second preambular paragraph, for the following reasons: to promote broad acceptance of the court by States and thereby enhance its effectiveness; to enhance credibility and moral authority of the court; to avoid overloading the court with cases that could be dealt with adequately by national courts; and to limit the financial burden imposed on the

22. *Id.*

23. *Id.*

24. *Id.*

25. See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, ¶¶ 54, 55, U.N. GAOR, 50th Sess., Supp. No. 22, U.N. Doc. A/50/22 (1995).

international community With regard to selection of crimes, a number of delegations suggested that the jurisdiction of the court should be limited to three or four of the crimes under general international law . . . because of the magnitude, the occurrence and the inevitable international consequences of these crimes.²⁶

ILC members also discussed doing away with the gravity threshold in favor of limiting the jurisdiction of the Court.²⁷

Nevertheless, the overall “gravity threshold,” which was initially formulated as an alternative to narrowing the prescriptive jurisdiction given to the Court in the ILC Draft Statute, continued to receive broad support as the negotiations progressed. For example, in March 1996, the United Kingdom submitted a discussion paper urging that, “the ICC prosecutor should have discretion to refuse to prosecute even though a *prima facie* case against an accused has been established [and] the court should not be obliged to go ahead with every case over which it has jurisdiction, or which is not inadmissible”²⁸ Thus, the gravity threshold was maintained in

26. *Id.* ¶¶ 54, 55.

27. See, e.g., *Summary of the Proceedings of the Preparatory Committee During the Period 25 March – 12 April 1996*, ¶ 123, U.N. Doc. A/AC.249/1 (May 7, 1996) (noting that some delegations suggested that, rather than providing for the “non-gravity of the crime as a ground for inadmissibility . . . the inclusion of more detailed definitions of crimes . . . would suffice to indicate that the crime did not pertain to the jurisdiction of the court”).

28. UK Discussion Paper on Complementarity, *supra* note 20, ¶¶ 14, 29; see also *Summary Record of the 5th Plenary Meeting*, U.N. Doc. A/CONF.183/SR.5, ¶ 45 (1998) (recording Croatia’s appeal for guarantees that the ICC would “not be burdened by minor violations” and that cases brought before it be of “sufficient gravity and significance”). Sweden reiterated that the Court must not only satisfy that it has jurisdiction, but also that the case is admissible, with sufficient gravity being a determining factor of the latter. See *Summary Record of 10th Meeting*, U.N. Doc. A/CONF.183/C.1/SR.10, ¶¶ 18, 22 (1998). Zimbabwe stated that the gravity threshold dispels the concern that the ICC’s effectiveness will be undermined by inclusion of minor breaches in crimes within its jurisdiction. See *Summary Record of 36th Meeting*, U.N. Doc. A/CONF.183/C.1/SR.36, ¶ 13, 32 (1998). Amnesty International, which commented extensively on the Draft Statute throughout the negotiating process, also supported the notion that the Prosecutor should have sufficient flexibility to forego an investigation on the basis of insufficient gravity, even where the Court possessed jurisdiction. See Amnesty International, *The International Criminal Court, Making the Right Choices, Part II: Organizing the Court and Guaranteeing a Fair Trial*, IOR 40/11/97, § II.B.2 (July 1997) [hereinafter Amnesty International] (stating that “[t]he criterion enunciated in Article 26 (1) of the ILC draft statute for the prosecutor to decline to

the draft through the Preparatory Committee's August 1997 session, and remained unchanged for the remainder of the negotiating process, even though the subject matter jurisdiction of the Court was eventually limited to a few core crimes.²⁹

C. ARTICLE 17(1)(D) OF THE ROME STATUTE

As noted earlier, Article 17(1)(d) of the Rome Statute is nearly identical to the language originally proposed as Article 35.³⁰ Thus, as aptly summarized in one commentary on the Rome Statute's drafting history, "the Statute has always had threaded through it the idea of gravity—that the Court should hear only the most serious cases of truly international concern."³¹ This idea, in turn, seems to have been motivated by a desire among the drafters that the ICC "be a forum for trying major offenders, rather than pursuing perpetrators of isolated acts falling under the Court's jurisdiction."³² At the same

initiate an investigation is too rigid. That article provides that 'the Prosecutor shall initiate an investigation unless the prosecutor concludes that there is no possible basis for a prosecution under this Statute.' This could be read to require that the prosecutor would have to expend finite resources to investigate every case conceivably falling within the jurisdiction of the court regardless of the scale or gravity of the particular crimes, the quality of the evidence and other legitimate factors").

29. See, e.g., Press Release, *supra* note 14 (noting that, when some ICC Preparatory Committee members raised the issue in 1997, Christian Wenaweser from Liechtenstein and other members sought to limit the ICC's jurisdiction to genocide, war crimes, and crimes against humanity). The Preparatory Committee eventually limited the ICC's jurisdiction to these core crimes rather than expand it to include crimes such as environmental destruction and terrorism. See *Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997*, U.N. Doc. A/AC.249/1997/L.9/Rev. 1 (1997) (limiting the ICC's jurisdiction to only crimes considered most serious by the international community).

30. Compare *ILC 46th Session Report, supra* note 12, at 52, with Rome Statute, *supra* note 3, art. 17(1)(d).

31. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 419 (2000); see also Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 904-05 (2002) (noting that the statute's attention to gravity "is logical given that the philosophical underpinning of the ICC—as represented in paragraphs 3 and 4 of the preamble, and in articles 1 and 5—is deterrence through the threat of prosecution and punishment of grave crimes that threaten the peace, security, and well-being of the world").

32. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY

time, neither the Rome Statute nor the later-adopted ICC Rules of Procedure and Evidence³³ define gravity, leaving open a number of important questions as to its objectives and requirements in practice.

II. INTERPRETATION AND APPLICATION OF THE GRAVITY THRESHOLD WITHIN THE INTERNATIONAL CRIMINAL COURT

The Office of the Prosecutor (“OTP”) was the first organ of the ICC to interpret and apply the concept of “gravity” under the Rome Statute, and the Prosecutor continues to refer to gravity considerations when explaining his office’s policy toward selecting particular investigations and cases over others.³⁴ In addition, Pre-

213 (2d ed. 2001); *see also* Sadat & Carden, *supra* note 31, at 419 n.228 (“The Statute now contains extremely high threshold and intent requirements for the substantive offenses, indicating an intent to prosecute major offenders (essentially leaders) rather than followers. This may prove problematic in operation, for in many cases, particularly if a State’s judicial system has collapsed, the ICC should be able to try more, rather than fewer, participants in mass crimes, hopefully without being overwhelmed. Achieving this balance was one of the most difficult tasks of the framers. Understanding the delicate compromise reached is equally difficult, for the Statute does not address the problem explicitly, but only indirectly through the concept of ‘gravity’ and the jurisdictional and material elements of the *chapeaux* to the crimes against humanity and war crimes articles.”).

33. Sadat & Carden, *supra* note 31, at 419; Murphy, *supra* note 11, at 282 (stating that, “[a]lthough the concept of gravity is a central tenet of international criminal justice, the Statute provides little by way of explanation into what this means in practice”). At least two states did call for clarification of the term “gravity” during the drafting process. Venezuela, for example, in its comments to the Ad Hoc Committee dated March 14, 1995, stated that “vague, imprecise expressions must be avoided, since they may create difficulties when the time comes to put the provisions of the statute into practice.” *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report to the Secretary General*, U.N. Doc. A/AC.244/1/Add.1 (1995) [hereinafter *Comments to the Ad Hoc Committee*]. Later, at the Rome Conference, Chile noted the need to clearly explain the “vague reference” to sufficient gravity warranting further action by the Court. *Summary Record of 11th Meeting*, U.N. Doc. A/CONF.183/C.1/SR.11, ¶ 22, 29 (1998). It is unclear from the drafting history why these calls for greater clarification were not addressed in the final Statute.

34. Luis Moreno-Ocampo, *Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives*, 21 AM. U. INT’L L. REV. 497, 498 (2006) (discussing the importance, yet challenging character, of gravity in the selection of cases to be heard before the ICC).

Trial Chamber I has set forth its own understanding of Article 17(1)(d).³⁵

A. OFFICE OF THE PROSECUTOR

1. *General Interpretation*

As suggested above, the Prosecutor of the ICC has treated gravity not only as a hurdle to satisfying the admissibility of a situation or a case,³⁶ but also as “one of the most important criteria for selection of [the OTP’s] situations and cases.”³⁷ In terms of the criteria considered by the Prosecutor in analyzing the gravity of a situation or case, statements by the OTP have pointed to one or more of the following factors, some of which appear to overlap:

- the number of persons killed;
- the number of victims, particularly in the case of crimes against “physical integrity,” such as willful killing or rape;
- the severity of the crimes;
- the scale of the crimes;

35. See, e.g., Prosecutor v. Dyilo, *supra* note 10, ¶¶ 44, 45 (interpreting the gravity threshold provided under Article 17(1)(d)).

36. In the context of the ICC, the Court’s operations are divided into two broad categories: “situations” and “cases.” According to Pre-Trial Chamber I, “situations” are “generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” Situation in the Democratic Republic of Congo, Case No. ICC-01/04-tEN-Corr, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, ¶ 65 (Jan. 17, 2006). In other words, the “situation” refers to the operations of the ICC designed to determine whether crimes have been committed within a given country that should be investigated by the Prosecutor. By contrast, “cases” are defined as “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects” and entail “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.” *Id.*

37. Moreno-Ocampo, *supra* note 34, at 498; see also Murphy, *supra* note 11, at 284 (stating that “[c]rimes within the jurisdiction of the ICC are outlined in Articles 6 through 8 (genocide, crimes against humanity, and war crimes) of the Rome Statute, but Article 17 also requires that, in addition, the case must be of sufficient gravity to justify action by the Court. This admissibility threshold is of the utmost importance in determining prosecutorial policy”).

- the systematicity of the crimes;
- the nature of the crimes;
- the manner in which those crimes were committed; and
- the impact of the crimes.³⁸

In addition, the Prosecutor has made clear that, given the “global character of the ICC, its statutory provisions and logistical constraints,” the OTP will generally “focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”³⁹ Thus, as stated in a 2003

38. See, e.g., LUIS MORENO-OCAMPO, STATEMENT AT THE INFORMAL MEETING OF LEGAL ADVISORS OF MINISTRIES OF FOREIGN AFFAIRS 6 (Oct. 24, 2005), available at http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf [hereinafter MORENO-OCAMPO, INFORMAL MEETING OF LEGAL ADVISORS] (“We are currently in the process of refining our methodologies for assessing gravity. In particular, there are several factors that must be considered. The most obvious of these is the number of persons killed—as this tends to be the most reliably reported. However, we will not necessarily limit our investigations to situations where killing has been the predominant crime. We also look at number of victims of other crimes, especially crimes against physical integrity. The impact of the crimes is another important factor.”); ROD RASTAN, THE POWER OF THE PROSECUTOR IN INITIATING INVESTIGATIONS 7 (2007), available at <http://www.icclr.law.ubc.ca/Site%20Map/ICC/PoweroftheProsecutor.pdf> (stating that, “[i]n practice, in determining whether the situation is of sufficient gravity, the Office will consider issues of severity; scale; systematicity; impact; and particularly aggravating aspects”); ICC, OFFICE OF THE PROSECUTOR, REPORT ON THE ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS (JUNE 2003-JUNE 2006) 6 (2006), available at http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf [hereinafter ICC, FIRST THREE YEARS] (stating that, “factors relevant in assessing gravity include: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes”).

39. ICC, Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 7, September 2003, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf; see also MORENO-OCAMPO, INFORMAL MEETING OF LEGAL ADVISORS, *supra* note 38, at 5-6 (“Experience shows that the situations faced by the Court tend to involve large-scale commission of crimes, with an untold numbers of victims as well as many alleged perpetrators. As a global and permanent institution, the ICC will often be confronted with multiple situations of this nature . . . we have developed strategies that take into account the global nature of the ICC and allowing us to handle concurrently several situations, while respecting our limited resources. One of the most important elements of this strategy is to focus investigative and prosecutorial

policy paper released by the OTP, the “concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission.”⁴⁰ Nevertheless, in announcing his policy, the Prosecutor was careful to acknowledge that “[i]n some cases, the focus of an investigation by the [OTP] may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.”⁴¹

2. Application

The Prosecutor has stressed the importance of gravity when explaining both his approach to determining whether to investigate a particular situation and his decisions regarding whether to prosecute particular cases.

a. Situations

Between July 2002, when the Rome Statute entered into force, and February 2006, the Office of the Prosecutor had received 1,732 communications from individuals or groups in at least 103 different countries regarding alleged crimes within the jurisdiction of the Court. The OTP also received 3 referrals from states and 1 referral from the United Nations Security Council.⁴² Irrespective of the source of information sent to the OTP, the Office has indicated that it conducts an initial evaluation of each communication received to determine whether there is a “reasonable basis” to proceed with an investigation.⁴³

efforts and resources on those who bear the greatest responsibility for the most serious crimes . . .”).

40. See RASTAN, *supra* note 38, at 7 (“The global character of the ICC, its statutory provisions and logistical constraints, in turn, support the policy decision of focusing, as a general rule, the Office’s investigative and prosecutorial efforts and resources on those who bear the greatest responsibility for those crimes.”).

41. ICC, Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 3, September 2003, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

42. ICC, Office of the Prosecutor, *Update on Communications Received by the Office of the Prosecutor of the ICC*, at 1, 10 (Feb. 10, 2006).

43. ICC, Office of the Prosecutor, *Annex to the “Paper on Some Policy Issues Before the Office of the Prosecutor”: Referrals and Communications 1* (Sept. 2003), available at http://www.icc-cpi.int/library/organs/otp/policy_annex_final

In terms of choosing which situations to investigate, the OTP developed a three-tiered process for analyzing information regarding potential crimes within the jurisdiction of the Court.⁴⁴ The first phase “is an initial review to identify those communications that manifestly do not provide any basis for further action.”⁴⁵ For example, the Prosecutor responded to information regarding alleged crimes against humanity committed in Venezuela by saying that, based upon communications received and a review of external sources, there was insufficient evidence establishing a “widespread or systematic attack against a civilian population,” as required under the Rome Statute’s definition of crimes against humanity.⁴⁶ Thus, it does not seem that the OTP ever even considered the gravity of the alleged crimes in Venezuela, as it determined during the first stage of inquiry that the Court lacked jurisdiction.⁴⁷

The second phase of the Prosecutor’s analysis is an examination of the “seriousness” of those crimes that presumably do fall within the jurisdiction of the Court in order to determine if the situations are of sufficient gravity to warrant the attention of the ICC.⁴⁸ The Prosecutor’s decision to forego an investigation into war crimes allegedly committed by British forces in Iraq illustrates the distinction between the first two steps of the Prosecutor’s analysis. According to the OTP, an initial evaluation of the information submitted regarding crimes in Iraq established that there was a “reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman

_210404.pdf [hereinafter Office of the Prosecutor Annex] (explaining that “neither referrals nor private communications automatically ‘trigger’ the powers of the Prosecutor”).

44. *See id.*

45. *Id.* at 7.

46. Letter from Luis Moreno-Ocampo, Chief Prosecutor, ICC, Concerning the Situation in Venezuela, at 3-4, 9 (Feb. 9, 2006), available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf [hereinafter Moreno-Ocampo, Letter Concerning Situation in Venezuela].

47. *Id.* (explaining that the situation in Venezuela cannot be classified as an armed conflict and therefore does not come within the jurisdiction of the Court).

48. Office of the Prosecutor Annex, *supra* note 43, at 3-4 (identifying the second phase as a “more detailed legal and factual analysis of significant communications”).

treatment.”⁴⁹ Hence, the situation in Iraq satisfied the Prosecutor’s first level of analysis. Nevertheless, the Prosecutor concluded that the situation in Iraq “did not appear to meet the required threshold of the Statute” at the second level of analysis.⁵⁰ He explained:

The number of potential victims of crimes within the jurisdiction of the Court in this situation—4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment—was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.⁵¹

The Prosecutor also noted that, for war crimes, “a specific gravity threshold is set down in Article 8(1) [of the Rome Statute], which states that ‘the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.’”⁵² While this “threshold is not an element of the crime,” the Prosecutor explained, it does

49. Letter from Luis Moreno-Ocampo, Chief Prosecutor, ICC, Concerning the Situation in Iraq, at 8 (Feb. 9, 2006), available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf [hereinafter Moreno-Ocampo, Letter Concerning Situation in Iraq].

50. *Id.* at 8.

51. *Id.* at 9. In contrast to his letter explaining the lack of sufficient gravity in Iraq, the Prosecutor has stressed the evident gravity present in each of the three situations currently under investigation by the OTP. See, e.g., ICC, Office of the Prosecutor, *Background: Situation in the Central African Republic* (May 22, 2007), available at http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_A_EN.pdf (stating that, “according to all the information available to the OTP, the alleged crimes, notably killings and large-scale sexual crimes were of sufficient gravity to warrant an investigation”); ICC, FIRST THREE YEARS, *supra* note 38, at 6-7 (“After thorough analysis, the Office concluded that the situations in the Democratic Republic of the Congo (DRC) and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court. The situation in Darfur, the Sudan, referred to the Prosecutor by the Security Council, also clearly met the gravity standard.”).

52. Moreno-Ocampo, Letter Concerning Situation in Iraq, *supra* note 49, at 8.

“provide guidance that the Court is intended to focus on situations meeting these requirements.”⁵³

Third, looking at those situations likely to be admissible before the Court—in other words, those situations that fall within the Court’s jurisdiction *and* meet the gravity threshold⁵⁴—the OTP will conduct “advanced analysis and planning” pursuant to Article 53 of the Statute,⁵⁵ which provides in part that the Prosecutor may decline to initiate an investigation where, “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁵⁶

b. Cases

With respect to individual cases, the Prosecutor has said: “case selection is carried out through careful analysis based on the

53. *Id.*

54. Of course, the Prosecutor must also consider whether a situation or case would be inadmissible under *any* of the provisions of Article 17(1), including:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; [and]
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20

Rome Statute, *supra* note 3, art. 17(1)(a)-(c).

55. Office of the Prosecutor Annex, *supra* note 43, at 3-4 (mandating that the OTP conduct an investigation as expeditiously as possible).

56. Rome Statute, *supra* note 3, art. 53(1)(c). Although the term “interests of justice” was left undefined by the drafters of the Rome Statute, it has generally been interpreted to mean weighing “between the imperative of justice and the imperative of peace.” Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT’L CRIM. JUST. 162, 178 (2005). Matthew Brubacher suggests that it “requires the Prosecutor to take account of the broader interests of the international community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction.” Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. INT’L CRIM. JUST. 71, 81 (2004).

principles of objectivity and impartiality, and in accordance with the criteria set out in Article 53 of the Rome Statute,” among “the most important of [which] is gravity.”⁵⁷ More specifically, the Prosecutor first tries to obtain “as comprehensive a picture as possible of the crimes allegedly committed.”⁵⁸ From this overall picture, he identifies “particularly grave events”⁵⁹ and then traces liability back to those “most responsible.”⁶⁰

According to the Prosecutor, gravity was the dominant consideration guiding the selection of his first case in Northern Uganda, where the OTP has investigated crimes allegedly committed by both the Lords Resistance Army (“LRA”) and the national army, or Uganda Peoples Defence Forces (“UPDF”).⁶¹ In October 2005, the OTP announced that it was charging five members of the LRA under the Rome Statute, but would not yet bring charges against any member of the government-led forces.⁶² The Prosecutor explained his decision as follows:

The criteria [*sic*] for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more

57. MORENO-OCAMPO, INFORMAL MEETING OF LEGAL ADVISORS, *supra* note 38, at 6.

58. ICC, *Second Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593*, at 2 (Dec. 13, 2005), available at http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf [hereinafter *Second Report of the Prosecutor*].

59. *Id.*

60. MORENO-OCAMPO, INFORMAL MEETING OF LEGAL ADVISORS, *supra* note 38, at 7.

61. Press Release, ICC, *President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC* (Jan. 24, 2004), available at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html (documenting the Ugandan president's referral of the situation concerning the LRA to the ICC's prosecutor); see also LUIS MORENO-OCAMPO, STATEMENT BY THE CHIEF PROSECUTOR ON THE UGANDA ARREST WARRANTS (Oct. 14, 2005), available at http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf [hereinafter MORENO-OCAMPO, UGANDA ARREST WARRANTS STATEMENT] (making clear that the Prosecutor's investigation would cover *all crimes* committed in the region, including the alleged crimes of the UPDF).

62. See MORENO-OCAMPO, UGANDA ARREST WARRANTS STATEMENT, *supra* note 61, at 4-6 (identifying and outlining the crimes committed by the five charged members of the LRA).

numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA.⁶³

Gravity has also played an important role in guiding the OTP's investigation of the situation in the Democratic Republic of Congo ("DRC"). The Prosecutor first began looking at crimes allegedly committed in DRC in July 2003 and ultimately received a referral from the DRC government in March 2004.⁶⁴ The Prosecutor began his investigation by making a gravity assessment of the entire country and identifying Ituri as the region where the gravest crimes had been committed; he then identified the most serious incidents and focused his investigation on the persons most responsible for those crimes.⁶⁵ In a speech delivered to the Legal Advisors to Ministries of Foreign Affairs in 2005, the Prosecutor explained:

Given the scale of the situation, we expect to be investigating in the DRC for a long duration. Therefore, we are working sequentially, starting with one or two cases, selected on the basis of gravity, while continuing to develop other cases. We have focused our investigation through

63. *Id.* at 2-3; *see also* LUIS MORENO-OCAMPO, STATEMENT AT THE FOURTH SESSION OF THE ASSEMBLY OF STATES PARTIES 2 (Nov. 28, 2005), *available at* http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051128_English.pdf [hereinafter MORENO-OCAMPO, FOURTH SESSION STATEMENT] (reaffirming that in the Uganda case, the ICC investigated all groups that had committed crimes there, not just the LRA). The Prosecutor also noted that his office "selected our first case based on gravity" and documented that over a two-year period, "the Lord's Resistance Army (LRA) was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks." *Id.* Moreno-Ocampo further asserted that, given these statistics, it "was clear that we must start with the LRA." *Id.*; *see also* Moreno-Ocampo, *supra* note 34, at 501 ("Some people say that the only way to retain our impartiality is to prosecute both the LRA and the UPDF. However, I think that impartiality means that we apply the same criteria equally to all sides. A major criterion is gravity. There is no comparison of gravity between the crimes committed by the Ugandan army and by the LRA—the crimes committed by the LRA are much more grave than those committed by the Ugandan army. I continue to collect information on allegations against the UPDF. Then I will determine whether the gravity and complementarity requirements of the Statute are met for an investigation.").

64. *See generally* The Secretary-General, *Twentieth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, delivered to the Security Council*, U.N. Doc. S/2005/832 (Dec. 28, 2005) (describing the situation in the DRC leading to the referral of the case to the ICC).

65. MORENO-OCAMPO, INFORMAL MEETING OF LEGAL ADVISORS, *supra* note 38, at 7.

analysis . . . first, we confirmed that the North Eastern region of DRC (including Ituri) was the area with the gravest crimes within our temporal jurisdiction; second, we identified the most serious incidents; and third, we traced responsibilities back to the persons most responsible. Further cases will be developed in the future, on the basis of Statute criteria.⁶⁶

Finally, in the Darfur situation, the Security Council adopted Resolution 1593 which referred the situation in that region to the ICC.⁶⁷ After deciding that there was a reasonable basis to initiate an investigation, the Prosecutor outlined how the investigation would proceed in the following terms:

In the first phase of the investigation the Office collects information relating to the universe of crimes alleged to have taken place in Darfur, as well as the groups and individuals responsible for those crimes In the second phase of the investigation the Prosecutor will select specific cases for prosecution Accordingly, the Office has collated as comprehensive a picture as possible of the crimes allegedly committed in Darfur since 1 July 2002 From this over-all picture the Office has identified particularly grave events.⁶⁸

B. PRE-TRIAL CHAMBER I

The first and only judicial interpretation of the gravity threshold under the Rome Statute came from Pre-Trial Chamber I (“PTC I”), which discussed the requirements of Article 17(1)(d) in the context of evaluating the Prosecutor’s application for an arrest warrant against Thomas Lubanga Dyilo. PTC I charged Mr. Lubanga, the first suspect identified in the DRC situation,⁶⁹ with enlisting and conscripting children below the age of fifteen to participate actively in hostilities.⁷⁰ PTC I brought the charges against Mr. Lubanga in his capacity as the leader of the *Union des patriotes congolais* (“UPC”),

66. *Id.* at 6-7.

67. See ICC, Office of the Prosecutor, *Fact Sheet: The Situation in Darfur, the Sudan*, available at http://www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf (describing the U.N. Security Council referral to the Prosecutor of the situation in Darfur and the ICC’s processes since that referral).

68. *Second Report of the Prosecutor*, *supra* note 58, at 2-3.

69. *Prosecutor v. Dyilo*, *supra* note 10.

70. *A Word from the Prosecutor* (ICC), Nov. 2006, http://www.icc-cpi.int/library/about/newsletter/10/en_09.html.

a rebel movement operating in the Ituri region of the DRC, and its armed wing, the *Forces patriotiques pour la liberation du Congo* (“FPLC”).⁷¹

As an initial matter, the Pre-Trial Chamber noted the distinction between the “gravity threshold” under Article 17(1)(d) of the Rome Statute and the “gravity-driven” crimes within the jurisdiction of the Court:

The Chamber . . . observes that this gravity threshold is in addition to the drafters’ careful selection of the crimes included in articles 6 to 8 of the Statute, a selection based on gravity and directed at confining the material jurisdiction of the Court to the “most serious crimes of international concern.” Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.⁷²

The Chamber also confirmed:

The gravity threshold provided for under Article 17(1)(d) of the Statute must be applied at two different stages: (i) at the stage of initiation of the investigation of a situation, the relevant situation must meet such a gravity threshold and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold provided within that provision.⁷³

PTC I next addressed the requirements of the gravity threshold at the case stage, as this was the relevant inquiry for purposes of analyzing the Prosecutor’s request for an arrest warrant. As an initial matter, the Chamber performed a “contextual interpretation,” determining that “the fact that the gravity threshold of [A]rticle 17(1)(d) of the Statute is in addition to the gravity-driven selection of crimes included within the material jurisdiction of the Court indicates that the relevant conduct must present particular features which render it especially grave.”⁷⁴ It continued:

71. See Prosecutor v. Dyilo, *supra* note 10, ¶¶ 70-73 (finding that Mr. Lubanga’s position in the UPC and the FPLC made him the most responsible for its policy of conscripting and using children under the age of fifteen in armed conflicts).

72. *Id.* ¶ 41 (emphasis added).

73. *Id.* ¶ 44.

74. *Id.* ¶ 45.

The Chamber holds that the following two features must be considered. First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale. If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes . . . included within the material jurisdiction of the Court. Second, in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community.⁷⁵

Thus, in the view of PTC I, conduct “must be” either systematic or large-scale to satisfy the gravity threshold of Article 17(1)(d).⁷⁶ In addition, the “social alarm” caused by the conduct must be given “due consideration.”⁷⁷ The Chamber did not elaborate as to how these factors themselves are to be understood, nor did it mention any additional factors as relevant to the gravity determination.

PTC I then performed a “teleological interpretation” of the gravity requirement.⁷⁸ Specifically, the Chamber viewed Article 17(1)(d) against the “backdrop” of Paragraph 5 of the Rome Statute’s Preamble, which “emphasizes that the activities of the Court must seek to ‘put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’”⁷⁹ According to the Chamber, this teleological interpretation led to the conclusion that the “gravity threshold is a key tool provided by the drafters to maximize the Court’s deterrent effect.”⁸⁰ As a result, PTC I continued, “the Chamber must conclude that any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention,”⁸¹ which in turn led it “to the conclusion that other factors, in addition to the gravity of the relevant conduct, must be considered when determining whether a given case meets [the gravity] threshold.”⁸² Elaborating on this point, PTC I held:

75. *Id.* ¶ 46.

76. *Id.*

77. *Id.*

78. *See generally id.* ¶¶ 47-54.

79. *Id.* ¶ 47.

80. *Id.* ¶ 48.

81. *Id.*

82. *Id.* ¶ 49.

[T]he additional gravity threshold provided for in [A]rticle 17(1)(d) of the Statute is intended to ensure that the Court initiates cases only against the *most senior leaders suspected of being the most responsible for the crimes* within the jurisdiction of the Court allegedly committed in any given situation under investigation.⁸³

It justified the criteria by asserting that individuals who are “at the top” of the entities “allegedly responsible for the systematic or large scale commission of crimes within the jurisdiction of the Court . . . are the ones who can most effectively prevent or stop the commission of those crimes.” It also added:

[O]nly by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximized because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.⁸⁴

Pre-Trial Chamber I summed up its understanding of the gravity threshold by stating that a case will meet the requirements of the Article 17(1)(d) if the following three questions can be answered affirmatively:

- (i) Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)?;
- (ii) Considering the position of the relevant person in the State entity, organi[z]ation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and

83. *Id.* ¶ 50 (emphasis added). This additional factor is itself determined by reference to three sub-factors: (i) the rank of the persons—for instance, whether they are the most senior leaders; (ii) the role played by that person, whether by acting or failing to act, in the commission of systematic or large scale crimes within the jurisdiction of the Court; and (iii) the role played by the state entities, organizations or armed groups to which the person belonged in the overall commission of crimes within the jurisdiction of the Court. *Id.* ¶¶ 51-52.

84. *Id.* ¶¶ 53-54.

(iii) Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organizations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organi[z]ations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?⁸⁵

Notably, the Chamber recognized the fact that the Office of the Prosecutor had already indicated that it considers similar factors in analyzing the gravity of a given situation or case.⁸⁶ However, PTC I also stated that the factors outlined in its decision were not discretionary considerations, but rather necessary conditions for meeting the gravity threshold under the Rome Statute.⁸⁷

Applying its newly-defined test to the case against Mr. Lubanga, Pre-Trial Chamber I first found that the conduct alleged by the Prosecutor against the suspect—including the enlistment, conscription, and use of “hundreds of children under the age of fifteen” in hostilities⁸⁸—caused “social alarm” to the international community based on the extent of the relevant policy and practice.⁸⁹ The Court then concluded that Lubanga fulfilled the “senior leaders” requirement, finding reasonable grounds to believe that the accused had been president of the UPC since its foundation in 2000, and the commander-in-chief of the UPC’s armed forces, the FPLC, throughout 2002 and 2003.⁹⁰ Furthermore, the Pre-Trial Chamber noted that Lubanga

exercised *de facto* authority which corresponded to his positions as the first and only president of the UPC and Commander-in-Chief of the FPLC, which included *inter alia* the authority to negotiate, sign and implement ceasefires or peace agreements and participate in negotiations

85. *Id.* ¶ 63.

86. *See id.* ¶ 61 (“[T]he Chamber observes that the Prosecution has already adopted some of the factors that the Chamber considers part of the core content of the gravity threshold provided for in article 17(1)(d) of the Statute.”).

87. *Id.* ¶ 62.

88. *Id.* ¶¶ 65-66.

89. *Id.* ¶ 66.

90. *Id.* ¶ 67.

relating to controlling access of [the U.N. Mission in the DRC] and other U.N. personnel

to parts of territory of Ituri under UPC/FPLC control.⁹¹

Finally, the Court held that there was reason to believe Lubanga was among those “most responsible” for the alleged crimes based on his “ultimate control over the UPC/FPLC’s alleged policy/practice of enlisting . . . and using to participate actively in hostilities children under the age of fifteen.”⁹² Indeed, the Court concluded that Lubanga’s role in the relevant crimes “could not have been more relevant.”⁹³ Significantly, Pre-Trial Chamber I acknowledged that the UPC/FPLC was “only a regional group,” and that “during the relevant time there were in addition to the UPC/FPLC a number of other regional armed groups involved in the armed conflict in Ituri.”⁹⁴ Nevertheless, the Court held that Lubanga may be considered among the “senior leaders suspected of being most responsible” for the crimes due to his leadership position and his “unique role” in the UPC/FPLC’s adoption and implementation of the policy and practice of recruiting children for active participation in armed hostilities.⁹⁵ This finding suggests that one may be among those “most responsible” even if the Court knows other individuals who bear similar or even greater responsibility for a particular crime than the suspect.

III. ANALYSIS AND RECOMMENDATIONS

Generally speaking, the application of the gravity threshold by both Pre-Trial Chamber I and the Office of the Prosecutor has been consistent with the intent of the Rome Statute’s drafters, as well as the overall purposes envisioned for the International Criminal Court, which include combating impunity and maximizing deterrence. Nevertheless, there are aspects of both the Chamber’s and the Prosecutor’s interpretation and application of the gravity threshold that are worth fine-tuning. We therefore offer the following

91. *Id.* ¶ 68.

92. *Id.* ¶ 70.

93. *Id.*

94. *Id.* ¶ 71.

95. *Id.* ¶ 73.

recommendations aimed at improving the process of selecting investigations and prosecutions, and of evaluating the admissibility of situations and cases, which we believe, in turn, will increase public perceptions of the credibility and legitimacy of the ICC.

A. PRE-TRIAL CHAMBER I'S INTERPRETATION OF GRAVITY THRESHOLD

Pre-Trial Chamber I's February 2006 interpretation of the Rome Statute's gravity threshold carries potentially significant consequences for the operations of the ICC because it is the sole judicial interpretation available under Article 17(1)(d) to date. Indeed, no other decision of the Court contains any discussion of gravity as a condition of admissibility, despite PTC I's holding that "the gravity threshold provided for under [A]rticle 17(1)(d) of the Statute *must* be applied" at both the situation phase and the case phase of proceedings.⁹⁶ Furthermore, Pre-Trial Chamber I's February 2006 decision purports to set forth "necessary" conditions for satisfying the gravity threshold,⁹⁷ which means that the impact of the decision could substantially affect the types of situations investigated and cases prosecuted before the ICC.

As explained above, Pre-Trial Chamber I determined that the gravity analysis involves requirements relating to both the nature of the conduct and the rank and role of the perpetrator.⁹⁸ While the decision is helpful in that it provides guidance as to how "gravity"—a term not defined in the Rome Statute—will be interpreted by the ICC, a court with limited resources that must focus on those crimes that most warrant international prosecution, we believe that the Pre-Trial Chamber has interpreted the prerequisites for satisfying Article 17(1)(d) too strictly. Specifically, we recommend that the standard set forth by the Chamber not be applied so rigidly as to exclude exceptional circumstances which might nevertheless satisfy the purpose of the gravity threshold.

96. *Id.* ¶ 44 (emphasis added).

97. *Id.* ¶ 62.

98. *See id.* ¶ 70 (stating that Lubanga was both senior leadership and the driving force behind the recruitment of child soldiers).

1. *ICC Should Consider Factors Other Than Systematicity or Scale and Social Alarm in Analyzing Whether Conduct Satisfies Article 17(1)(d)*

In terms of determining what conduct satisfies Article 17(1)(d), PTC I held that “the conduct which is the subject of a case *must be* either systematic (pattern of incidents) or large-scale.”⁹⁹ In addition, the Chamber said that, “in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community.”¹⁰⁰ However, as noted earlier, the Chamber did not elaborate as to how these factors themselves are to be understood, nor did it mention any additional factors as relevant to the gravity determination.¹⁰¹

In announcing the requirement that, to satisfy the Article 17(1)(d) threshold, conduct must be either “systematic” or “large-scale,” the PTC observed: “If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes” falling within the jurisdiction of the Court.¹⁰² This statement may appear obvious enough at first, but in fact, it suggests that the term “gravity” is synonymous with the terms “systematic” or “large-scale,” thereby ignoring the fact that the drafters of the gravity threshold chose to use the former language and not the latter. Thus, while it is likely that the majority of crimes considered for prosecution before the ICC will involve conduct committed on a systematic or large-scale basis, PTC I’s decision *requiring* such systematicity or scale as a condition of Article 17(1)(d) in every case does not appear warranted, particularly where, for instance, “the number of victims would be relatively small in comparison to other situations, but where the impact was devastating to the countries concerned.”¹⁰³ To illustrate, if one considers the 2001 terrorist attack on the World Trade Center

99. *Id.* ¶ 46.

100. *Id.*

101. *Cf. id.* (demonstrating that the PTC stated these factors but did not discuss their definitions).

102. *Id.*

103. CHRISTOPHER KEITH HALL, SUGGESTIONS CONCERNING INTERNATIONAL CRIMINAL COURT PROSECUTORIAL POLICY AND STRATEGY AND EXTERNAL RELATIONS 21, 28 (2003), available at <http://www.icc-cpi.int/library/organs/otp/hall.pdf>.

in New York, the sheer number of victims may pale in comparison to other incidents of violence, but the impact of the attack on the United States was incomparable to anything the country has witnessed in recent history. A similar point is made by the following question posed by the ICC Prosecutor in 2006:

In the Congo a few months ago, guerrilla groups attacked and killed ten Blue Helmets [referring to United Nations forces]; their goal was to force the U.N. to withdraw. It would be catastrophic without the U.N. in the east of the Congo. Is gravity just the number of killings, or is it other factors, with wider-scale implications?¹⁰⁴

Yet another factor that seems particularly relevant to assessing “gravity” is the vulnerability of the targeted group. This is because looking at the sheer number of victims or the systematic nature in which crimes were committed does not take into account the particular suffering that may be inflicted on a population through attacks made on, for example, women, children, or disabled persons. An attack on religious or other revered community leaders may cause similarly heightened suffering.

It may be the case that PTC I’s reference to “social alarm” could account for some of these additional factors, but the Chamber did not explain the term, making it difficult to understand what, outside of the conscription and use of child soldiers in armed conflict, would constitute “social alarm.”¹⁰⁵ Furthermore, it is unclear why the Chamber has chosen to look to the social alarm caused by the alleged conduct in the “international community”; the impact on the community or nation where the crimes occurred seems a more meaningful standard, particularly in light of the Rome Statute’s broader goals of ending impunity and promoting deterrence.

The notion that “gravity” cannot always be determined by reference to scale or systematicity is supported by the practice of the *ad hoc* criminal tribunals for the former Yugoslavia (“ICTY”) and Rwanda (“ICTR”). While the statutes of these tribunals do not limit the admissibility of cases according to gravity, both the ICTY and the ICTR do apply the concept of “gravity” in the context of

104. Moreno-Ocampo, *supra* note 34, at 498.

105. See Prosecutor v. Dyilo, *supra* note 10, ¶ 46.

sentencing.¹⁰⁶ Furthermore, the overall purpose of analyzing the gravity of crimes within the jurisdiction of the ICTY and ICTR at the sentencing phase is similar to the larger purposes of the Rome Statute's overall gravity threshold—namely, ending impunity and maximizing deterrence.¹⁰⁷ Thus, although conducted under a different context by tribunals of a different nature, it is nevertheless instructive to examine the *ad hoc* tribunals' approach to the concept of gravity. Importantly, the relevant jurisprudence of those tribunals shows that, although "scale" is a key factor to be used in evaluating the gravity of a perpetrator's crimes,¹⁰⁸ a number of additional "aggravating factors" are examined, including the impact on the

106. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, S/25704/Add.1, *adopted by the Security Council* U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 23(2), U.N. Doc. S/RES/955 (Nov. 8, 1994) (noting that when imposing sentences, "the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person").

107. *See, e.g.*, Prosecutor v. Ntakirutimana & Ntakirutimana, Case No. ICTR-96-10, ICTR-96-17, Judgment and Sentence, ¶ 884 (Feb. 21, 2003), *available at* <http://69.94.11.53/ENGLISH/cases/NtakirutimanaE/judgement/ch5.htm> (explaining that, "the principle of gradation in sentencing . . . enables the Tribunals to distinguish between crimes which are of the most heinous nature, and those which, although reprehensible and deserving severe penalty, should not receive the highest penalties. The imposition of the highest penalties upon those at the upper end of the sentencing scale, such as those who planned or ordered atrocities, or those who committed crimes with especial zeal or sadism, enables the Chamber to punish, deter, and consequently stigmatize those crimes at a level that corresponds to their overall magnitude and reflects the extent of the suffering inflicted upon the victims"); Prosecutor v. Karera, Case No. ICTR-01-74-T, Judgment and Sentence, ¶ 572 (Dec. 7, 2007) ("[The Chamber] shall consider the principle of gradation in sentencing which enables it to punish, deter and consequently stigmatize the crimes considered, at a level that corresponds to their overall magnitude and reflects the extent of suffering inflicted upon the victims."); Prosecutor v. Krstic, Case No. IT-98-33, Judgment, ¶ 693 (Aug. 2, 2001) ("The practice of the Tribunal . . . reflects two objectives of a sentence: the need to punish an individual for the crimes committed and the need to deter other individuals from committing similar crimes."); Prosecutor v. Tadic, Case No. IT-94-1, Sentencing Judgment, ¶ 7 (Nov. 11, 1999) (stressing that "deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law") (internal citations omitted).

108. *See, e.g.*, Prosecutor v. Semanza, Case No. ICTR-97-20; Judgment and Sentence, ¶ 571 (May 15, 2003) (stating that the numbers of victims killed by the accused was an aggravating factor with respect to the crime of genocide because it speaks to the gravity of the offense).

victims;¹⁰⁹ the manner in which the crime was carried out;¹¹⁰ the role of the perpetrator in commission of the crimes;¹¹¹ and the vulnerability of the targeted group (for example, the vulnerability of women, children, or the handicapped).¹¹² Overall, however, the most dramatic feature revealed from a review of *ad hocs*' sentencing jurisprudence is the amorphous nature of the factors denoting gravity. This approach recognizes that each situation presents its own unique features indicative of the gravity of the crimes, typically demonstrated by a combination of factors. As noted above, the OTP has pointed to a variety of factors as relevant to determining the gravity of crimes, which largely overlap with the types of things

109. *Krstic*, Case No. IT-98-33, ¶ 703 (noting that “the circumstance that the victim detainees were completely at the mercy of their captors, [and] the physical and psychological suffering inflicted upon witnesses to the crime . . . [are] relevant in assessing the gravity of the crimes in this case,” as appropriate “consideration of those circumstances gives ‘a voice’ to the suffering of the victims”); *Prosecutor v. Krnojelac*, Case No. IT-97-25, Judgment, ¶ 512 (Mar. 15, 2002) (holding that “the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences”).

110. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Sentence, ¶ 18 (May 21, 1999) (holding that the “heinous means” by which the accused committed the crimes was an aggravating factor); *Krstic*, Case No. IT-98-33, ¶ 703 (considering “the ‘indiscriminate, disproportionate, terrifying’ or ‘heinous’ means and methods used to commit the crimes” as part of the Chamber’s gravity analysis).

111. *Prosecutor v. Serushago*, Case No. ICTR-98-39, Sentencing Judgment, ¶¶ 29-30 (Feb. 5, 1999) (stating that the fact that the Accused gave orders as a *de facto* leader and he ordered several people executed were found to be aggravating circumstances, as was his “voluntary participation” in the commission of the crimes); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sentence, ¶ 3 (Oct. 2, 1998) (stating that the Chamber considered the following to be aggravating factors: Akayesu “consciously chose to participate” in systematic killings; his status in government made him the most senior government personality in Taba and in this capacity he was responsible for protecting the population, which he failed to do; he “publicly incited people to kill”; he also ordered the killing of a number of persons; he participated in the killings; and he supported “the rape of many women in the bureau communal” through his presence and acts).

112. *Krstic*, Case No. IT-98-33, ¶ 702 (agreeing “with the Prosecutor that the number of victims and their suffering are relevant factors in determining the sentence and that the mistreatment of women or children is especially significant in the present case”); *Prosecutor v. Kvočka*, Case No. IT-98-30/1, Judgment, ¶ 702 (Nov. 2, 2001) (holding that “the sexual violence inflicted upon the women, and the discriminatory nature of the crimes . . . are relevant factors in assessing the gravity of the crimes”).

considered by the ICTY and the ICTR in their own approaches to gravity.¹¹³

In sum, while it is likely that the majority of crimes considered for prosecution before the ICC will involve conduct committed on a systematic or large-scale basis, PTC I's decision requiring such systematicity or scale as a condition of Article 17(1)(d) in every case does not appear warranted. Rather, the gravity analysis should be sufficiently flexible so as to allow the Court to consider exceptional circumstances, beyond scale and systematicity, as contributing to the gravity of a given case. In particular, factors such as the impact on victims, the manner in which the crimes were carried out, and the vulnerability of the victim population may weigh in favor of finding that a particular case meets the gravity threshold, even if it does not involve crimes on the same scale or the same degree of systematicity as might typically be seen in cases coming before the ICC.

2. Focusing on Senior Leaders Suspected of Being Most Responsible Is Prudent As a Matter of Policy, but Is Not Required by the Rome Statute

As explained above, the Prosecutor, as a matter of policy, has stated that the OTP will focus its investigative efforts on those bearing the greatest responsibility for alleged crimes within the jurisdiction of the Court.¹¹⁴ The "obvious intuitive appeal"¹¹⁵ of this approach has been well-summarized by one commentator:

[P]owerful considerations dictate that if one is to pursue a path of prosecution, and if one must make selections, it makes sense to give priority to high-level offenders, at least where those offenders exhibit a high degree of culpability. The planners and leaders of atrocities are

113. See *supra* note 38 and accompanying text (noting that the OTP has stated that the gravity analysis involves such factors as the number of persons killed; the number of victims, particularly in the case of crimes against "physical integrity," such as willful killing or rape; the severity of the crimes; the scale of the crimes; the systematicity of the crimes; the nature of the crimes; the manner in which crimes were committed; and the impact of the crimes).

114. See *supra* note 39 and accompanying text.

115. Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 628-29 (2007) (debating whether more serious offenders should always be the focus and noting that guilty, high-level commanders may be less morally culpable than their subordinates who participated directly in the primary offense).

broadly considered the most culpable, their arrest and prosecution is likely to have the greatest symbolic value and provide the greatest sense of justice for the largest number of victims, their incarceration is most likely to aid political transition, they provide a relatively narrow target for deterrence, and the deterrence resulting from their punishment, if effective, will have a broader impact than that of individual low-level perpetrators.¹¹⁶

At the same time, the Prosecutor has recognized that in some cases, the focus of an investigation may go wider than high-ranking officers.¹¹⁷ This approach was praised by Human Rights Watch, which has “welcome[d] the prosecutor’s policy of focusing on those who bear the greatest responsibility,” while also “urg[ing] the office to keep a degree of flexibility with respect to [its] implementation”¹¹⁸

Yet in February 2006, Pre-Trial Chamber I seemed to remove the flexibility announced in the Prosecutor’s stated policy.¹¹⁹ Specifically, PTC I held in the context of the *Lubanga* case that, viewed against the backdrop of the Rome Statute’s Preamble, Article 17(1)(d) must be seen as a “key tool provided by the drafters to maximize the Court’s deterrent effect,”¹²⁰ and that therefore “any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention.”¹²¹ As mentioned earlier, the Chamber then concluded that, in order to maximize the Court’s deterrent effect, cases should be initiated only against the “most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court.”¹²²

116. *Id.*

117. ICC, Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 3, Sept. 2003, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

118. ICC, Office of the Prosecutor, *Transcript, Second Public Hearing: NGOs and Other Experts*, at 6, available at http://www.icc-cpi.int/library/organs/otp/OTP_PH2_HGNGO.pdf; see also *infra* note 129 and accompanying text (explaining why, under certain circumstances, the ICC may want to prosecute individuals who are not senior leaders suspected of being the most responsible for the commission of crimes within the jurisdiction of the Court).

119. See *supra* note 83 and accompanying text.

120. Prosecutor v. Dyilo, *supra* note 10, ¶ 48.

121. *Id.* ¶¶ 47-48.

122. *Id.* ¶ 50; see also *supra* note 83 and accompanying text (describing the three sub-factors to be considered when determining whether an individual is the most senior leader responsible for the criminal activity).

While focusing on the so-called “big fish” may be wise as a matter of policy, PTC I’s interpretation of the threshold as *requiring* that cases be brought only against the “most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court”¹²³ is not necessarily supported by the Statute and its drafting history. Indeed, the Pre-Trial Chamber seems to have narrowed the personal jurisdiction of the ICC in a manner that was never contemplated by the drafters. Article 17(1) refers back to Article 1 of the Rome Statute,¹²⁴ which in turn states that the ICC “shall have the power to exercise its jurisdiction over *persons* for the most serious crimes of international concern, as referred to in this Statute.”¹²⁵ Thus, by contrast to other, non-permanent international criminal bodies, such as the Special Court of Sierra Leone (“SCSL”) and the Extraordinary Chambers in the Court of Cambodia (“ECCC”), the ICC’s personal jurisdiction is not expressly limited to any particular class or category of persons.¹²⁶ Moreover, the standard imposed by PTC I is very strict, requiring that the perpetrator be *both* a “senior leader” and among those “most responsible” for the alleged crime(s).¹²⁷ Applying this standard literally would presumably

123. Prosecutor v. Dyilo, *supra* note 10, ¶ 50.

124. Rome Statute, *supra* note 3, art. 17(1) (“Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where . . .”). Paragraph 10 of the Preamble provides: “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions . . .” *Id.* pmbl.

125. *Id.* art. 1 (emphasis added); *see also id.* pmbl. (referring simply to the “perpetrators” of “the most serious crimes of concern to the international community as a whole”).

126. *See* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Republic of Kampuchea, art. 1, NS/RKM/1004/006 (Oct. 27, 2004) (Revised translation by the Council of Jurists and the Secretariat of the Khmer Rouge Trial Task Force, Nov. 23, 2004) [hereinafter ECCC Establishment Law] (“The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979 . . .”); Statute of the Special Court for Sierra Leone, art. 1(1), Jan. 16, 2002 (“The Special Court shall, . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”).

127. *See supra* notes 82 and 83 and accompanying text.

prevent the ICC from prosecuting someone like “Comrade Duch,” a former member of the Khmer Rouge who has been indicted by the ECCC for crimes against humanity and war crimes allegedly committed at the Tuol Sleng prison, where thousands of people were imprisoned, tortured, and killed between 1975 and 1979.¹²⁸ Although Duch was not among the top leadership of the Khmer Rouge, the fact that the murder and torture of civilians was committed on such a widespread basis under his authority at the prison renders him subject to the personal jurisdiction of the ECCC, which includes individuals who were *either* among the “senior leaders” *or* those “most responsible” for the crimes within the jurisdiction of the Court.¹²⁹

Furthermore, as a practical matter, one can imagine situations where the objectives of the Rome Statute—including ending impunity, promoting deterrence, and giving voice to the victims of the world’s most heinous crimes¹³⁰—would be served through the prosecution of an individual who might not be described as among the “most senior leaders suspected of being most responsible.” For example, Human Rights Watch has pointed out that, “[i]n some contexts, pursuing those officials further down in the chain of command . . . could have a significant impact for victims on the ground and/or may be necessary for the implementation of an effective prosecutorial strategy in a particular country situation.”¹³¹

128. See, e.g., Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav, Alias “DUCH,” Criminal Case File No. 001/18-07-2007-ECCC-OCIJ, ¶ 29 (Dec. 3, 2007), available at http://www.eccc.gov.kh/english/cabinet/courtDoc/16/PTC_decision_appeal_duch_C5-45_EN.pdf.

129. ECCC Establishment Law, *supra* note 126, art. 1.

130. See Rome Statute, *supra* note 3, pmb1. (“Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity; . . . Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . .”).

131. ICC, Office of the Prosecutor, *Transcript, Second Public Hearing: NGOs and Other Experts*, at 7, available at http://www.icc-cpi.int/library/organs/otp/OTP_PH2_HGNGO.pdf. Using Darfur as an example, Ms. Mattioli explained:

For example, in the context of Darfur, HRW believes it is important for the ICC to prosecute state governors and provincial commissioners, as well as

Others have similarly argued that a “prosecutorial design that includes followers as well as leaders may often serve victim interests better than would a leaders-only design.”¹³² At least one commentator has also challenged the idea that a policy of deterrence is best served by focusing strictly on senior leaders, calling instead for the prosecution of a “cross-section of perpetrators.”¹³³ This commentator explains:

Prosecuting a cross-section of perpetrators may be desirable in terms not only of retribution but also of deterrence. In support of the strategy of

Janjaweed leaders. Our research suggests that their prosecution could have a tremendous impact for the victims on the ground by, for example, allowing victims who have been displaced as a result of the ‘ethnic cleansing’ campaign to return to their villages. In addition, going after mid-level ranks may have practical advantages in helping the prosecutor to build cases leading to those at the top level in the chain of command. As such, it may be beneficial to also bring forward cases involving mid-level perpetrators, at least initially, for prosecution in certain country situations.

Id.; see also Murphy, *supra* note 11, at 293 (arguing that the policy of focusing on senior leaders only may lead to an impunity gap because it “may exclude others equally culpable of heinous crimes, but who did not hold positions of authority”).

132. Madeline Morris, *Complementarity and Its Discontents: States, Victims, and the International Criminal Court*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 177, 187 (Dinah Shelton ed., 2000). Morris explains that in addition to being “concerned with leaders, victims pervasively express a deep and heartfelt desire that their particular perpetrators be brought to justice.” *Id.* Thus, while she recognizes that, “[o]bviously, not all leaders and not all followers can be prosecuted in most contexts of crimes of mass violence,” Morris believes that a prosecutorial strategy that includes both leaders and followers would mean that “at least some victims’ needs would be met and, more to the point, such prosecutions would constitute an acknowledgment of the interests of victims and of their legitimacy.” *Id.* In addition, Morris writes, “even for victims whose own individual perpetrators are not prosecuted, there may be symbolic retributive value in the prosecution, condemnation and punishment of a full cross-section of perpetrators, including followers as well as leaders.” *Id.* Jose Alvarez has made a similar point in the context of the Rwandan genocide. See Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 400 (1999) (“While international trials of a few Rwandan high-level perpetrators will provide some additional details about much that we already know, namely how the genocide was orchestrated and how the actual killings were organized, such trials will tell us next to nothing about those most directly involved in the killings or about their individual victims. They will not tell family members where victims are buried or the particular circumstances of their deaths. And they will not tell anyone how the average Rwandan, not in a position of authority, was co-opted into mass slaughter.”).

133. Morris, *supra* note 132, at 188.

prosecuting only the top leaders, the argument often is made that it is most important to prosecute the leaders because “without the leaders, these crimes would not occur.” It is equally true, however, that without the followers these crimes would not occur. Indeed, there are probably more than a handful of would-be leaders of crimes of mass violence whose dangerous aspirations are never realized for lack of followers. Applying deterrents at top, middle and lower levels of criminal hierarchies may be a more effective deterrence strategy, ultimately, than exclusive prosecution of those in leadership positions.¹³⁴

One way to resolve this issue would be to interpret PTC I’s February 2006 reference to “senior leaders” as including persons who, while not necessarily at the top of any military or political structure, exercised such authority with respect to the crimes at issue that they may nevertheless be treated as *de facto* leaders. As one commentator has explained:

In the [Pre-Trial] Chamber’s opinion, only by concentrating on this type of individual [*i.e.*, senior leaders suspected of being the most responsible] can the deterrent effects of the activities of the Court be maximized because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commissions of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted In this regard, the concept of “senior leader” does not preclude those holding no formal rank but who exercised significant *de facto* command or leadership positions.¹³⁵

This approach is supported by the jurisprudence of the *ad hoc* international criminal tribunal for the former Yugoslavia, which has in recent years limited itself to prosecuting only “senior leaders,” but has interpreted “senior leaders” as being satisfied by individuals who either carried a particular hierarchical rank or who may be considered senior due to their actual role in the commission of the crime.¹³⁶ However, it is not altogether obvious from the language of

134. *Id.*

135. See Murphy, *supra* note 11, at 290.

136. See, e.g., Prosecutor v. Ademi, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*, ¶ 29 (Sept. 14, 2005) (“As far as the level of responsibility of the Accused is concerned, the Referral Bench recalls that in light of the history and purpose of Rule 11 *bis*, the level of responsibility should be interpreted so as to include both the military rank of the Accused and their actual role in the commission of the crimes.”). Note that this decision was delivered in the context of Rule 11 *bis*, which allows the

PTC I's February 2006 decision that this is the approach that will be taken by the ICC going forward. For example, although PTC I stated that it will look to three sub-factors to determine if an individual is among the "most senior leaders suspected of being most responsible for the crimes"—namely, the rank of the person; the role played by that person in the commission of crimes within the jurisdiction of the Court; and the role played by the state entities, organizations, or armed groups to which the person belonged in the overall commission of crimes within the jurisdiction of the Court¹³⁷—it is unclear whether each of these factors must exist to support a finding that the person is a senior leader suspected of being most responsible, or whether one factor may outweigh another factor in a given case. Indeed, in summarizing its conditions for satisfying the gravity threshold, PTC I reiterated that among the questions needed to be answered affirmatively "before the Court will meet the gravity threshold" is the following: "*Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation.*"¹³⁸ Such language suggests that the Pre-Trial Chamber may *not* find the criterion of "senior leader" satisfied based on an individual's role in the commission of the relevant crimes alone.

In the event that the Chamber did intend to allow some flexibility in determining who is a "senior leader," such that it will not require that an accused have achieved some particular rank in a military or political hierarchy, this intent should be clarified. Moreover, as with our preceding recommendation regarding the inclusion of factors beyond "scale" and "systematicity" as part of the Court's analysis of the gravity of crimes in certain circumstances, flexibility might also prove useful with respect to determining whether a particular perpetrator meets the gravity threshold even if he or she is not among the "most senior" leaders "most responsible" for the relevant crimes.

ICTY to transfer cases *not* involving "senior leaders" to domestic jurisdictions. Thus, by stating that the level of responsibility should be interpreted as including "both" the military rank of the Accused and their actual role, the point is that *either* of these factors could lead to a conclusion that the Accused satisfies the "senior leaders" requirements and may not be transferred from the ICTY. *Id.*

137. See *Prosecutor v. Dyilo*, *supra* note 10, ¶¶ 51-52.

138. *Id.* ¶ 63 (emphasis added).

B. THE GRAVITY THRESHOLD VERSUS EXERCISE OF PROSECUTORIAL DISCRETION

As discussed above, the Prosecutor seems to apply the concept of gravity at two distinct stages in determining whether to initiate an investigation or pursue a particular prosecution. First, as a matter of statutory obligation, the Prosecutor considers whether the situation or case under consideration will be admissible before the ICC, which requires *inter alia* that the situation or case meet the gravity threshold set forth in Article 17(1)(d). Second, the Prosecutor has, as a matter of policy, stated that gravity is “one of the most important criteria for selection of [the OTP’s] situations and cases.”¹³⁹ In other words, even after the Prosecutor has satisfied himself that the jurisdiction and admissibility requirements of the Rome Statute have been met, he has apparently chosen, as a matter of prosecutorial discretion, to highlight the relative gravity of situations and cases as a means of determining which will be investigated and prosecuted.

Two related observations flow from this dual-use of gravity. The first is that it has not always been clear when the Prosecutor is talking about gravity as a requirement under the Rome Statute versus gravity as one of presumably many factors leading to the OTP’s decision to prosecute certain crimes over other crimes. For instance, the Prosecutor has repeatedly explained his decision to pursue an investigation of crimes committed by the Lord’s Resistance Army in Uganda—prior to looking at the alleged crimes of government forces—based on the determination that the crimes committed by the LRA “were much more numerous and of much higher gravity than alleged crimes committed by” the national army.¹⁴⁰ Notably, the Prosecutor did not say in this context—as he did with the overall

139. Moreno-Ocampo, *supra* note 34, at 498.

140. MORENO-OCAMPO, UGANDA ARREST WARRANTS STATEMENT, *supra* note 61, at 2-3; *see also* MORENO-OCAMPO, FOURTH SESSION STATEMENT, *supra* note 63, at 2 (“In Uganda, we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the Lord’s Resistance Army (LRA) was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA.”).

situation in Iraq, for example¹⁴¹—that the alleged conduct of government forces was insufficiently grave to be admissible in a case before the ICC. Rather, he has stressed that the LRA's conduct was *more* grave than that of the government forces. In other words, it appears that the Prosecutor's choice to investigate and prosecute the conduct of the LRA prior to looking into the alleged crimes of the government was based on an exercise of prosecutorial discretion, not as a result of the gravity requirement under Article 17(1)(d). If the Prosecutor is not careful to distinguish between considerations of gravity for purposes of determining whether a situation or a case is *admissible* under Article 17 of the Rome Statute, and considerations of gravity for purposes of determining which situations and cases, among those that are presumably admissible, will be investigated or prosecuted *as a matter of prosecutorial discretion*, the public perception of the Court may suffer. Public perception of the ICC is inextricably linked with establishing the Court's legitimacy, particularly in its early years of operations, and transparency as to how the Office of the Prosecutor determines which crimes are admissible before the Court, and of those crimes, which crimes will be investigated and prosecuted, is in turn essential to promoting public confidence in the ICC's work.¹⁴²

The second observation is that the public's trust in the work of the Court would likely be strengthened if the Prosecutor clearly communicated to the public that, once the statutory requirements governing the admissibility of a situation or case are met—including satisfaction of the gravity threshold—the *relative gravity* of crimes may be one factor among many that enters into the Prosecutor's ultimate decision to initiate an investigation or prosecute a case. The need for such clarity is illustrated by recent commentary raising concerns over the OTP's divergent approach to the selection of its first cases in the context of the Uganda situation and the DRC

141. Moreno-Ocampo, Letter Concerning Situation in Iraq, *supra* note 49, at 8-9 (“According to the available information, it did not appear that any of the criteria of Article 8(1) were satisfied.”).

142. *See, e.g.,* Côté, *supra* note 56, at 171 (“The international criminal tribunal, which has a mandate to examine armed conflicts of a political and/or ethnic nature where suspicion prevails and which needs to rapidly establish its credibility and independence, must exercise its powers in the most transparent way.”).

situation, respectively.¹⁴³ Specifically, referring to a statement by the OTP in which it explained that Thomas Lubanga Dyilo was charged as the first suspect in the DRC situation because he was facing “imminent release” from prison in the DRC¹⁴⁴—meaning that if the ICC delayed its case against Lubanga he may have evaded arrest—one commentator observed: “One might wonder, therefore, whether the selection of the Lubanga case was based on gravity or by his ‘possible imminent release.’ This shows contradiction and a clear deviation from the policy initially adopted by the OTP in relation to the gravity selection process.”¹⁴⁵ The commentator concluded that the OTP’s application of the gravity criterion “raises some concerns,” noting that in the case of Lubanga, the OTP “focused on crimes that are less serious than others committed within the context of grave events.”¹⁴⁶

It is worth noting, however, that the OTP may legitimately be persuaded by different factors in different contexts when selecting situations and cases, as the Rome Statute—like the statutes of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, as well as the practice of many national jurisdictions¹⁴⁷—allows the

143. Mohamed M. El Zeidy, *The Gravity Threshold Under the Statute of the International Criminal Court*, 19 CRIM. L. F. 35, 41 (2008).

144. ICC, FIRST THREE YEARS, *supra* note 38, at 8 (“In the situation in the DRC, the Office initially investigated a wide range of crimes allegedly committed, seeking to represent the broad range of criminality. The Office subsequently decided in its first case to focus on the crime of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. *The decision to focus on this crime was triggered by the possible imminent release of Thomas Lubanga Dyilo, who had been under arrest in the DRC for approximately one year before he was transferred to the Court.*”) (emphasis added).

145. El Zeidy, *supra* note 143, at 41.

146. *Id.* at 56-57.

147. See, e.g., Murphy, *supra* note 11, at 308 (“The International Military Tribunals did not deal with all the possible suspects. The Chief Prosecutors indicted a mere 24 before the Nuremberg Tribunal, and 28 in the Tokyo Tribunal. The prosecutors for the ICTY and ICTR also adopted a selective approach to the prosecution of suspects.”); Greenawalt, *supra* note 115, at 599 (“Questions of prosecutorial discretion . . . are not unique to the International Criminal Court. The structure of prosecutorial authority set forth in the Rome Statute closely resembles that typical of common law systems, in which [the] prosecutor, subject to varying degrees of judicial supervision, enjoy the primary authority to select and pursue criminal cases.”); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L LAW 510, 518 (2003) (“Since crime in virtually every country exceeds

Prosecutor ultimate discretion to choose where to initiate investigations and which cases to prosecute.¹⁴⁸ Indeed, as a practical matter, prosecutorial discretion is a necessary tool for ensuring a court's efficacy, particularly in post-conflict situations where the number of crimes admissible before a court will far outweigh the resources available to prosecute those crimes.¹⁴⁹ This fact is highlighted by the experiences of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda, which demonstrated that "even out of the group of the most serious crimes of concern to the international community as a whole, not all crimes committed can in practice be prosecuted."¹⁵⁰ As former Prosecutor of the ICTY and ICTR, Justice Louise Arbour, observed as early as 1997: The real challenge faced by the ICC Prosecutor will be "to choose from many meritorious complaints the appropriate ones for

the ability of the criminal justice system to adjudicate it, prosecutors must be able to exercise their discretion to pursue or decline particular cases in order to maintain a functioning criminal justice system.").

148. Murphy, *supra* note 11, at 293 (the Prosecutor's discretion is evidenced by the fact that "he or she is under no obligation to initiate proceedings once a situation has been referred to the OTP"); Brubacher, *supra* note 56, at 75 ("In the ICC, prosecutorial discretion is implied by the fact that the Prosecutor is under no obligation to initiate proceedings once a situation has been referred to the OTP.").

149. Côté, *supra* note 56, at 164-65 ("The last ten years of practice of the existing international criminal Tribunals (i.e. the ICTR, ICTY and SCSL) have demonstrated that the efficiency of the international Prosecutor—his capacity to investigate and prosecute in order to fulfill his mandate with limited resources and time—resides in the discretionary exercise of his powers."); AVRIL McDONALD & ROELOF HAVEMAN, PROSECUTORIAL DISCRETION—SOME THOUGHTS ON "OBJECTIFYING" THE EXERCISE OF PROSECUTORIAL DISCRETION BY THE PROSECUTOR OF THE ICC 2 (2003), available at http://www.icc-cpi.int/library/organs/otp/mcdonald_haveman.pdf ("In the beginning of the Court it may be tempting to" investigate and subsequently prosecute "as much [*sic*] cases as possible, to guarantee that within the first 7 years of its existence at least some substantive cases are dealt with before the court, and thus proving its importance. However, if not from the start then within a short time, there will be limits to the Court's capacity. The Court, for this and other reasons, will have to decide what its purpose, role, capacity and limitations in a particular situation are; decisions that will, in the first instance, have to be made by the Office of the Prosecutor (OTP)."); Amnesty International, *supra* note 28 ("The criteria for initiating an investigation and for commencing a prosecution should be clearly spelled out in the statute and rules, but should leave some flexibility for prosecutorial discretion, particularly since it is unlikely that the prosecutor will have the resources to investigate and prosecute every case where the court has jurisdiction and states have failed to fulfil their responsibility to bring those responsible to justice.").

150. Murphy, *supra* note 11, at 287.

international intervention, rather than to weed out weak or frivolous ones.”¹⁵¹ In addition, vesting the Prosecutor with ultimate authority to pursue or decline particular situations or cases is believed to promote the “human rights norm of receiving a fair trial” by securing the independence of the Prosecutor, and is therefore “a crucial element in determining the long-term legitimacy of the ICC.”¹⁵²

Thus, while the relative gravity of a particular crime may lead the OTP to prosecute one case over another in one context, it may legitimately be persuaded by other factors—practical considerations such as the likelihood of apprehending a suspect or the availability of evidence, or strategic considerations such as a desire to shed light on the “complete landscape” of events that occurred within a particular situation—in another context.¹⁵³ At the same time, however, the commentator cited above with regard to the OTP’s different approach in the Uganda and DRC situations is correct in observing that the Lubanga case is “contradictory” to a number of statements made by the OTP regarding the importance of gravity in the selection of cases.¹⁵⁴ We therefore suggest that it would enhance the legitimacy of the ICC if the OTP were to communicate as clearly as possible which factors were in fact relevant to its decisions in each context so that the public may more accurately evaluate those decisions.

151. Danner, *supra* note 147, at 519-20 (citing Louise M. Arbour, *Statement to the Preparatory Commission on the Establishment of an International Criminal Court*, 1997 ICTY Y.B. 229, 232, U.N. Sales No. E.99.III.P.2).

152. Brubacher, *supra* note 56, at 84; *see also* Danner, *supra* note 147, at 515 (“The Prosecutor’s ability to make individualized considerations based on law and justice, rather than the self-interest or sheer power of any particular state, transforms the Court from a political body festooned with the trappings of law to a legal institution with strong political undertones.”).

153. *See* Côté, *supra* note 56, at 168 (noting that, in the context of the ICTY and ICTR, Prosecutors have considered, as a matter of discretion, such factors as the “prospect for arresting the suspect,” the “sufficiency of the evidence available” and how a case fits within a strategy of “highlighting the complete landscape of the criminal acts perpetrated at the time”).

154. El Zeidy, *supra* note 143, at 57.