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Gravity

The role and assessment of 'gravity'
at the International Criminal Court

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Abstract

This thesis investigates the concept and role of 'gravity' in the law of the International Criminal Court (ICC). Gravity most importantly relates to assessing admissibility of situations and cases before the Court and acts as 'gatekeeper' to ensure only the gravest examples are investigated and prosecuted. Gravity therefore influences where the ICC focuses its attention, which has significant ramifications for the Court's perceived legitimacy internationally.

The thesis draws on ICC case law, academic literature and the ICC Prosecutor's policy papers to investigate how gravity is assessed in admissibility decisions. Gravity decision-making processes are analysed with reference to the concepts of a 'gravity threshold', 'relative gravity' and the Prosecutor's discretion.

The ICC has developed mandatory factors for assessing gravity that are appropriately broad in scope allowing many relevant factors to be considered. The use of consistent criteria is beneficial because it increases transparency of gravity decisions.

The concepts of a 'gravity threshold' and 'relative gravity' are implicit in gravity assessments in admissibility decisions. This thesis argues that relative gravity should become a mandatory aspect of assessing gravity to ensure the gravest situations and cases come before the ICC. While the 'gravity threshold' concept is useful, thresholds change in response to changing circumstances and for this reason should remain an implicit rather than mandatory aspect of gravity assessments. Inseparable from assessing gravity is the Prosecutor's discretion and this thesis argues the Prosecutors is the most appropriate person to assess gravity.

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Introduction

Gravity has been and continues to be an important concept in the International Criminal Court (ICC).¹ The concept has been used to justify many important decisions on situations and cases the Court has decided to investigate and prosecute throughout the world.² The Court's choice of situations and cases to focus resources on has important implications for the perceived legitimacy of the ICC in the international community. The use of gravity to justify such decisions has placed the concept at the centre of much debate as to what role it should play at the ICC and how the concept should be assessed. Despite the debate, gravity remains an opaque concept. Clarity around the meaning, role and assessment of gravity is therefore of utmost importance for the ICC and for its legitimacy internationally.

Research question

This thesis focuses on the following research question: *What is the role of 'gravity' in the law of the International Criminal Court and how should 'gravity' be assessed?*

This overall research question is addressed in four separate chapters that each addresses a sub question that contributes to answering this overall question.

This research aims to provide clarity and insight on the role of gravity in ICC proceedings and also how gravity can best be assessed in practice to fulfill its role. This research has focused on analysing the Court's case law, the practice of the Prosecutor and the academic literature. This thesis does not focus on examining the jurisprudence of other international or domestic Courts.

Guide to chapters

The first four chapters focus on answering its own research question. The final chapter provides a discussion and recommendations.

¹ The International Criminal Court was established by the Rome Statute adopted on 17 July 1998 and

² For example: non- investigation in the Iraq situation, non-investigation in the Comoros situation, and prosecution of members of the Lord Resistance Army in the Uganda situation.

Chapter 1 addresses the question: *Where and how is the concept of 'gravity' relevant in the law of the ICC?* This Chapter investigates how gravity relates to the provisions of the Rome Statute of the ICC, in particular the provisions on admissibility, and also how gravity is relevant at different stages of ICC proceedings.

Chapter 2 addresses the question: *How can gravity's role in the law of the ICC be explained in theory?* This chapter investigates how the role of gravity can be explained from a theoretical perspective and outlines three concepts that help explain gravity's role: gravity as a threshold, relative gravity and gravity as a discretionary decision of the Prosecutor. The chapter outlines how each of these concepts is to a more or less extent reflected in practice.

Chapter 3 addresses the question: *What factors does the ICC use to assess gravity and how appropriate are these factors?* This Chapter investigates the mandatory factors of scale, nature, manner of commission and impact that the ICC uses when assessing gravity in practice and provides an appraisal as to how appropriate these factors are and outlines some of the complexities that arise in their use.

Chapter 4 addresses the question: *What additional gravity factors does the ICC use to assess gravity and how appropriate are these factors?* This Chapter investigates additional factors identified and considered by the Prosecutor, namely traditionally under prosecuted crimes and the role and rank of the perpetrator, and provides an appraisal of the use and appropriateness of these factors.

Chapter 5 is a discussion and includes recommendations on the role of gravity and how it should be assessed to best fulfill its role in the law of the ICC.

Chapter 1: Where and how gravity is relevant

Where and how is the concept of ‘gravity’ relevant in the law of the ICC?

This chapter addresses the question of where and how the concept of gravity is relevant in the law of the ICC. This is an important question because gravity is not defined in the Rome Statute but plays a key role in many stages of the Court’s proceedings. Most importantly gravity is a factor to be considered when assessing admissibility. Admissibility is considered during preliminary investigations, when opening an investigation into a situation and when opening a specific case within a situation. In addition, gravity is considered in deciding the sentences of persons convicted by the Court. The factors considered relevant to assessing gravity for the purpose of sentencing are helpful in assessing gravity for admissibility decisions. Admissibility decisions are important because they determine whether situations and cases are sufficiently grave to end up before the ICC. In addition to admissibility, gravity is also a factor relevant to the crimes within the ICC’s material jurisdiction, as these crimes are inherently grave already.

Gravity is not defined in the Rome Statute

The Rome Statute, the ICC’s founding document, does not define ‘gravity’ nor does it provide guidance on how gravity should be interpreted. References to gravity however are threaded through the Rome Statute’s provisions. Interpreting the meaning of gravity has been left up to different organs of the ICC, namely the Prosecutor and the Chambers. The first reference to gravity in the ICC’s statutory framework appeared with the adoption of the Regulations of the Office of the Prosecutor (**Prosecutor’s Regulations**) in April 2009.³ Regulation 29(2) states that to assess the gravity of crimes allegedly committed in a situation the Prosecutor shall consider various factors including ‘scale, nature, manner of commission, and

³ Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 [23 April 2009] (**Prosecutor’s Regulations**)

impact'.⁴ This regulation has provided some guidance on the interpretation of gravity but beyond this it has been left up to the Prosecutor and the Chambers to interpret.

Despite not being clearly defined in Statute, or case law, the concept of gravity has been used by the Prosecutor and Chambers to justify many decisions.⁵ The use of gravity to justify decisions has made it both an important and debated concept. The lack of clarity on the meaning of gravity in the ICC's constitutive documents highlights the importance of clear statements of law from the Prosecutor and Chambers as to the criteria they use to assess gravity and the appropriate role gravity plays in the law of the ICC. To date, such statements on the meaning of gravity have been inconsistent despite the concept's routine use to justify important decisions.⁶

1.1 Gravity in admissibility decisions

Gravity is a mandatory consideration when assessing admissibility of situations and cases under the Rome Statute. Situations are investigations initiated by the Prosecutor into whole conflicts, often over a broad area such as a whole country or region, where a number of crimes have been committed by a number of people. A case relates to the actual prosecution of an individual, or individuals, in relation to specific events. First a situation is opened in relation to a conflict and then specific cases within the situation are selected for prosecution.

Admissibility of situations

Gravity is included in article 53 and article 17, the key provisions relating to admissibility.⁷ Article 53 governs decisions on whether an investigation into a new situation can be initiated by the Prosecutor. The relevant decision is whether there is a

⁴ Prosecutor's Regulations (n 3) Regulation 29(2)

⁵ For example: (n 2)

⁶ For example: In *The Prosecutor v Thomas Lubanga Dyilo* the Pre-trial chamber set out specific criteria for the assessment of gravity. The Appeals Chamber reversed the Pre-Trial Chamber decision without offering alternative criteria for gravity. Also the Pre Trial Chamber in the *Comoros* decision asked the Prosecutor to reconsider its decision on gravity, thus undermining the Prosecutor's interpretation of the concept.

⁷ Rome Statute of the International Criminal Court (**Rome Statute**), Article 53 and Article 17

‘reasonable basis to proceed with an investigation’ and requires the Prosecutor to apply the three factors set out in article 53(1)(a)-(c).⁸

The three factors in article 53(1)(a)-(c) relate to jurisdiction, admissibility and the interests of justice. First, the Prosecutor must assess whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. Second, the prosecutor must assess whether potential cases arising out of the situation would be admissible before the Court under article 17 of the statute. In assessing admissibility under article 17 the Prosecutor must consider whether the case is sufficiently grave to justify action by the Court. Third, the Prosecutor must assess whether, when considering the gravity of the crime and the interests of the victims there are nonetheless substantial reasons to believe that an investigation would not serve in the interests of justice.⁹ Gravity relates to the second and third factors in the article 53(1) test.

In accordance with article 53(1)(b), the second limb of the test, the prosecutor must decide whether ‘the case is or would be admissible under article 17’.¹⁰ Article 17 sets out four factors that the court shall consider in determining admissibility. A case will be inadmissible if any of the four factors are satisfied. The first two factors relate to the existence and genuineness of national investigations and prosecutions that may render action by the ICC unnecessary.¹¹ The third factor relates to whether the accused has already been tried for the conduct that is the subject of the complaint.¹² Gravity is not relevant to these first three factors however it is relevant to the fourth. The fourth factor states that the Court shall determine that a case is inadmissible where it ‘is not of sufficient gravity to justify further action by the Court’.¹³

Admissibility of cases

⁸ International Criminal Court Rules of Procedure and Evidence (**ICC RPE**), Rule 48 and Situation in Georgia ‘Decision on the Prosecutor’s request for authorization of an investigation’ [27 January 2016], ICC-01/15-12 (**Georgia authorisation decision**) [4]

⁹ Georgia authorisation decision (n 8) [5]

¹⁰ Ibid [36]

¹¹ Rome Statute, Article 17(1)(a) and Article 17(1)(b)

¹² Ibid, Article 17(1)(c)

¹³ Ibid, Article 17(1)(d)

Admissibility of cases is assessed according to similar criteria to situations, either by applying the same factors set out in article 53(1)(a)-(c) that form the reasonable basis to proceed test, or by applying the factors set out in article 53(2)(a)-(c) of the Statute. Regulation 33 of the Prosecutor's Regulations states that in selecting potential cases the Prosecutor shall consider the article 53(1)(a)-(c) factors to assess jurisdiction, admissibility (including gravity), and the interests of justice.¹⁴ The Prosecutor, in her policy paper on case selection and prioritisation, has also stated that it will apply the same legal factors at the case selection phase as at the situation selection phase.¹⁵ It appears therefore that the criteria for assessing the admissibility of a case are the same as the assessment of the admissibility of a situation. This shows us that the Court is developing a consistent approach, trying to ensure the process for assessing admissibility at different stages of proceedings is consistent. For a smooth, coherent process, it makes sense to apply the same criteria for deciding admissibility at the case stage as at the situation stage because the assessment will often relate to the same individuals and conduct only at different stages. This means that if conduct is deemed admissible at the situation stage it is likely to be admissible later at the case stage. The main difference will be that at the case stage the individuals and conduct assessed will be more specifically identified.

It has been argued however that the admissibility of a case can also be considered under article 53(2) of the Rome Statute.¹⁶ Article 53(2) refers to whether there is a sufficient basis for a 'prosecution' rather than an investigation. Only cases, not situations, can form the basis of prosecutions so the language of article 53(2) implies that it covers the opening of a case.¹⁷ Article 53(2) is similar to article 53(1) in that it requires admissibility of a case to be considered under article 17, and also whether the prosecution would be in the interests of justice (taking into account all circumstances, including gravity of the crime, the interests of the victims, the age and infirmity of the

¹⁴ Prosecutor's Regulations (n 3) Regulation 33

¹⁵ The Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' [15 September 2016], (**Policy paper on case selection**) [25]

¹⁶ Kai Ambos and Ignaz Stegmiller, 'Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?' [2013] 59(4) *Crime Law Soc Change* 419

¹⁷ Prosecutor's Regulations (n 3) Regulation 29(5)

alleged perpetrator and their role in the alleged crime).¹⁸ The main difference between article 53(1) and article 53(2) is that under the latter the Court must decide whether there is sufficient legal or factual basis to seek a warrant or summons under article 58 whereas under the former the Court must consider whether there is a reasonable basis to believe a crime within the jurisdiction of the Court has been committed.¹⁹ Issuing a warrant or summons under article 58 requires reasonable grounds to believe that the *person*, who is the subject of the warrant or summons, has committed a crime within the jurisdiction of the Court.²⁰ In this respect the criteria under article 53(2) are more specific, relating to a particular accused, than under article 53(1). The argument that the admissibility of a case should come under article 53(2) therefore does have merit because it is specific to the individual.

The factors under article 53(2)(a)-(c) are very similar to those under article 53(1)(a)-(c) that relate to assessing admissibility of a situation. This has led some commentators to claim case selection can come under article 53(2) or on a *mutatis mutandis* basis under article 53(1).²¹ Whether admissibility of a case is assessed under article 53(1) or 53(2) both require assessing gravity. The outcome of assessing admissibility applying the factors in article 53(1) or article 53(2) at the case stage is essentially the same and so either approach is acceptable. However, in the interests of consistency, I argue that the Prosecutor's approach is sound and that the same legal factors should be applied at the case stage as at the situation stage and these are the factors set out in article 53(1)(a)-(c).

1.2 Assessing admissibility during preliminary investigations

Gravity is an important concept in the assessment of admissibility at the ICC. Admissibility is assessed at three distinct stages in ICC proceedings: preliminary investigations, the opening of a situation and the opening of a case. The way admissibility arises at each of these stages is slightly different.

¹⁸ Rome Statute, Article 53(2)(b) and Article 53(2)(c)

¹⁹ Ibid, Article 53(2)(a) and Article 53(1)(a)

²⁰ Ibid, Article 58(1)(a)

²¹ Kai Ambos and Ignaz Stegmüller (n 16) 419

Before the Prosecutor opens a formal investigation into a situation she conducts a preliminary investigation in relation to all communications that come to the Prosecutor's attention to determine whether a situation meets the legal criteria to warrant investigation. To distinguish those situations that warrant investigation from those that do not the Prosecutor has established a filtering process comprising four phases.²²

Phase one involves an initial assessment of all information on the alleged crimes received and requires a decision on whether to open a preliminary investigation. The purpose of phase one is to analyse and verify the seriousness of the information received, filter out information outside the ICC's jurisdiction and identify information within its jurisdiction.²³ The Prosecutor receives communications relating to potential situations from different sources, including individuals, intergovernmental organisations, non-governmental organisations, the United Nations Security Council (UNSC) or a State party to the Rome Statute.²⁴ Regardless of referral type, once a communication is made the information is subject to critical analysis and independent evaluation by the Prosecutor.²⁵ Once a potential situation is identified the factors in article 53(1)(a)-(c) provide the legal framework for a preliminary investigation and are applied the same way regardless of how the information was referred to the Prosecutor.²⁶

Phase two represents the formal commencement of the preliminary investigation. Phase two relates to article 53(1)(a) and focuses on whether the preconditions to the exercise of jurisdiction are satisfied. This requires consideration of whether the conduct occurred by a national of a State party, on the territory of a State party, whether the conduct occurred after the Statute came into force for the State party, and whether there is a reasonable basis to believe that the alleged crimes fall within the

²² The Office of the Prosecutor, 'Report on Preliminary Examination Activities 2016' [14 November 2016] (**Prosecutor's Report on Preliminary Examinations 2016**) [15]

²³ Ibid [15]

²⁴ Ibid [2]

²⁵ Ibid [76]

²⁶ Ibid [76]

ICC's subject matter jurisdiction. Phase two leads to an 'article 5 report', in reference to the material jurisdiction of the Court defined in article 5.²⁷

Phase three, correlating to article 53(1)(b), focuses on the admissibility of potential cases in terms of complementarity and gravity. Phase three is where gravity is considered at the preliminary investigation stage of proceedings. Assessment of gravity at this stage includes the assessment of scale, nature, manner of commission of the crimes, and their impact as set out in regulation 29(2).²⁸ Each of these factors is considered in detail by the Prosecutor at the preliminary investigation stage. At the preliminary stage this assessment of gravity must be done bearing in mind the potential cases that would likely arise from an investigation of a situation.²⁹ At the preliminary investigation stage there is not yet a specific case, in the sense of identified specific incidents, suspects and conduct, so the assessment of admissibility (and thus gravity) must take into account potential cases that can be identified during preliminary examinations on the information available.³⁰ Phase three leads to an 'article 17 report' in reference to the admissibility issues as defined in article 17 of the Rome Statute.

Phase four examines the interests of justice, correlating to article 53(1)(c). After considering all phases the Prosecutor prepares an article 53(1) report which sets out the Prosecutor's decision on whether to initiate an investigation into a situation in accordance with article 53(1). These reports set out the Prosecutor's assessment of each of the factors in article 53(1)(a)-(c).

At the preliminary investigation stage admissibility is constantly assessed up until when a decision is made on whether or not to open an investigation into the situation. There is no timeline provided in the Rome Statute for bringing a preliminary investigation to a close so depending on the facts and circumstances of each preliminary investigation the Prosecutor may decide to decline to initiate an

²⁷ Prosecutor's Report on Preliminary Examinations 2016 (n 22) [15]

²⁸ Ibid [6]

²⁹ Ibid [6]

³⁰ The Office of the Prosecutor, 'Policy Paper on Preliminary Examinations' [November 2013] (**Prosecutor's Policy Paper on Preliminary Examinations**) [43]

investigation or continue to collect information before making a decision.³¹ The consideration of admissibility, and gravity, is therefore an ongoing process as the Prosecutor acquires and assesses further information. Any admissibility decision at the preliminary investigation stage is without prejudice to individual criminal responsibility that may arise following subsequent investigation and prosecution. Preliminary admissibility determinations only relate to the preliminary investigation and are not binding on future admissibility determinations.³²

1.3 Assessing admissibility at the opening of a situation

The assessment of gravity arises in a number of ways at the opening of a situation. The first is at the culmination of the preliminary investigation process when the Prosecutor issues her article 53(1) report with her decision on whether or not to open an investigation into a situation. If the preliminary investigation is initiated by a State party or UN SC referral then the Prosecutor's conclusion whether to open an investigation is valid and a situation can be opened.

If the Prosecutor decides not to initiate an investigation into a situation due to inadmissibility then the Pre-Trial Chamber may be asked to review the decision of the Prosecutor.³³ Such a request for review can come from the referring State party or the UN SC if the situation was a UN SC referral.³⁴ The Pre-Trial Chamber may also, on its own initiative, review a decision of the Prosecutor not to initiate an investigation if the decision not to investigate relates only to the interests of justice.³⁵ Upon review, the Pre-Trial Chamber must assess admissibility, and if it finds that the Prosecutor has made an error in their assessment then the Pre-Trial Chamber may ask the Prosecutor to reconsider their decision.³⁶

³¹ Prosecutor's Policy Paper on Preliminary Examinations [14]

³² Ibid [44]

³³ Rome Statute, Article 53(3)(a)

³⁴ Ibid, Article 53(3)(a)

³⁵ Ibid, Article 53(3)(b)

³⁶ Ibid, Article 53(3)(a)

The Pre-Trial Chamber is also required to assess gravity when the Prosecutor requests authorisation to open an investigation into a situation that the Prosecutor has initiated *proprio motu*.³⁷ In such an instance the Prosecutor will set out her own assessment of admissibility in a request to the Pre-Trial Chamber for authorisation. The Pre-Trial Chamber will then independently assess the Prosecutor's assessment of admissibility. A situation will only be opened in such an instance if the Pre-Trial Trial approves the request for authorisation.³⁸

Admissibility at the situation stage, like at the preliminary investigation stage, must be considered in relation to potential cases that would result from the investigation. At the situation opening stage admissibility cannot be conducted against the backdrop of a concrete case because before an investigation is opened it is not possible to define the exact parameters of the case in terms of conduct and identified suspects for the purpose of prosecution.³⁹ The assessment is therefore preliminary in nature, subject to revision if circumstances change, and not binding on future admissibility decisions.⁴⁰

1.4 Assessing admissibility at the opening of a case

The concept of admissibility, and thus gravity, arises again when a case is opened. The concept of a case is distinct from a situation as it relates to specific incidents where identified suspects have committed crimes.⁴¹ The admissibility assessment in respect of a case consists of examining the person and the conduct that is the subject of the case.⁴² The commencement of the case stage occurs when a warrant of arrest or summons to appear is issued.⁴³

³⁷ Rome Statute, Article 15(3)

³⁸ Ibid, Article 15(4)

³⁹ Georgia authorisation decision (n 8) [36]

⁴⁰ The Office of the Prosecutor, 'Situation in the Central African Republic II, Article 53(1) Report' [24 September 2014] (**CAR II situation Article 53(1) report**) [225]

⁴¹ *Prosecutor v Thomas Lubanga Dyilo*, 'Decision on the Prosecutor's Application for a warrant of Arrest, Article 58' [10 February 2006], ICC-01/04-01/06-8-US-Corr (**Lubanga warrant of arrest decision**) [31]

⁴² Ibid [31]

⁴³ Rome Statute, Article 58

Gravity is assessed at the case stage of proceedings when the Court decides to assess admissibility on its own motion or when an admissibility challenge is made by an accused. The Court has the ability to satisfy itself that it has jurisdiction in any case brought before it and may, on its own motion, determine admissibility of the case in accordance with article 17.⁴⁴ Whether it chooses to make such a determination of admissibility is at the Court's discretion.⁴⁵ Challenges to admissibility of a case can also be made by the accused for whom a warrant of arrest or summons has been issued and can come before or after the confirmation of charges decision.⁴⁶

The admissibility factors set out in article 17, presented earlier with respect to situations, are also applied when assessing the admissibility of a case. These factors require consideration of whether a case is of sufficient gravity in order for it to be prosecuted by the Court.⁴⁷ The Prosecutor has also stated specifically in her policy paper on case selection and prioritisation that she will ensure cases selected for investigation and prosecution will be admissible in terms of gravity.⁴⁸ The factors considered by the Prosecutor in relation to assessing gravity at the situation selection phase will be applied *mutatis mutandis* at the case selection phase.⁴⁹ The Pre-Trial Chamber has also stated the factors relevant to assessing gravity at the case stage are the same as those at the situation stage.⁵⁰ The factors are both quantitative and qualitative, and include scale, nature, manner of commission and impact of the crimes.⁵¹ However given its nature, case selection requires a more focused application of the factors than at the situation phase.⁵²

⁴⁴ Rome Statute, Article 19(1)

⁴⁵ *Prosecutor v Bahar Idriss Abu Garda*, 'Decision on the Confirmation of Charges' [8 February 2010], ICC-02/05-02/09-243-Red (**Abu Garda confirmation of charges decision**) [27] and *Prosecutor v Jean-Pierre Bemba Gombo*, 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' [15 June 2009], ICC-01/05/08 [25]

⁴⁶ Rome Statute, Article 19(6) and Article 19(2)(a)

⁴⁷ *Ibid*, Article 17(1)(d)

⁴⁸ The Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' [15 September 2016], (**Policy paper on case selection**) [24]

⁴⁹ *Ibid* [25]

⁵⁰ *Abu Garda confirmation of charges decision* (n 45) [31] and [32] and *Prosecutor v Charles Blé Goudé*, 'Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity' [12 November 2014], ICC-02/11-02/11-185 (**Goudé defence challenge decision**) [11]

⁵¹ *Abu Garda confirmation of charges decision* (n 45) [31] and [32] and *Goudé defence challenge decision* (n 50) [11]

⁵² *Policy Paper on Case Selection* (n 48) [25]

1.5 Gravity of crimes within ICC's material jurisdiction

Crimes included in the Rome Statute are limited to 'the most serious crimes of concern to the international community' and so are already inherently grave.⁵³ Gravity is also a factor that forms part of the elements of specific crimes within the ICC's jurisdiction. For genocide, the contextual element and the special intent suggest severe gravity and this distinguishes genocide from other crimes.⁵⁴ Genocide requires 'the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'.⁵⁵ This requires that the conduct that is performed by the perpetrator for genocide occurs in combination with other people against a group, or that the conduct of the individual is so severe that it could itself effect the destruction of the group. For genocide there is also a special 'intent to destroy in whole or in part, a national, ethnical, racial or religious group'.⁵⁶ This special intent points to the gravity of genocide, as it requires intent to destroy the whole or part of a group. The severity of the crime of genocide has led to it being referred to by leading scholars as the 'crime of crimes'.⁵⁷ This indicates that genocide is the gravest crime of all.

The constituent elements of crimes against humanity also make them grave. Crimes against humanity must be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.⁵⁸ Further the requisite 'attack' is 'a course of conduct involving the multiple commission of acts...against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.⁵⁹ The elements of widespread or systematic, attacks being against civilians, and attacks being pursuant to a policy make crimes against humanity significantly graver than other crimes. These elements

⁵³ Rome Statute, Article 5(1)

⁵⁴ Margaret M de Guzman, 'Gravity and the Legitimacy of the International Criminal Court' [2008] 32(5), *Fordham International Law Journal* 1407

⁵⁵ International Criminal Court Elements of Crimes (**ICC Elements of Crimes**), Article 6

⁵⁶ Rome Statute, Article 6

⁵⁷ William A. Schabas, *Genocide in International Law, The Crimes of Crimes*, (2nd edn, Cambridge University Press 1999) 1

⁵⁸ Rome Statute, Article 7

⁵⁹ *Ibid*, Article 7(2)(a)

of crimes against humanity ensure that only serious conduct is criminalised by these crimes and therefore already include gravity in their nature.⁶⁰ Crimes against humanity due to their constituent elements are therefore considered very grave, second only to genocide in terms of their gravity.

War crimes on the other hand, although they can be extremely grave, do not have elements that ensure their gravity. The ICC has jurisdiction over war crimes ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’.⁶¹ The words ‘in particular’ imply the Court is encouraged to focus on war crimes that are part of a plan or policy or that are large scale.⁶² The Court retains however, jurisdiction over small-scale, isolated war crimes. This means the Court has jurisdiction over some crimes that are considerably less serious than other crimes. Such small-scale war crimes could lack sufficient seriousness to constitute the most serious crimes of international concern, which is supposed to be the focus of Rome Statute crimes. The Rome Statute is therefore inconsistent in the material crimes over which it has jurisdiction. Genocide and crimes against humanity are undoubtedly of extreme gravity however small scale war crimes are not.

1.6 Relevance of gravity in sentencing

Gravity is a factor relevant to the determination of sentences in the Rome Statute. When determining a sentence a Court shall take into account such factors as ‘the gravity of the crime and the individual circumstances of the convicted person’.⁶³ Factors to be considered in the determination of a sentence during sentencing are set out in rule 145 of the ICC Rules of Procedure and Evidence (**RPE**). The Pre-Trial Chamber has held that factors listed in Rule 145(1)(c) and Rule 145(2)(b) of the RPE for sentencing are relevant to assessing gravity in the context of admissibility

⁶⁰ Margaret M de Guzman (n 54) 1407

⁶¹ Rome Statute, Article 8(1)

⁶² The Office of the Prosecutor, ‘Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report’ [6 November 2014] (**Comoros Article 53(1) Report**) [33]

⁶³ Rome Statute, Article 78(1)

determinations.⁶⁴ How gravity factors apply for sentencing is therefore relevant to the important gravity assessments in admissibility decisions.

Many of the factors from Rule 145 correlate to the factors of scale, nature, manner of commission and impact set out in regulation 29(2) of the Prosecutor's regulations that are considered when assessing gravity for admissibility purposes at the preliminary, situation and case stages. Rule 145(1)(c) refers to 'the extent of the damage caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location'.⁶⁵ The Pre-Trial Chamber has stated that these factors 'can serve as useful guidelines for the evaluation of the gravity threshold required by article 17(1)(d)'.⁶⁶ Rule 145(2)(b) refers to, *inter alia*, the 'commission of the crime where the victim is particularly defenceless', the 'commission of the crime with particular cruelty or where there were multiple victims' and the 'commission of the crime for any motive involving discrimination'.⁶⁷ These factors could all easily fit within the parameters of the factors of scale, nature, manner of commission and impact. How the factors from Rule 145(1)(c) and Rule 145(2)(b) have been interpreted in the sentencing context are therefore useful interpretative tools for assessing gravity in admissibility decisions.

Conclusion

This chapter addresses where and how the concept of gravity is relevant in the law of the ICC. Most fundamentally, gravity plays a key role in admissibility decisions that occur at the preliminary stage, the situation opening stage and the case opening stage. Admissibility decisions are very important in the ICC because they determine whether situations and cases are opened and ensure only sufficiently grave situations and cases end up before the Court. This is important for the Court's legitimacy as its mandate includes ensuring that the most serious crimes of concern to the international

⁶⁴ Goudé defence challenge decision (n 50) [12]

⁶⁵ ICC RPE, Rule 145(1)(c)

⁶⁶ Abu Garda confirmation of the charges decision (n 45) [32]

⁶⁷ ICC RPE, Rule 145(2)(b)(ii)-(iv)

community do not go unpunished. Gravity is also relevant to assessing the appropriate sentence of persons convicted by the Court. The factors relevant to assessing gravity in sentencing are very similar to the factors used to assess gravity for admissibility. The sentencing jurisprudence around gravity can therefore be used as a guide for gravity admissibility decisions. Gravity also relates to the crimes within the ICC's material jurisdiction that includes crimes that are inherently grave, with the exception of small-scale war crimes.

Chapter 2: Gravity and theory

How can gravity's role in the law of the ICC be explained in theory?

This chapter addresses the roles that gravity plays in the law of the ICC and how they can be explained in theory. Firstly, gravity can be explained as a threshold that must be reached for a situation or case to be deemed serious enough to be dealt with by the Court. The threshold concept envisages that there is a set level that must be reached, and once it is reached a situation or case is admissible. Secondly, gravity can be explained as a relative concept that is used to select and prioritise between situations and cases by comparing the relative gravity of them in order to select and prioritise the most serious. This is conceptually different to a threshold as relative gravity means something will only be grave relative to other situations or cases and this can change depending on the gravity of other situations and cases. The threshold concept envisages a set level that does not change.

The distinction made between gravity as a threshold and a relative concept is not mentioned in the Rome Statute but it is discussed extensively in the academic literature and is reflected in the ICC's practice. The distinction helps to explain the role of gravity in the ICC. However, unlike mandatory gravity factors (to be discussed in chapter 3) an assessment of threshold or relative gravity is not mandatory, rather, they provide theoretical explanations for the role gravity plays in the law of the ICC.

Inseparable from the role of gravity in the law of the ICC is the discretion of the Prosecutor. Any assessment of gravity requires the exercise of discretion and the appropriate discretion to be given to the Prosecutor when assessing gravity has been the cause of much debate. I argue that the ICC Prosecutor should be granted wide discretion to assess gravity as the Prosecutor has the best knowledge and experience to make important gravity decisions. Interpreted in this way gravity can be viewed also as a discretionary decision of the Prosecutor.

In this thesis I argue that the role of gravity as a relative concept is so important and convincing that it should be made a mandatory practical consideration in the

assessment of gravity. In this sense the theoretical concept of relative gravity, although implicitly relevant in assessing gravity, would become a mandatory gravity factor that would have to be assessed in practice. I do not argue that gravity as a threshold should be made a mandatory gravity factor. The threshold concept is problematic because a fixed threshold level cannot be established, as the level will always change depending on the circumstances. Relative gravity however is always relevant to assessing gravity in the workings of the ICC.

2.1 Gravity as a threshold

Gravity as a threshold is the idea that a situation or case must meet a certain level of seriousness to be admissible before the ICC. This requires that situations and cases that fall below this legal barrier be rejected.⁶⁸ The threshold concept has been linked with the admissibility provisions, particularly article 17(1)(d), where the Prosecutor must consider whether a case is inadmissible due to insufficient gravity.⁶⁹ Such decisions can be conceptualised as a threshold requiring the application of set criteria to determine whether a situation or case is grave enough to pass the threshold.

Reasons for having a threshold

An important reason for having a gravity threshold at the ICC is to control the Court's caseload in accordance with the Court's available capacity. If the ICC had to address every crime within its jurisdiction, including less grave crimes, it would be flooded with cases and would become ineffective.⁷⁰ The first drafters of the Rome Statute, the United Nations International Law Commission supported this view. The Commission saw the gravity threshold as not just to ensure the Court limited its focus to the most

⁶⁸ Ignaz Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda' [2009] 9, *International Criminal Law Review* 562

⁶⁹ Susana SaCouto & Katherine Cleary, 'The Gravity Threshold of the International Criminal Court', [2008] 23(5), *American Journal of International Law* 813

⁷⁰ Mohamed. M EL Zeidy, 'The Gravity Threshold under the Statute of the International Criminal Court' [2008] 19, *Criminal Law Forum* 36

serious crimes, but also to manage the Court's caseload according to available resources.⁷¹

As identified by the United Nations International Law Commission, the gravity threshold also addresses the Court's resource concerns. International crimes are frequent and national authorities often fail to investigate and prosecute perpetrators. Without a gravity threshold the ICC could quickly become overburdened with less serious cases.⁷² In 2005 Luis Moreno Ocampo, the ICC's first Prosecutor emphasised this idea. He explained that the gravity criterion represents a recognition of the financial restrictions under which the ICC operates and it is necessary to adopt a 'resource driven approach' when deciding to bring situations and cases.⁷³

The threshold concept has also been reflected by the Courts in the way they have interpreted gravity as requiring a situation or case to be graver than merely satisfying the ICC's subject matter jurisdiction. Any crime within the jurisdiction of the ICC is serious. Article 5 explains the 'jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community'.⁷⁴ The Court however has stated in case law that as regards the sufficient gravity requirement in article 17(1)(d) that 'this gravity threshold is in addition to the drafters' careful selection of crimes included in article 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"'.⁷⁵ Therefore just because a case addresses one of the most serious crimes of concern to the international community does not make it necessarily admissible before the Court, if it doesn't pass the threshold requirement.⁷⁶

⁷¹ Susana SaCouto & Katherine Cleary (n 69) 819

⁷² Russell Buchan, 'The *Mavi Marmara* Incident and the International Criminal Court' [2014] 25 Criminal Law Forum 492

⁷³ Office of the Prosecutor, 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs' [24 October 2005], New York, 9

⁷⁴ Rome Statute, Article 5

⁷⁵ *Prosecutor v Thomas Lubanga Dyilo*, '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' [24 February 2006], ICC-01/04-01/06-8-US-CORR [41]

⁷⁶ *Ibid* [41]

Gravity as a threshold can therefore be used to keep out cases that the ICC has material jurisdiction over but are not sufficiently grave to warrant the ICC's attention. Small-scale or isolated war crimes are an example of a crime that would come within the Court's material jurisdiction but might not pass the gravity threshold. The crimes of genocide and crimes against humanity have constituent elements that make them particularly grave and so these crimes would almost always pass the threshold.⁷⁷ War Crimes in comparison do not have elements that make them inherently grave. Only war crimes that are 'committed as part of a plan or policy or as part of a large scale commission' should be considered grave enough to pass the threshold.⁷⁸ The gravity threshold could be legitimately used to exclude small-scale war crimes from being heard by the Court.

Need for threshold criteria

To operate a consistent threshold above which situations and cases must reach for the ICC to exercise jurisdiction clear criteria is needed to assess gravity. Regulation 29(2) of the Prosecutor's Regulations provide clarity in this regard by stating that assessing gravity requires considering the factors of scale, nature, manner of commission, and impact of the crimes.⁷⁹ If the Prosecutor's threshold decisions are to be reviewed by the Pre-Trial Chamber there needs to be clear criteria established for the Pre-Trial Chamber to judge the Prosecutors decisions against.

In addition to the need for consistent criteria to assess whether the threshold has been met, there is also a need for all factors relevant to a particular context to be considered. This means some flexibility in the scope of the criteria applied is necessary and additional factors affecting gravity need to be able to be considered.

⁷⁷ For example: Genocide requires perpetrators to possess a 'special intent' to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Crimes against humanity require the conduct of the perpetrator to be committed as part of a widespread or systematic attack directed against a civilian population.

⁷⁸ Rome Statute, Article 8(1)

⁷⁹ Prosecutor's Regulations (n 3) Regulation 29(2)

It is also undesirable for the Court to set particular standards for different gravity factors, for example a particular number of victims harmed, as there might countervailing factors that make a particular situation or case grave. Setting exact requirements for establishing whether particular factors are met could produce undesired outcomes if countervailing factors are particularly grave. It is important therefore that relevant factors are established and made mandatory considerations for assessing gravity but the Prosecutor and Chambers need to be left to decide what weight to place on each factor according to the context.⁸⁰ This means the establishment of an exact level above which a situation or case must reach to pass the threshold is not possible because this will not allow for the emphasis of different factors in different circumstances.

Exact threshold not possible or desirable

When deciding gravity the Prosecutor must decide which gravity factors they consider are severe and emphasise such factors. All situations and cases that merit the ICC's consideration will score highly on certain gravity factors and lower on others. It is the Prosecutor's job to decide, according to the context, which factors are severe and should be emphasised. Deciding what weight to place on particular gravity factors requires a discretionary assessment. Establishing an exact objective level above which a situation or case needs to reach to pass the threshold is not therefore possible.

Some commentators have argued that the threshold gravity decision requires the application of set gravity criteria to determine if the threshold is met and the gravity of other situations and cases is irrelevant to the threshold assessment. De Guzman argues that the admissibility provisions do not refer to only the gravest situations in the world and the Rome Statute does not limit the Court's jurisdiction to the most serious cases within a situation. Therefore upon the satisfaction of the gravity criteria the gravity threshold will be met and a situation or case will be admissible. De

⁸⁰ Margaret M. de Guzman (n 54) 1457

Guzman argues that the gravity of other situations and cases should have no bearing on the gravity threshold decision.⁸¹

I disagree, as I do not think a gravity decision can be made in isolation by the simple application of objective criteria. Relative gravity considerations come into the threshold decision. I consider that the threshold decision and the relative gravity comparison are intertwined and are part of the same gravity assessment. The concept of a threshold is useful to understand the role of gravity in the ICC however establishing an exact threshold level that a situation or case must reach in every circumstance is not possible or desirable.

The inability of establishing an exact threshold level for gravity can be shown with the example of when the Court is flooded with an increase in potential cases that it does not have capacity to hear. Faced with a high number of cases the Court will need to increase the threshold to prioritise the gravest of those cases due to its limited capacity. If an objective threshold level was all that existed then all the cases could potentially pass this threshold and the Court would not have capacity to hear them all. Relative gravity is necessary to decide which are the most grave. Relative gravity is therefore inseparable from the threshold concept.

2.2 Gravity as a relative concept

Relative gravity plays a role in selecting and prioritising the most important situations and cases for investigation and prosecution. It is by comparing the gravity between situations and cases that the Prosecutor can make an informed decision on what situation or case is graver. Assessing gravity requires prioritising certain goals and gravity factors over others as one situation or case will be grave in relation to one gravity factor and another situation or case will be grave in relation to another. By comparing across situations and cases, rather than considering gravity in relation to the one situation or case in isolation, the Prosecutor will be able to assess relative gravity.

⁸¹ Margaret M. de Guzman (n 54) 1457

While relative gravity has been argued to be a tool to decide between situations and cases that have already met the gravity threshold, in practice it guides gravity decisions at all stages of proceedings.⁸² Comparisons between situations and cases occur even at the preliminary investigation stage before a formal admissibility decision has been made. I argue that the importance of relative gravity is such that it should be made a mandatory consideration when assessing gravity at all stages of proceedings like the other mandatory factors (to be discussed in chapter 3).

Basis for relative gravity in the Rome Statute

Unlike the threshold decision, that has its statutory basis in article 17, relative gravity does not have such a clear statutory basis in the Rome Statute. The Statute does not directly address whether the Prosecutor should consider relative gravity in decision-making.⁸³ Ignaz Stegmiller, however argues that discretionary gravity decisions, that involve a comparative gravity analysis, derive their basis from the Article 53(1)(c) and Article 53(2)(c) of the Statute that relate to assessing whether the opening of a situation or case would serve the ‘interests of justice’.⁸⁴ The determination of interests of justice is a discretion given to the Prosecutor, with the possibility for Pre-Trial Chamber review.⁸⁵ In assessing whether opening a situation or case is in the ‘interests of justice’ the Prosecutor must consider the ‘gravity of the crime’.⁸⁶ Stegmiller grounds the gravity threshold test in Articles 53(1)(b), 53(2)(b) and 17(1)(d) of the Rome Statute and the relative gravity test as having its statutory basis in Article 53(1)(c) for situations Article 53(2)(c) for cases.⁸⁷

Stegmiller’s analysis has merit as the language of the interests of justice provisions, and the assessment of the interests of justice envision a relative and discretionary gravity analysis. Gravity is one of the elements that must be considered when

⁸² Margaret M. de Guzman (n 54) 1459

⁸³ Ibid 1406

⁸⁴ Ignaz Stegmiller (n 68) 562

⁸⁵ Rome Statute, Article 53(3)(b)

⁸⁶ Ibid, Article 53(1)(c) and Article 53(2)(c)

⁸⁷ Ignaz Stegmiller (n 68) 564

determining the interests of justice and so the Rome Statute therefore grants authority to the Prosecutor to determine that no situation or case warrants investigation or prosecution based on a relative comparison of gravity with other situations and cases before the Court.⁸⁸ Grounding the use of relative gravity in provisions of the Rome Statute is important to justify the use of relative gravity as a concept to guide selection and prioritisation of situations and cases. Stegmiller's analysis of these provisions is therefore valuable for this justification.

Relative gravity reflected in ICC practice

An example from the Prosecutor's preliminary examination in Burundi shows how the Prosecutor is using relative gravity to select and prioritise potential cases at the preliminary investigation stage. The Prosecutor's 2016 preliminary examination report states 'Based on information gathered from multiple reliable sources, the Office has set up a comprehensive database of incidents that occurred in the context of the situation in Burundi since April 2015. This database is continuously updated as additional or new information becomes available. It will enable the office to *identify and compare the gravest incidents alleged*... and to examine particular features of the situation, such as the most affected locations, timeframes and types of targets' (*Emphasis added*).⁸⁹ The Prosecutor uses relative gravity at the preliminary investigation stage to identify the gravest incidents that could be the basis for future cases.

The Prosecutor has stated that gravity is an important factor considered when selecting and prioritising cases to prosecute. The Prosecutor stated in her policy paper on case selection and prioritisation, released in November 2016, that gravity is the predominant case selection criteria adopted by the Office when exercising discretion in determining cases to select and prioritise for investigation and prosecution.⁹⁰ The specific criteria applied by the Prosecutor in selecting cases are: the *gravity of the crimes*, the degree of responsibility of the alleged perpetrators and the ability to bring

⁸⁸ Margaret M. de Guzman (n 54) 1415

⁸⁹ Prosecutor's Report on Preliminary Examinations 2016 (n 22) [54]

⁹⁰ Policy paper on case selection (n 48) [6]

charges that are representative of all crimes committed in the situation. (*Emphasis added*)⁹¹

The case selection document used by the Prosecutor illustrates the way the Prosecutor uses relative gravity in case selection and prioritisation. The case selection document includes all potential cases before the ICC across all situations. The document includes potential cases identified at the preliminary investigation stage and new potential cases are added to the document as investigations proceed and when new situations are opened.⁹² The Prosecutor selects cases for investigation and prosecution from among the cases identified in the case selection document. There are normally many cases that satisfy the selection criteria (gravity, degree of responsibility, representative charges) within any situation and across all situations. The case selection document is used to prioritise cases both within a situation and across situations to manage the Prosecutor's overall workload.⁹³ The case document also informs decisions on the appropriate number of cases to be pursued within any given situation as the Prosecutor's limited resources restrict the number of cases it can investigate and prosecute.⁹⁴

Cases that meet the selection criteria are commenced over time, cases temporarily not prioritised remain part of the case selection document and the Prosecutor investigates and prosecutes such cases as circumstances permit based on the prioritisation criteria.⁹⁵ The gravity of the crime is one of the prioritisation criteria. The selection and prioritisation of cases therefore involves a comparative assessment across cases and involves comparing the relative gravity of each case. The concept of relative gravity is therefore very important in deciding what cases to prosecute.

Relative gravity was a key factor used by the Prosecutor to decide to prosecute cases against the Lord Resistance Army (**LRA**) in the Uganda situation. Regarding arrest warrants, the Prosecutor stated 'the criteria for selection of the first case was gravity.

⁹¹ Policy paper on case selection (n 48) [34]

⁹² Ibid [10]

⁹³ Ibid [11]

⁹⁴ Ibid [12]

⁹⁵ Ibid [48]

We analysed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF [Uganda People's Defence Force]. We therefore started with an investigation of the LRA'.⁹⁶ Relative gravity is invoked here as the cases involving the LRA were selected because they were relatively graver than other cases in Uganda. The Prosecutor's choice to investigate and prosecute the conduct of the LRA prior to looking into the alleged government crimes was based on a comparison of the relative gravity of the crimes, not by applying the admissibility threshold test.⁹⁷

The Prosecutor has also used relative gravity in the selection of situations. Relative gravity was an important factor influencing the Prosecutor's decision not to open an investigation into Iraq in 2006 relating to alleged misconduct by British soldiers.⁹⁸ The Prosecutor made its decision based on relative gravity, comparing the Iraq situation with the situations in the Democratic Republic of the Congo (DRC), Northern Uganda and Darfur. The Prosecutor's analysis in the Iraq decision was based not on the fact that the loss of life of 10-20 people in Iraq was not serious rather the Prosecutor compared this with the thousands of deaths in the DRC, Northern Uganda and Darfur.⁹⁹ The Prosecutor was therefore assessing gravity across different situations and exercising discretion to decide the Iraq situation was relatively less grave.

The practice of the ICC shows that relative gravity comes into all stages of the ICC's investigation, namely preliminary investigations, opening a situation and opening of a case. Relative comparisons therefore inform the Prosecutor's decisions in the process leading up to and during its 'threshold' admissibility gravity decisions. I therefore consider relative gravity to be an unavoidable factor that is and should be considered in all gravity assessments. I argue that relative gravity should be made a mandatory

⁹⁶ Office of the Prosecutor Press Release, 'Statement by Prosecutor Luis Moreno-Ocampo' [14 October 2005] 3

⁹⁷ Susana SaCouto & Katherine Cleary (n 69) 851

⁹⁸ The Office of the Prosecutor 'Statement by Prosecutor Luis Moreno-Ocampo' [9 February 2006] 9

⁹⁹ Ibid, 9 and William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' [2008] 6(4) Journal of International Criminal Justice 747

gravity factor that the Prosecutor must consider when assessing gravity. The distinction between the threshold decision that requires applying objective criteria and the relative decision that is used to prioritise situations and cases cannot be separated because gravity assessments at all stages of proceedings require relative gravity considerations.

Role of relative gravity in upholding the Court's legitimacy

Relative gravity is important because it allows the Prosecutor to balance the ICC's interests and goals in a way that can uphold the Court's legitimacy in the eyes of the international community. The Prosecutor can do this by using relative gravity to select situations and cases that are the most serious and that pursue the Court's specific goals. The ICC is a young Court and its success is dependent on it gaining wider membership and support. The Court's perceived legitimacy is critical to this. The task of prioritising the Court's objectives is a component of the consideration of gravity in selection decisions.¹⁰⁰ Making legitimate gravity determinations are crucial for the Court to achieve credibility before the international community.¹⁰¹

Commentators, including William Schabas and Margaret M. deGuzman, have argued that the selection and initiation of investigations into situations and cases is among the most critical tasks of the ICC because these decisions directly influence the legitimacy of the Court and judgments as to its effectiveness.¹⁰² Ray Murphy has said that 'Intervention in less grave situations, which fail to reflect the concern of the international community as a whole might lead to ICC fatigue and diminishing support from the international community'.¹⁰³ Gravity is fundamental in deciding to open a situation or case and such decisions have important ramifications for the Court's perceived legitimacy and a relative gravity approach can ensure that both the

¹⁰⁰ Margaret M. de Guzman (n 54) 1459

¹⁰¹ Anna Trenga 'The Gravity Threshold of Article 17(1)(d), How Grave is Grave Enough?' [2015] 11 All Eyes on the ICC 80

¹⁰² Alette Smeulers, Maartje Weerdesteijn and Barbara Hola, 'The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance' [2015] 15 International Criminal Law Review 2

¹⁰³ Ray Murphy, 'Gravity Issues and the International Criminal Court' [2006] 17(3) Criminal Law Forum 311

most serious situations and cases, as well as those that address the Court's specific goals, are selected for investigation and prosecution.

2.3 Gravity involves the exercise of discretion by the Prosecutor

The role of gravity in the law of the ICC is strongly related to the discretion of the Prosecutor. This is true whether gravity is conceptualised as a threshold or as a relative concept. The exercise of discretion is an inherent part of assessing gravity because assessing gravity requires emphasising particular gravity factors depending on the circumstances and this requires a subjective appraisal. There has been much discussion in the academic literature and case law about the appropriate role and freedom given to the Prosecutor in exercising her discretion when making gravity determinations.

Gravity assessments are made by the Prosecutor and are subject to review by the Pre-Trial Chamber in certain situations. I argue that the Prosecutor is the appropriate person in the ICC to make gravity decisions because they possess the best knowledge of all potential situations and cases before the Court and have experience making gravity decisions. The Pre-Trial Chamber should respect the Prosecutor's discretion regarding such decisions and only find differently should the Prosecutor clearly abuse their discretion. The *Registered Vessels of Comoros, Greece and Cambodia (Comoros)* decision illustrates the importance of Prosecutorial discretion in making gravity decisions and illustrates the danger of the Pre-Trial Chamber being overzealous in reviewing the Prosecutor's gravity assessments.¹⁰⁴

The importance of Prosecutorial Discretion

Prosecutorial discretion is important to ensure both that the Prosecutor is appropriately independent as well as allowing the Court to be efficient and reactive to differing circumstances. An independent Prosecutor is important in well-functioning

¹⁰⁴ *Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, 'Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation'* [16 July 2015], ICC-01/13-34 (**Comoros Pre-Trial Chamber decision**)

criminal law systems to ensure appropriate separation of the roles of the judiciary, prosecution and defence. At the core of such independence is the discretion to decide whether or not to investigate and prosecute cases.¹⁰⁵ Discretion also allows the Prosecutor to temporarily or permanently alter prosecutorial focus in response to external pressures or alternatively insulate itself from such pressures if it believes it is necessary in the interests of justice.¹⁰⁶ The Prosecutor may also legitimately need to exercise discretion to make strategic considerations.¹⁰⁷

In situations investigated by the ICC the number of cases requiring prosecution by the Court will normally outnumber the capacity to prosecute these cases. The Prosecutor therefore needs to be able to exercise discretion in deciding what weight to place on different factors to decide what cases to prosecute.¹⁰⁸ The ICC Prosecutor is different to domestic Prosecutors who usually have a mandate to prosecute all conduct above a *de minimis* standard. The ICC Prosecutor, in contrast, must select among an array of potential situations and cases to decide which most merits the ICC's attention.¹⁰⁹ These selection decisions require the exercise of discretion.

Prosecutorial discretion under the Rome Statute

The Prosecutor has a lot of discretion under the Rome Statute. Their independence is reflected in article 42(1) that states 'the Office of the Prosecutor shall act independently as a separate organ of the Court'.¹¹⁰ The Prosecutor's discretion is reflected in them being under no obligation to initiate an investigation once a situation has been referred to her.¹¹¹ The Prosecutor can also decline to proceed with an investigation, after conducting a preliminary investigation, if they decide there is no

¹⁰⁵ Geert-Jan Alexander Knoop and Tom Zwart 'The Flotilla Case before the ICC: The Need to Do Justice While Keeping Heaven Intact' [2015] 15 International Criminal Law Review 1073 quoting Morten Bergsmo and Pieter Kruger, "Article 53" in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 702

¹⁰⁶ Stephen Eliot Smith, 'Inventing the Laws of Gravity: The ICC's Initial *Lubanga* Decision and its Regressive Consequences' [2008] 8 International Criminal Law Review 341

¹⁰⁷ Susana SaCouto & Katherine Cleary (n 69) 813

¹⁰⁸ Ibid 813

¹⁰⁹ Margaret M. de Guzman (n 54) 1459

¹¹⁰ Rome Statute, Article 42(1)

¹¹¹ Ibid, Article 13

‘reasonable basis to proceed’.¹¹² Schabas has stated that the assessment of ‘gravity’ and ‘interests of justice’ under article 53(1)(b) and (c), which form part of the reasonable basis to proceed test, provide enormous space for discretionary determinations.¹¹³ Furthermore, the Prosecutor has the ability, under article 15, to initiate investigations into situations on their own initiative, *proprio motu*, subject to authorisation by the Pre-Trial Chamber.¹¹⁴ Importantly, in each of these discretionary decisions made by the Prosecutor, gravity is a key factor that must be considered.

The Prosecutor’s independence and power to decide situations and cases to investigate and prosecute has been hailed as a major accomplishment of the Rome Statute as it allows for a selection policy based on judicial rather than political reasoning.¹¹⁵ Apart from the gravity provisions the Rome Statute offers limited guidance regarding selection criteria for investigations and prosecutions. This gives the Prosecutor discretion to decide upon situations and potential cases to focus on. The Prosecutor has developed policies regarding selection policy, as set out in her policy paper on case selection and prioritisation. In developing these policies the prosecutor has stressed that gravity is one of the core criteria for selection decisions.¹¹⁶

As a limit on the Prosecutor’s discretion, the Pre-Trial Chamber may, in some circumstances, review the Prosecutor’s decisions. If the Prosecutor decides not to open an investigation that is referred by a State party or the UN SC the Pre-Trial Chamber can review such a decision and ask the Prosecutor to re-consider the decision.¹¹⁷ The Pre-Trial Chamber can also review, on its own motion, a decision of the prosecutor not to proceed with an investigation or case if based on ‘the interests of justice’ alone.¹¹⁸ Further, if the Prosecutor decides to initiate an investigation *proprio motu* it must be authorised by the Pre-Trial Chamber.¹¹⁹ This power of review is

¹¹² Rome Statute, Article 53(1)

¹¹³ William A. Schabas (n 99) 735

¹¹⁴ Rome Statute, Article 15(3) and Article 15(4)

¹¹⁵ Alette Smeulers, Maartje Weerdesteijn and Barbara Hola (n 102) 3

¹¹⁶ Ibid 3

¹¹⁷ Rome Statute, Article 53(3)(a)

¹¹⁸ Ibid, Article 53(3)(b)

¹¹⁹ Ibid, Article 15(4)

important and it provides a check on the Prosecutor's discretion. I argue that the Pre-Trial Chamber should only find differently to the Prosecutor, when reviewing the Prosecutor's discretionary gravity decisions, if the Prosecutor has abused their discretion. This pays deference to the fact that the Prosecutor is the most appropriate organ of the Court to make these discretionary decisions.

Registered Vessels of Comoros, Greece and Cambodia

The Pre-Trial Chamber decision in *Comoros* illustrates the important role of Prosecutorial discretion in making gravity decisions and also the appropriate role for the Pre-Trial Chamber in reviewing such decisions.¹²⁰ The *Comoros* decision related to events upon the Mavi Marmara, a ship registered to the Union of the Comoros, on 31 May 2010. Israeli Defence Forces (**IDF**) intercepted a humanitarian aid flotilla off the coast of Israel that was destined for the Gaza strip. In the process of boarding and taking control of the Mavi Marmara 10 people were killed, approximately 50 more injured, and there were hundreds of alleged outrages upon personal dignity.¹²¹ The Comoros referred the situation to the ICC. The Prosecutor opened a preliminary investigation and on 6 November 2014 issued a decision not to open a situation based on insufficient gravity.¹²² The Comoros appealed this decision to the Pre-Trial Chamber who decided that the Prosecutor had considered the proper gravity factors but had applied them incorrectly. The Pre-Trial Chamber therefore asked the Prosecutor to reconsider their decision not to initiate an investigation because of insufficient gravity.¹²³ The Prosecutor to date has not issued its reconsidered decision.

The Pre-Trial Chamber reviewed the Prosecutor's assessment of the four gravity factors (scale, nature, manner of commission and impact) and decided that each of them had been applied incorrectly. The Pre-Trial Chamber asserted that the

¹²⁰ Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, "Decision on the Request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (16 July 2015), ICC-01/13-34 (**Comoros Pre-Trial Chamber decision**)

¹²¹ Ibid [25]

¹²² The Office of the Prosecutor 'Situation on the Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report' [6 November 2014] (**Comoros Article 53(1) report**) [24]

¹²³ Comoros Pre-Trial Chamber decision (n 104) [50]

Prosecutor's assessment of gravity is not a matter of discretion, but instead 'requires the application of exacting legal requirements'.¹²⁴ The Pre-Trial Chamber said the only discretion available to the Prosecutor comes under the 'interests of justice' clause in Article 53(1)(c).¹²⁵ This approach suggests the Prosecutor has no discretion in deciding which situations are sufficiently grave.¹²⁶ The Prosecutor's determinations are owed no deference, but are subject to 'independent judicial oversight'.¹²⁷ This approach by the Pre-Trial Chamber makes the assessment of gravity very mechanical and fails to recognise that the assessment requires substantial evaluation and judgment. The Prosecutor is the person best placed to assess gravity given the Prosecutor's experience and role in developing evidence, building cases and knowledge of other situations and cases before the Court.¹²⁸

The Pre-Trial Chamber's assertion that the only discretion available comes under the 'interests of justice' clause is questionable. A decision of the Prosecutor not to proceed with an investigation or prosecution that it decides is not in the 'interests of justice' may be reviewed by the Pre-Trial Chamber on its own motion.¹²⁹ A decision not to proceed under this clause by the Prosecutor is only effective if confirmed by the Pre-Trial Chamber. By limiting the Prosecutor's discretion to this clause the Pre-Trial Chamber is therefore retaining as much power for itself as possible over the Prosecutor's decisions. This position presupposes that the Pre-Trial Chamber is the more appropriate body to make gravity decisions.

Furthermore by disallowing discretion under other sub clauses in Article 53(1) it removes Prosecutorial discretion in the assessment of gravity. Gravity as assessed under Article 53(1)(b) requires consideration of sufficient gravity under Article

¹²⁴ Comoros Pre-Trial Chamber decision (n 104) [14]

¹²⁵ Ibid [14]

¹²⁶ Margaret M. de Guzman, "What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation" (11 August 2015), Volume 19, Issue 19, <https://www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber> (19 May 2017)

¹²⁷ Comoros Pre-Trial Chamber decision (n 104) [15]

¹²⁸ Alex Whiting, "The ICC Prosecutor should Reject Judges' Decision in Mavi Marmara" (20 July 2015), <https://www.justsecurity.org/24778/icc-prosecutor-reject-judges-decision-mavi-marmara/> (19 May 2017)

¹²⁹ Rome Statute, Article 53(3)(b)

17(1)(d). Gravity cannot be assessed without discretion being exercised because gravity factors must be assessed in relation to the particular circumstances. The Pre-Trial Chamber's statement that discretion only relates to the interests of justice clause in Article 53(1)(c) does not withstand scrutiny.

The Pre-Trial Chamber's assessment of particular evidence relating to the use of 'live fire' ammunition when the IDF soldiers boarded the Mavi Marmara illustrates its view of the limited scope for the Prosecutor to exercise discretion in assessing gravity. The assessment of the live fire evidence relates to the 'manner of commission' of the crimes, one of the four gravity factors that the Prosecutor must consider when assessing gravity. The use of live fire before the boarding of the Mavi Marmara was important because it could indicate that a plan or policy existed to attack civilians by the IDF forces. This could indicate high-level involvement by Israeli commanders and would weigh in favour of finding sufficient gravity in relation to the manner of commission of the crimes.

The Prosecutor had considered the available evidence relating to the manner of commission of the crimes and concluded that there was insufficient information to show that the alleged crimes were the result of a deliberate policy or plan to attack civilians. The Pre-Trial Chamber however focused intently on specific evidence relating to the use of live fire, saying it could possibly suggest the existence of a plan or policy, and this weighed in favour of finding sufficient gravity and the opening of an investigation. The Prosecutor had considered all the available evidence to make their reasoned assessment. The Pre-Trial Chamber focuses on one specific piece of evidence to insist that because the evidence is disputed an investigation is required. This approach by the Pre-Trial Chamber undermines the role of the Prosecutor in undertaking their function of analysing and assessing the available evidence relating to the gravity factors. The Pre-Trial Chamber's approach would require the Prosecutor to open an investigation whenever there exists a tiny amount of evidence that could suggest gravity. This undermines the Prosecutor's discretion.¹³⁰

¹³⁰ Alex Whiting (n 128)

The Pre-Trial Chamber's approach sets the standard for opening a situation extremely low. The Pre-Trial Chamber stated 'facts which are difficult to establish, or which are unclear... call for the opening of such an investigation. If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor shall open an investigation, as only by investigating could doubts be overcome.'¹³¹ Many referrals to the ICC contain allegations with at least one crime within the Court's jurisdiction. If the Prosecutor follows the Pre-Trial Chamber's view then it will have to open dozens of situations.¹³² The view taken by the Pre-Trial Chamber shows a misunderstanding of the scope of situations and cases before the ICC. Setting the standard so low would overrun the Court with cases that it does not have the resources to hear. This is exactly what the gravity threshold is there to prevent.

Judge Kovacs provided a partially dissenting opinion in the *Comoros* decision that provides the Prosecutor with a more appropriate level of discretion to make important gravity decisions. Judge Kovacs found the Prosecutor's gravity findings were reasonable and that 'the gravity threshold was far from being met'.¹³³ He thought the standard of Pre-Trial Chamber review should be whether the Prosecutor abused his discretion, not the stringent review applied by the majority, which he thought 'clearly interferes with the Prosecutor's margin of discretion'.¹³⁴ Judge Kovacs states 'I do not believe that the Pre-Trial Chamber is called upon to sit as a court of appeals with respect to the Prosecutor's decisions. Rather the Pre-Trial Chamber's role is merely to make sure that the Prosecutor has not abused her discretion in arriving at her decision not to initiate an investigation on the basis of the criteria set out in article 53(1) of the Statute.'¹³⁵

¹³¹ Comoros Pre-Trial Chamber decision (n 104) [13]

¹³² Kevin Jon Heller, "The Pre-Trial Chamber's Dangerous Comoros Review Decision" (17 July 2015), <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/> (19 May 2017)

¹³³ Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, "Partially Dissenting Opinion of Judge Péter Kovács" (16 July 2015), ICC-01/13-34-Anx, (**Judge Kovács partially dissenting opinion in Comoros**) [23]

¹³⁴ Ibid [8]

¹³⁵ Ibid [7]

Judge Kovacs emphasises the importance of the Prosecutor's margin of discretion in deciding not to initiate an investigation and says the 'abuse of discretion' standard provides a better balance between the prosecutor's discretion and independence and the role of the Pre-Trial Chamber in reviewing the prosecutor's decision which is limited to requesting the Prosecutor to reconsider its decision. Judge Kovacs states that the majority conducted a stringent review that interferes with the Prosecutor's discretion and second-guesses the Prosecutor's decisions on gravity.¹³⁶ His dissent supports the idea that substantial doubts around the evidence supporting a potential case may justify non-investigation and that such an assessment can be made and is a legitimate use of prosecutorial discretion.¹³⁷

I support Judge Kovac's view and consider that the Pre-Trial Chamber went too far in second-guessing the Prosecutor's decision on gravity. Judge Kovac's view is consistent with the discretion granted to the Prosecutor under the Rome Statute and reflects the fact that the prosecutor is best placed to make gravity decisions given their experience in assessing gravity when deciding other situations and cases to investigate and prosecute. The Prosecutor has knowledge of other situations and cases before the Court and so can use discretion to make a relative gravity assessment. Such knowledge was emphasised when the Prosecutor stated that 10 deaths and between 50 and 55 injured 'reached relatively limited proportions as compared, generally, to other cases'.¹³⁸ The Pre-Trial Chamber does not have this same knowledge and experience. The Pre-Trial Chamber's decision in Comoros appears not to have considered the relative gravity of the Comoros situation with other situations that have come before the Court. Had it considered the relative gravity of other situations before the Court it seems improbable that it could have come to the decision that it did.

I consider the Prosecutor should reject the Pre-Trial Chamber's approach and re-issue the decision that the situation is of insufficient gravity. The Prosecutor appropriately exercised its discretion in finding the Comoros situation insufficiently grave to justify

¹³⁶ Judge Kovács partially dissenting opinion in Comoros [8]

¹³⁷ Geert-Jan Alexander Knoops and Tom Zwart "The Flotilla Case before the ICC: The Need to Do Justice While Keeping Heaven Intact" (2015), *International Criminal Law Review*, 15, 1069-1097, page 1090

¹³⁸ Comoros Article 53(1) report (n 122) [138]

opening an investigation. The Pre-Trial Chamber clearly misunderstood the role of gravity as a threshold to keep out less important situations and also did not consider the relative gravity of the Comoros situation with other situations before the ICC.

Conclusion

This chapter explores the roles gravity plays in the law of the ICC and how they can be explained in theory. Firstly gravity can be conceptualised as a threshold that a situation or case must meet in order for it to be admissible before the ICC. The notion of a threshold ensures the ICC is not flooded with insignificant cases that it does not have the capacity or resources to deal with and envisages a set level above which a situation or case needs to reach to be admissible. Such a concept is useful to conceptualise gravity's role but cannot be construed strictly as the level required to be admissible will change depending on the circumstances and in relation to other situations and cases before the Court. Relative gravity considerations therefore relate to gravity even when conceptualised as a threshold. Secondly gravity can be conceptualised as a relative concept that is used to select and prioritise between situations and cases by making a relative assessment of their gravity. The relative gravity assessment ensures that only the gravest situations and cases are selected and prioritised for investigation and prosecution by the Court.

Also inherently linked to the role of gravity in the ICC is the discretion of the Prosecutor. The assessment of gravity requires the Prosecutor to exercise discretion in assessing gravity factors against the particular circumstances. The recent *Comoros* decision illustrates the importance of the Prosecutor's discretion and shows how the Prosecutor is best placed to assess gravity given their knowledge of all situations and cases before the Court. The Pre-Trial Chamber overstepped its role in reviewing the Prosecutor's gravity assessment in *Comoros*.

The concepts of a threshold and relative gravity help to explain the role gravity plays in the ICC. They are theoretical concepts distinct from the practical factors the Prosecutor and Chambers currently use when assessing gravity which are the focus of

chapter 3 (mandatory factors) and chapter 4 (additional factors). It is argued in this thesis that the theoretical role of relative gravity in the ICC is so important and convincing that it should be made a mandatory gravity factor that must be considered when assessing gravity in practice. The same is not argued for gravity as a threshold because the level of a threshold fluctuates depending in the circumstances.

Chapter 3: Factors used by the ICC to assess gravity

What factors does the ICC use to assess gravity and how appropriate are these factors?

This chapter addresses the particular gravity factors that the ICC has developed as mandatory considerations in the assessment of gravity and analyses their appropriateness. The factors are set out in regulation 29(2) of the Prosecutor's regulations and are the scale, nature, manner of commission and impact of crimes.¹³⁹ These four mandatory gravity factors are distinct from the theoretical concepts of gravity discussed in the previous chapter (as a threshold, relative gravity, and gravity as the exercise of the Prosecutor's discretion). It is now established practice in the law of the ICC that the Prosecutor and Chambers set out in depth analysis of each of these factors when assessing gravity.

The Prosecutor has provided guidance on what the assessment of each of the four mandatory gravity factors entails however there exists no specific standards or requirements established to determine if each of these factors is satisfied. Neither are the factors ranked in terms of their importance. Instead, the practice of the Prosecutor and Pre-Trial Chamber has been to emphasise one or more of these factors, depending on the circumstances, before concluding whether there is sufficient gravity. Such emphasis of a particular factor requires a subjective assessment.

The four gravity factors are appropriate and useful because they cover a wide range of elements that can make a crime grave thus allowing for different circumstances to be taken into account when assessing gravity. The breadth of the gravity factors is a strength as it allows all potential circumstances that may affect gravity to be considered. If narrow rule-based criteria were applied important factors in particular circumstances could be missed. The four mandatory factors provide consistency in assessing gravity and ensure legal certainty and consistency in the Court's decision making. This in turn helps to ensure the Court's decisions appear legitimate.

¹³⁹ Prosecutor's Regulations (n 3) Regulation 29(2)

3.1 Recognition of the importance of quantitative and qualitative factors

The Prosecutor and Chambers have both stated that quantitative and qualitative factors shall be considered when assessing gravity. The four mandatory factors, which include both quantitative and qualitative factors, are scale, nature, manner of commission and impact of the crimes. These will be discussed in turn.

Prosecutor's practice

The importance of both quantitative and qualitative factors in assessing gravity was acknowledged early in the Prosecutor's practice. The first recognition came by Prosecutor Luis Moreno Ocampo in the 2006 when he said 'The gravity of crimes is central to the process of case selection. The office looks at factors such as the scale and nature of the crimes (in particular, high numbers of killings), the systematic character and the impact of the crimes'.¹⁴⁰ In 2006 a draft policy paper from the Prosecutor, never published but referenced by William Schabas, reflected the view that both quantitative and qualitative factors were important in assessing gravity. The draft policy paper stated that the gravity assessment required assessing the scale, nature, manner of commission and impact of the crimes.¹⁴¹ Interestingly, these factors are identical to those adopted in the Prosecutor's Regulations in 2009.¹⁴²

The importance of quantitative and qualitative factors was solidified when the Prosecutor's regulations entered into force on 23 April 2009.¹⁴³ Regulation 29(2) states that when the Prosecutor determines whether there is a reasonable basis to proceed with an investigation or prosecution she must 'assess the gravity of the crimes allegedly committed in the situation' and to do so 'shall consider various factors including their scale, nature, manner of commission, and impact'.¹⁴⁴ The use of the word 'shall' connotes the mandatory consideration of these factors however the

¹⁴⁰ Statement of the Prosecutor of the International Criminal Court, Mr Luis-Moreno Ocampo to the UN Security Council pursuant to UNSCR 1593 (2005) [14 June 2006] [2]

¹⁴¹ Office of the Prosecutor 'Criteria for Selection of Situations and Cases', unpublished draft document of the Office of the Prosecutor [June 2006] [5], mentioned in William A. Schabas (n 99) 740

¹⁴² Prosecutor's Regulations (n 3) Regulation 29(2)

¹⁴³ Ibid, (adopted 23 April 2009)

¹⁴⁴ Ibid, Regulation 29(2)

word ‘including’ implies further factors may be considered in addition to those stated. It has become practice for the Prosecutor to set out its analysis of the four factors from regulation 29(2) in its gravity decisions.

ICC Case law

The importance of qualitative and quantitative factors is also reflected in the ICC’s case law. Their importance was first recognised in case law in the *Abu Garda* confirmation of the charges decision in February 2010 where the Pre-Trial Chamber stated ‘the gravity of a given case should not be assessed only from a quantitative perspective, i.e by considering the number of victims, rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case’.¹⁴⁵ The Pre-Trial Chamber mentioned the extent of damage caused, the harm caused to victims, the nature of the unlawful behaviour and the means employed as relevant factors to consider.¹⁴⁶

Since *Abu Garda* the reference to quantitative and qualitative factors has been regularly emphasised in case law. In March 2010 the Pre-Trial Chamber in the *Kenya authorisation decision* stated ‘the Chamber considers that gravity may be examined following a quantitative and qualitative approach. Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave’.¹⁴⁷ The Pre-Trial Chamber then went on to mention scale, nature, manner of commission and impact as factors that could provide useful guidance in assessing gravity.¹⁴⁸ In October 2011 the Pre-Trial Chamber in the *Côte d’Ivoire authorisation decision* stated the gravity assessment ‘must be carried out following a quantitative

¹⁴⁵ Abu Garda confirmation of charges decision (n 45) [31]

¹⁴⁶ Ibid [32]

¹⁴⁷ *Situation in the Republic of Kenya, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya’* [31 March 2010] ICC-01/09-19 (Kenya authorisation decision) [62]

¹⁴⁸ Ibid [62]

and qualitative approach'.¹⁴⁹ The Pre-Trial Chamber referenced *Abu Garda* as its authority. The *Goudé defence challenge decision* also recognised the need to assess quantitative and qualitative factors and cited both *Abu Garda* and the *Kenya authorisation decision* as its authority.¹⁵⁰ The Pre-Trial Chamber in *Comoros* also recognised that gravity must be assessed from a quantitative and qualitative viewpoint and that scale, nature, manner of commission and impact are indicators of gravity.¹⁵¹

Pre-Trial Chamber adopted Prosecutor's gravity factors

The four gravity factors were established by the Prosecutor and then adopted by the Pre-Trial Chamber with limited scrutiny. The Pre-Trial Chamber in *Abu Garda* states 'the Chamber agrees with the Prosecution's view that, in assessing the gravity of a case, "the issues of nature, manner and impact of the [alleged] attack are critical"'.¹⁵² The Pre-Trial Chamber adopts the Prosecutor's submissions regarding gravity with no analysis or justification. The later ICC decisions reference *Abu Garda* for their assertions that assessing gravity requires the consideration of the four gravity factors that are currently used by the Prosecutor for assessing gravity.¹⁵³ None of these subsequent cases provide any discussion into why these are appropriate factors or whether other factors were considered before adopting the Prosecutor's factors. It appears the Pre-Trial Chamber gave little thought as to the appropriateness of the factors used to assess gravity or whether the Prosecutor's factors are the best.¹⁵⁴ The current position reflected in case law therefore does not provide compelling support for the gravity factors that currently exist because they have not been subject to extensive analysis. I consider the four gravity factors to be appropriate as they allow the consideration of a wide range of potential factors that could affect gravity however the consideration of further factors is legitimate and necessary given the existing factors have not been put under extensive scrutiny.

¹⁴⁹ *Situation in the Republic of Côte d'Ivoire, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'* [3 October 2011] ICC-02/11/14 (**Côte d'Ivoire authorisation decision**) [203]

¹⁵⁰ *Goudé defence challenge decision* (n 50) [11]

¹⁵¹ *Comoros Pre-Trial Chamber decision* (n 104) [21]

¹⁵² *Abu Garda confirmation of charges decision* (n 45) [31]

¹⁵³ Stuart Ford, 'What Investigative Resources does the International Criminal Court Need to Succeed?: A Gravity-Based Approach' [2017] 16(1) *Washington University Global Studies Law Review* 11

¹⁵⁴ *Ibid* 12

Gravity assessment requires consideration of all factors

All gravity factors require consideration to provide an overall gravity assessment. The evaluation of the factors is not a mathematical process and different weight will have to be given to different factors depending on the context. Each situation or case will have its own features indicative of the gravity of the crimes that will be demonstrated by one or more gravity factors. Some factors, like the number of victims, lend themselves to a quantitative approach whereas other factors, like whether crimes were carried out in a particularly brutal manner, lend themselves to a qualitative approach.¹⁵⁵ The quantitative and qualitative factors are combined to make an overall gravity assessment. Flexibility in the factors considered allows for the consideration of all circumstances that contribute to the gravity of a given case.¹⁵⁶ No fixed weight can be assigned to any particular criteria but rather a judgment has to be made according to the facts and circumstances of each situation.¹⁵⁷

A problem with the multi-factor approach to gravity assessments is that it can allow for manipulation of the factors to reach a desired outcome. If there are few victims the decision maker can emphasise the wider impact of the crimes. If the impact of the crimes is unclear the decision maker can emphasise the brutal means of commission. For crimes before the ICC there is almost always some aspect that can be labeled grave. The Prosecutor's gravity assessments have emphasised one or more gravity factors in particular before stating their conclusion.¹⁵⁸ To ensure the decision maker does not simply pick and choose the gravity factor that supports a desired outcome it is important that all factors are applied to ensure the full spectrum of factors are considered. This will require the decision maker to justify why or why not a certain factor is or is not considered grave. If the reasons for finding a particular factor grave or not are given they can be reviewed to see if they are justified. If the decision was

¹⁵⁵ Stuart Ford (n 153) 9

¹⁵⁶ Susana SaCouto & Katherine Cleary (n 69) 843

¹⁵⁷ William A. Schabas (n 99) 740

¹⁵⁸ Margaret de Guzman, 'How Serious are International Crimes? The Gravity Problem in International Criminal Law' [2012] 51 Columbia Journal of Transnational Law 66

clearly affected by bias or lack of proper consideration of the circumstances then this will be clear in the justifications given in the decision.

Publication of decisions

Gravity decisions must be communicated clearly and transparently. The reasons for the particular decision, the criteria applied, and why particular gravity factors are given more weight than others in the particular context need to be made clear. The Prosecutor has developed the practice of publishing Article 53(1) reports regarding admissibility decisions on opening of situations. The Prosecutor also publishes preliminary examination reports each year that set out the status of the gravity assessments in preliminary investigations it has opened. The publication of these decisions is important so all interested parties can see the reasons given for the Prosecutor's admissibility decisions.

Although not a specific gravity decision, the Prosecutor's policy paper on case selection and prioritisation was made public in 2016 to 'ensure clarity and transparency in the manner in which it applies the requisite legal criteria and exercises its prosecutorial discretion'.¹⁵⁹ The legal criteria applied for making case selection and prioritisation decisions include gravity. The purpose of the policy paper is to ensure that the exercise of such discretion in all instances is guided by sound, fair and transparent principles and criteria.¹⁶⁰

The case selection document used to select and prioritise cases is not made public because it contains details of potential cases against identified suspects who are yet to be arrested and releasing the document would jeopardise their arrest. Once admissibility decisions are made regarding individual cases, and the accused has been apprehended, these too should be published, as has been the practice of the Court.

3.2 Scale of the crimes

¹⁵⁹ Policy paper on case selection (n 15) [3]

¹⁶⁰ Ibid [5]

The first mandatory factor listed by the Prosecutor for assessing gravity requires an assessment of the scale of the crimes. The Prosecutor's policy paper on preliminary examinations provides a comprehensive definition of what assessing the scale of the crimes requires:

'The scale of the crimes may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).'¹⁶¹ (*Emphasis added*)

From this definition we can distinguish three important elements relevant to assessing the scale of the crimes: the number of victims, the extent of the damage, and the geographical and temporal spread of the crimes. The scale factor acknowledges that the gravity of crimes increases as the number of victims increases, when the extent of damage increases, and if there is a wide geographical and temporal scope.¹⁶²

The number of victims is an obvious and important factor in assessing the scale of the crimes. It seems logical that, all other things being equal, a crime that affects two people is graver than a crime that affects one person. The benefit of such a measure is also that it can be easily assessed in numerical terms. If the number of victims is known it can also assist in a relative gravity analysis because it is easy to determine which situation or case involves a higher number. Caution is needed in such analysis however as countervailing qualitative factors may render one situation graver than another despite having less victims.

The Prosecutor has used the number of victims as an important determinant of gravity from early on in the ICC's existence. In 2005 Prosecutor Luis Moreno Ocampo stated that the methodologies for determining gravity include the number of persons killed, the number of victims, and the number of potential victims found in other situations

¹⁶¹ Prosecutor's Policy Paper on Preliminary Examinations (n 30) [62]

¹⁶² Stuart Ford (n 153) 8

under investigation and analysis.¹⁶³ In 2006, Prosecutor Ocampo justified non-action in Iraq based on the number of victims, the loss of life of 10-20 people in Iraq was seen as less grave than the thousands of deaths in the DRC, Northern Uganda and Darfur, Sudan.¹⁶⁴

The current Prosecutor, Fatou Bensouda, consistently mentions the number of victims in Article 53(1) reports that set out her gravity decisions in relation to situations.¹⁶⁵ In the Article 53(1) report relating to the situation in the Central African Republic II (**CAR II situation**) the Prosecutor makes regular references to the number of victims when assessing gravity.¹⁶⁶ She mentions the exact numbers of people killed, wounded, and victimised in the attacks from both the Séléka and Anti-balaka groups involved in the conflict.¹⁶⁷ The Pre-Trial Chamber also places importance on the number of victims as exemplified in the recent authorisation decision on the investigation into Georgia. The Pre-Trial Chamber states there were 51-113 killings, over 5,000 dwellings destroyed, and forced displacement of between 13,400 and 18,500 persons.¹⁶⁸ These numbers were used to determine that the scale of the crimes supported a finding of sufficient gravity.¹⁶⁹

The extent of the damage is also an important aspect of assessing scale. The presence of many victims won't render the scale of the crimes grave unless the extent of the damage is significant. The Prosecutor's practice seems to be to separate the type of victimisation as a way of elaborating on the extent of the damage. For example in the article 53(1) report in the CAR II situation the Prosecutor talks about different types of victims, for example, the 'Séléka allegedly killed 306 people...and wounded 805 more' and 'between August 2013 and July 2014, 114 reported incidents of

¹⁶³ Statement of Luis Moreno Ocampo, 'Informal Meeting of Legal Advisors to Ministries of Foreign Affairs, New York' [24 October 2005] 167

¹⁶⁴ The Office of the Prosecutor 'Statement by Prosecutor Luis Moreno-Ocampo' [9 February 2006] 9 and William A. Schabas, (n 99) 747

¹⁶⁵ For examples see: CAR II Article 53(1) report (n 40) [255] and [260] and The Office of the Prosecutor, 'Situation in Mali, Article 53(1) Report' [16 January 2013] (**Mali situation Article 53(1) report**), [144], [152] and [166].

¹⁶⁶ CAR II situation Article 53(1) report (n 40) [255] and [260]

¹⁶⁷ Ibid [255] and [260]

¹⁶⁸ Georgia authorisation decision (n 8) [54]

¹⁶⁹ Georgia authorisation decision (n 8) [54]

killings...resulting in some 1248 victims'.¹⁷⁰ Thus we know that the extent of the damage for 306 victims was very severe because they were killed, however the extent of the damage for the other 805 was less severe because they were only wounded. In the second example we are told there were 1248 victims, with 114 killings. We know the extent of the damage was significant for the 114 killed but there is no mention of the extent of the damage for the other victims, so it is hard to assess the gravity of the crimes against these victims.

Interestingly, the 'extent of the damage' appears to overlap with the 'impact of the crimes', a gravity factor in itself, which addresses the wider implications of the crimes on victims and their communities. Where the extent of damage is significant the impact on the victims is likely to also be significant. In the *Georgia authorisation decision* the Pre-Trial Chamber, after mentioning the number of persons forcibly displaced, stated that this resulted in a '75% decrease in the ethnically Georgian population in South Ossetia'.¹⁷¹ This is both the impact on the victims and the extent of the damage to the victims. This example shows how in some instances the gravity factors do not have perfectly defined parameters and can overlap.

In addressing scale the Prosecutor also considers the geographical and temporal spread of the crimes. In the CAR II situation the Prosecutor found 'cases of killings...in each of the prefectures in the CAR', and thus because the killing occurred across the whole country this supported a finding of sufficient scale of the crimes.¹⁷² Likewise in the *Kenya authorisation decision* the Pre-Trial Chamber, in finding the scale of the crimes supported sufficient scale, mentioned that the post-election violence 'affected six of the eight Kenyan provinces'.¹⁷³ In the *Côte d'Ivoire* decision the Pre-Trial Chamber also found sufficient gravity where the violence occurred in 'many of the neighbourhoods of Abidjan and the west of Côte

¹⁷⁰ CAR II situation Article 53(1) report (n 40) [260]

¹⁷¹ Georgia authorisation decision (n 8) [54]

¹⁷² CAR II situation Article 53(1) report (n 40) [255]

¹⁷³ Kenya authorisation decision (n 147) [190]

d'Ivoire'.¹⁷⁴ Thus even when the crimes did not occur in the majority of the country it was still widespread enough to weigh in favour of finding sufficient gravity.

The violence considered in the CAR II situation covered a two-year period. In comparison, in the Kenya situation most of the post-election violence occurred over a period of approximately two months and the post-election violence in the Côte d'Ivoire situation lasted approximately 6 months.¹⁷⁵ In assessing scale the Pre-Trial Chamber does not mention that these are short time periods. This could suggest a low threshold for the temporal spread of crimes. However in both the Kenya and Côte d'Ivoire situations the intensity during these periods was high. The findings are therefore consistent with the definition of the scale of crimes provided by the Prosecutor which states that if the intensity of crimes is high over a short period or limited geographical area they can still be of significant scale.

I consider scale to be an important factor in assessing the gravity of crimes. Using the number of victims provides a transparent method of assessing scale and allows for easy comparisons with other situations and cases. The number of victims however needs to be considered in light of the extent of the damage because a high number of victims will not make a crime grave unless the extent of the damage is significant. The geographical and temporal spread of crimes have been considered regularly by the ICC but these seem less helpful as elements to assess scale because they can be deemed irrelevant if the violence is particularly intense. The important factor seems not the temporal or geographical spread but the intensity of the violence.

3.3 Nature of the crimes

The second mandatory factor listed by the Prosecutor for assessing gravity is the nature of the crimes. The Prosecutor's policy paper on preliminary examinations provides the following guidance for assessing the nature of the crimes:

'The nature of the crimes refers to the *specific elements of each offence* such as killings, rapes and other crimes involving sexual or gender violence

¹⁷⁴ Côte d'Ivoire authorisation decision (n 149) [62]

¹⁷⁵ Kenya authorisation decision (n 147) [202] and Côte d'Ivoire authorisation decision (n 149) [62]

and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.¹⁷⁶

(*Emphasis added*)

The nature of the crimes relates to what crime the act perpetrated amounts to (i.e its legal qualification). The nature of the crimes also implicitly recognises that there exists a hierarchy among crimes and that some crimes are graver than others.¹⁷⁷ Killings, for example, are graver than torture or rape.¹⁷⁸ De Guzman argues that a hierarchy of criminal acts exists when assessing the nature of the crimes: murder is the most serious, then sexual violence, then crimes involving physical and psychological suffering like torture, with property offences being the least serious.¹⁷⁹ Such a hierarchy is useful in assessing the comparative gravity of crimes. However without a set out hierarchy it can only help determine between crimes clearly of different severity, like murder and property crimes for example. Without a clearly stated hierarchy, crimes of similar gravity, for example rape and sexual slavery, are harder to distinguish.

The legal qualification of acts as certain crimes and the hierarchy of severity of these crimes was at issue in the *Comoros decision* when the Pre-Trial Chamber assessed the nature of the crimes.¹⁸⁰ The Pre-Trial Chamber considered whether the conduct of IDF forces against captured passengers of the Mavi Marmara amounted to the war crime of torture or the lesser crime of outrages on personal dignity. During the raid of the Mavi Marmara IDF soldiers allegedly mistreated the captured passengers by subjecting them to overly tight handcuffing, beating, denial of toilet facilities, denial of medication, limited food and drink, forced kneeling in the sun, exposure to sea spray and wind, threats, intimidation and blindfolding.¹⁸¹ The Pre-Trial Chamber stated ‘the concept of the nature of the crimes... revolves around the relative gravity of the possible legal qualifications of the apparent facts, i.e the crimes that are being or

¹⁷⁶ Prosecutor’s Policy Paper on Preliminary Examinations (n 30) [63]

¹⁷⁷ Stuart Ford (n 153) 8

¹⁷⁸ Ibid 8

¹⁷⁹ Margaret M de Guzman (n 54) 1452

¹⁸⁰ Comoros Pre-Trial Chamber decision (n 104)

¹⁸¹ Comoros Pre-Trial Chamber decision (n 104) [29]

could be prosecuted'.¹⁸² The Prosecutor decided the acts were outrages on personal dignity, but not torture. The Pre-Trial Chamber however thought the acts could constitute torture and that this weighed in favour of finding sufficient gravity. The Pre-Trial Chamber's view supports the idea that if the crimes qualify as torture, rather than outrages on personal dignity, this makes them graver. The legal qualification of the crime is therefore important, because if the crime amounts to torture it is graver than if it amounts to outrages on personal dignity.

Other Court practice shows that analysis of the nature of crimes requires an assessment of the legal qualification of the acts in question as a particular crime. The *Georgia authorisation decision* states, in relation to the nature of crimes, that 'the potential cases could encompass an array of war crimes and crimes against humanity'.¹⁸³ The Article 53(1) report from the CAR II situation refers to the alleged acts as constituting the war crimes and crimes against humanity of torture, attacking humanitarian personnel, and recruiting of children under the age of 15.¹⁸⁴ Likewise the Mali situation Article 53(1) report refers to the alleged acts as constituting particular crimes under the Rome Statute, for example the murder of combatants under Article 8(2)(c)(i).¹⁸⁵

Assessment of the nature of crimes is an important factor in assessing gravity. Some crimes should be considered more severe than others and the legal qualification of an act as a particular crime is an appropriate consideration to assess gravity. If one situation contains acts of murder and another contains acts of torture then the situation with acts of murder should be considered graver, if all other factors are equal. Likewise, if one situation contains acts of murder that constitute genocide whereas another situation contains acts of murder that constitute isolated war crimes then the qualification of these acts of murder as genocide or as a war crime does impact on the assessment of their relative gravity. There is however a lack of clarity as to the exact hierarchy of crimes. Establishing which crime is graver is difficult when two crimes

¹⁸² Comoros Pre-Trial Chamber decision (n 104) [28]

¹⁸³ Georgia authorisation decision (n 8) [53]

¹⁸⁴ CAR II situation Article 53(1) report (n 40) [256]

¹⁸⁵ Mali situation Article 53(1) report (n 165) [145]

are similar in nature. It would be beneficial for the Prosecutor to provide some guidance on a hierarchy of crimes. This would provide more accuracy and consistency in assessing the nature gravity factor, notwithstanding that other gravity factors will also impact the overall assessment of gravity in light of the particular circumstances.

3.4 Manner of commission of the crimes

The manner of commission of crimes is the third mandatory factor listed by the Prosecutor for assessing gravity. The Prosecutor's policy paper sets out guidance for assessing the manner of commission of crimes as follows:

‘The manner of commission of the crimes may be assessed in light of, inter alia, the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a *plan or organised policy* or otherwise resulted from the abuse of power or official capacity, and *elements of particular cruelty*, including the vulnerability of the victims, any *motives involving discrimination*, or the use of rape and sexual violence as a means of destroying groups.¹⁸⁶ (*Emphasis added*)

The manner of commission factor recognises that two crimes may be legally qualified as exactly the same, for example they both qualify as murder, however the way the crimes are carried out may affect their gravity.¹⁸⁷ The examples given above are ways in which a crime may be of greater gravity. In the assessment of manner of commission the Court has focused primarily on three factors: the existence of discriminatory motives, the use of particularly cruel and brutal means, as well as focusing on whether there has been a plan or policy.

The Prosecutor and Pre-Trial Chamber have emphasised discriminatory motives in many of their assessments of the manner of commission of crimes. In the CAR II situation the Prosecutor emphasised the Anti-Balaka forces targeted, with particular brutality, nomadic Mboro Muslims and that the attacks had led to displacement of the

¹⁸⁶ Prosecutor's Policy Paper on Preliminary Examinations (n 30) [64]

¹⁸⁷ Stuart Ford (n 153) 8

Muslim population resulting in only 20% of the Muslim population remaining in the CAR and fewer than 1,000 of more than 100,000 Muslims remained in the capital, Bangui.¹⁸⁸ In the Côte d'Ivoire situation the Prosecutor emphasised that 'many of the crimes were committed with cruelty and on ethnic, religious or politically discriminatory grounds'.¹⁸⁹ The Pre-Trial Chamber, in the *Goudé defence challenge decision*, stated that the crimes committed by Goudé in Côte d'Ivoire were 'in the context of a disputed presidential election on political, national, ethnic or religious grounds as victims were targeted because they were assimilated to members of Alassane Ouattara's political groups'.¹⁹⁰ The Pre-Trial Chamber also found that Goudé used hate speech and xenophobic messages to incite his pro-Gbagbo youth to commit violent crimes against civilians perceived to support Ouattara.¹⁹¹ Focusing on discriminatory motives in assessing the manner of commission of the crimes is important because these motives are often the underlying causes of conflicts and fuel the violence.

The use of particularly cruel and brutal means of committing crimes is another key factor in assessing the manner of commission of crimes. Brutal means was emphasised in the *Kenya authorisation decision* where the Pre-Trial Chamber stated 'Some of the crimes... were also marked by elements of brutality, for example burning victims alive, attacking places sheltering IDPs [Internally Displaced Persons], beheadings, and using pangas and machetes to hack people to death'.¹⁹² In Kenya sexual violence was also widespread with gang rape, genital mutilation and forced circumcision, with family members often forced to watch.¹⁹³ In the CAR II situation the Prosecutor stated that crimes were committed with particular cruelty with victims being tortured before being killed, burnt alive, pregnant women were raped and rape occurred in the presence of family members.¹⁹⁴ The Pre-Trial Chamber in the *Georgia authorisation decision* stated the 'expulsion of civilians was sought by brutal means'

¹⁸⁸ CAR II situation Article 53(1) report (n 40) [262] and [263]

¹⁸⁹ Situation in the Republic of Côte d'Ivoire, 'Request for Authorisation of an Investigation pursuant to article 15' [23 June 2011] ICC-02/11-3 [58]

¹⁹⁰ Goudé defence challenge decision (n 50) [21]

¹⁹¹ Ibid [21]

¹⁹² Kenya authorisation decision (n 147) [199]

¹⁹³ Ibid [192]

¹⁹⁴ CAR II situation Article 53(1) report (n 40) [257]

that involved a ‘consistent pattern of deliberate killing, beating and threatening civilians, detention, looting properties and burning houses’.¹⁹⁵ The use of cruel and brutal means of committing crimes distinguishes the gravity of two crimes that are otherwise the same. It is justified that a murder that involves the decapitation of the deceased and torture of the deceased before their death is graver than a murder by a single shot to the head with no suffering.

The Court has also considered whether crimes are committed as part of a plan or policy when assessing the manner of commission of crimes. The existence of a plan or policy was considered in the *Comoros decision*. The debate in Comoros related to the use of live fire ammunition before the IDF soldiers boarded the Mavi Marmara. The Pre-Trial Chamber found that whether live fire was used prior to boarding the Mavi Marmara was material to whether there was a prior intent or plan to attack civilians.¹⁹⁶ The existence of a plan would suggest pre-meditation to attack civilians and also the involvement of high-level state officials in positions of power. If there was a pre-existing plan to attack civilians with live fire this is more severe than if the attacks with live fire occurred in the heat of the moment, in a response to the violent circumstances, with no prior intention. The existence of a plan or policy when assessing the manner of commission of a crime is therefore an important aspect that can affect gravity.

The manner of commission of the crimes is an important factor in assessing gravity. The Court has focused on discriminatory intent, particularly cruel and brutal means and the existence of a plan or policy in assessing the manner of commission. These are all factors that legitimately make the commission of a crime graver.

3.5 Impact of the crimes

The final of the four mandatory gravity factors set out by the Prosecutor is the impact of the crimes. The Prosecutor provides the following guidance on assessing impact:

¹⁹⁵ Georgia authorisation decision (n 8) [54] and [20]

¹⁹⁶ Comoros Pre-Trial Chamber decision (n 104) [31]

‘The impact of crimes may be assessed in light of, *inter alia*, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.’¹⁹⁷ (*Emphasis added*)

The impact of the crimes focuses on the immediate and consequential effects of the crimes on the victims as well as the effects on the victims’ communities. This factor recognises that the consequences of crimes on victims affect their gravity.¹⁹⁸

The Kenya situation is illustrative of how crimes can cause immediate and subsequent effects on victims and all of these effects are relevant to assessing the impact of the crimes. Direct victims of sexual violence in Kenya suffered from the direct impact of the physical abuse of the violence, as well as consequential affects of psychological trauma and HIV infection.¹⁹⁹ In addition, the husbands and families of many rape victims abandoned them due to the social stigma of being raped while many other victims became pregnant from being raped.²⁰⁰ The impact of the crimes on the victims therefore entailed immense suffering but there were also more extensive consequences as a result of the physical act of the rape. This subsequent impact is also important in assessing gravity.

In the CAR II situation the Prosecutor emphasised the impact of the crimes on CAR society as a whole. In her Article 53(1) report the Prosecutor highlights that the crimes committed by the Séléka and Anti-Balaka had impact on the direct victims as well as the victims’ families, the victims’ communities, and the CAR society as a whole.²⁰¹ The religious and ethnic components of the violence led to a de-facto partition of the country with the Séléka controlling the North East of the country and the Anti-Balaka controlling the North West.²⁰² The targeted attacks on Muslims had resulted in 20% of the total Muslim population remaining in the CAR.²⁰³ The massive exodus of Muslims, who were important to the small-scale trade and commerce

¹⁹⁷ Prosecutor’s Policy Paper on Preliminary Examinations (n 30) [65]

¹⁹⁸ Stuart Ford (n 153) 9

¹⁹⁹ Kenya authorisation decision (n 147) [194]

²⁰⁰ Ibid [194]

²⁰¹ CAR II situation Article 53(1) report (n 40) [258] and [263]

²⁰² Ibid [258] and [263]

²⁰³ Ibid [263]

sectors, had resulted in food and medicine shortages and significant increases in market prices.²⁰⁴ Thus when the crimes impact the wider community it increases their gravity.

The impact of the crimes on affected communities also arose in the context of attacks on humanitarian aid workers in the *Abu Garda* case. Abu Garda was charged with war crimes in relation to an incident at the Haskanita military camp, in Darfur, Sudan, on 29 September 2007.²⁰⁵ The charges related to killing of 12 African Mission in Sudan (AMIS) peacekeepers and attempting to kill eight others.²⁰⁶ In finding that the crimes were sufficiently grave to be admissible before the ICC the Court emphasised the impact of the crimes on the millions of Darfurians who were deprived of humanitarian aid as a result of the attacks. The Pre-Trial Chamber stated that as a result of the attack ‘AMIS operations were severely disrupted, thus affecting its mandated protective roles with respect to millions of Darfurian civilians in need of humanitarian aid and security’, and that ‘this left a large number of civilians without AMIS protection, on which they had allegedly relied before the attack’.²⁰⁷ The Pre-Trial Chamber thus finds that not only were the consequences of the attack grave for direct victims of the attack, the AMIS personnel, and for their families, but also for the wider community due to the reduction in AMIS activities in the area.

An important comparison of the assessment of the impact of the crimes on affected communities can be made comparing *Abu Garda* to the Comoros situation. The Prosecutor in Comoros stated in its Article 53(1) report that ‘the alleged crimes clearly had significant impact on victims and their families...[however] it does not appear that the conduct of the IDF during the incident can be considered to have had a significant impact on the civilian population of Gaza.’²⁰⁸ The Prosecutor then pointed out that ‘the supplies carried by the vessels in the flotilla were ultimately distributed in Gaza’.²⁰⁹ This suggests the wider impact of the crimes, beyond the direct victims, is

²⁰⁴ CAR II situation Article 53(1) report (n 40) [263]

²⁰⁵ Abu Garda confirmation of charges decision (n 45) [21]

²⁰⁶ Ibid [21]

²⁰⁷ Abu Garda confirmation of charges decision (n 45) [33]

²⁰⁸ Comoros situation Article 53(1) report (n 62) [141]

²⁰⁹ Ibid [141]

an important factor affecting gravity. In *Abu Garda* the wider impact was significant because Darfurians did not receive humanitarian aid whereas in *Comoros* the wider impact was less because the humanitarian aid was delivered to Gaza.

The impact of the crimes is an important factor in assessing gravity. Any crime within the ICC's jurisdiction is going to have significant impact on direct victims, however subsequent impact, that may not be immediately obvious as seen in the Kenya situation, that instills terror and suffering upon the victim will make a crime particularly grave. The wider implications and impact of the crimes on the community and society generally will also weigh in favour of severe gravity.

Conclusion

This chapter considers the mandatory factors the ICC has established to assess gravity and analyses their appropriateness. The Prosecutor has developed four gravity factors of scale, nature, manner of commission and impact of crimes. These factors are each considered in depth by the Prosecutor and Chambers when making gravity assessments. These are all important and relevant factors to be considered when assessing gravity and encompass both quantitative and qualitative considerations. They are appropriately broad in scope allowing for the consideration of a wide range of factors that may be relevant to the assessment of gravity in different circumstances. Narrower criteria would be undesirable as relevant factors could be excluded. The guidance on assessing each factor given by the Prosecutor is useful and provides focus for their assessment.

Mandatory factors provide consistency in making gravity decisions as all factors must be considered and justifications given for why a factor is or is not emphasised. In making a gravity decision, one or more gravity factors will be emphasised as making a crime particularly grave in the circumstances. This requires a subjective decision of the decision maker. In order to make this subjective decision as transparent and accountable as possible the Prosecutor must make public an assessment of each

gravity factor, justifying why it emphasises one gravity factor and not others in its overall decision on gravity.

Chapter 4: Additional gravity factors

What additional gravity factors does the ICC use to assess gravity and how appropriate are these factors?

This Chapter focuses on the additional factors that the ICC has focused on in assessing gravity. In addition to the four mandatory gravity factors of scale, nature, manner of commission and impact, the Prosecutor has focused on crimes that are traditionally under prosecuted as well as, at the situation stage, the role and rank of the perpetrator in assessing gravity. Allowing for additional gravity factors helps ensure all factors that may impact on gravity are considered.

Focusing on crimes that are traditionally under prosecuted is justified because it acts as a deterrent against impunity, contributing to the prevention of such crimes.

However the Prosecutor has tried to link these crimes with gravity, which is not always convincing because crimes are grave due to a number of factors. If a crime is under-prosecuted this will not necessarily make it grave if the crime scores lowly on other gravity factors (e.g. is committed on a small scale, the manner of commission is not particularly gruesome and the impact is small). Being under-prosecuted should only be one factor among many that make a crime grave. Crimes committed against property are an example where, despite these crimes being traditionally under prosecuted, it is difficult to justify them as grave, compared to other ICC crimes.

The same is true for whether the perpetrator is a senior leader or not. If a senior leader commits a crime that scores low on the four mandatory gravity factors this will not make the crime grave. To the contrary, a crime committed by a non-senior leader that scores high on the four gravity factors is a grave crime. That the perpetrator is a senior leader should never be the only, or even the predominant factor that makes a crime grave. Seniority must be considered alongside all the other gravity factors and a crime committed by a senior leader should only be justified as graver than a crime committed by a low ranked perpetrator if all other gravity factors are equal.

If either of these additional factors are emphasised by the Prosecutor or Pre-Trial Chamber as a relevant gravity factor justifying the opening of a situation or case this must be clearly supported with reasons why. This ensures transparency in the factors applied.

4.1 Crimes traditionally under prosecuted

The Prosecutor has stated that in selecting and prioritising cases to prosecute she will focus on crimes that have been traditionally under prosecuted. The Prosecutor's November 2016 policy paper states that the Prosecutor's aim is 'to represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure...the most serious crimes committed in each situation do not go unpunished'.²¹⁰ The Prosecutor identifies crimes against children, sexual crimes, attacks against cultural, religious, historical and other protected objects and attacks against humanitarian and peacekeeping personnel as traditionally under-prosecuted crimes worthy of particular attention.²¹¹ In focusing on such crimes the Prosecutor will '*aim to highlight the gravity of these crimes*, thereby helping to end impunity for, and contributing to the prevention of, such crimes'.²¹² (*Emphasis added*)

Focusing on crimes that are traditionally under prosecuted is a reasonable prosecutorial strategy to prevent impunity for certain types of crimes, however trying to link all of these crimes as grave will not always be convincing. Crimes are grave due to many factors, including their scale, nature, manner of commission and impact. Crimes that are under-prosecuted may be more or less grave depending on how they rank with regard to these different gravity factors. The fact a crime is under-prosecuted may be an additional factor that weighs in favour of finding a crime grave but it must be only an additional factor that the Prosecutor considers, it cannot be an overriding consideration otherwise it will distort the gravity analysis and the Prosecutor will start prosecuting less grave crimes just because they are traditionally under prosecuted. This could lead to legitimacy issues if the gravest cases are

²¹⁰ Policy paper on case selection (n 15) [45]

²¹¹ Ibid [46]

²¹² Ibid [46]

consequently not prosecuted. The Prosecutor should therefore only prioritise under prosecuted crimes when deciding between two crimes that are otherwise of equal gravity.

Crimes against property

The Prosecutor has identified ‘attacks against cultural, religious, historical and other protected objects’ as crimes that are under prosecuted and deserving of its attention.²¹³ Crimes against property, as these identified crimes are, must be taken seriously, particularly due to their relationship with other crimes under the ICC’s jurisdiction like genocide that aim to eradicate specific groups of people. The rise in systematic destruction of cultural property by groups like ISIS in the context of armed conflicts further justifies a focus on these crimes.²¹⁴ However trying to link these crimes to gravity can be difficult. The Trial Chamber in the Al Mahdi sentencing judgment stated ‘in the view of the Chamber, even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons’.²¹⁵ This statement by the Trial Chamber directly undermines the intention of the Prosecutor to highlight gravity in under prosecuted property crimes.

The difference between property crimes and crimes against people relates primarily to the nature of the crimes that recognises that crimes have a hierarchy of seriousness. Crimes against people are fundamentally more serious than crimes against property. The Prosecutor cannot decide that such a hierarchy of seriousness cannot apply just because a crime is under prosecuted. If an under-prosecuted crime is of equal gravity to another crime then the fact it is under prosecuted is a legitimate factor to consider in deciding to prosecute. But if a crime is clearly graver than an under prosecuted crime, then the graver crime must be prosecuted otherwise the ICC’s legitimacy will be undermined.

²¹³ Policy paper on case selection (n 15) [46]

²¹⁴ Paige Casaly, ‘Al Mahdi before the ICC, Cultural Property and World Heritage in International Criminal Law’ [2016] 14 Journal of International Criminal Justice 1219

²¹⁵ *Prosecutor v Ahmad Al Faqi Al Mahdi, ‘Judgment and Sentence’* [27 September 2016] ICC-01/12-01/15 [77]

The importance of representative charging, and focusing on traditionally under prosecuted crimes, cannot be dismissed. If the Prosecutor only focuses attention on the gravest crimes then only genocide would ever be prosecuted. Lesser crimes within the Rome Statute's jurisdiction would never be prosecuted, which would beg the question as to why they were included at all. The fact a crime is under prosecuted is a factor making it graver because under prosecuting crimes allows for impunity. However, the fact a crime is under prosecuted should be only one factor that influences the gravity analysis.

Crimes against children

The Prosecutor has indicated crimes against children as another area of crimes traditionally under prosecuted that she will focus on and in doing so aim to highlight their gravity. The Prosecutor's policy paper on children released in November 2016 stated that an assessment of the impact of alleged crimes on children will be incorporated into its analysis of the gravity of potential cases.²¹⁶ The Prosecutor further states that 'In general, the Office will regard crimes against or affecting children as particularly grave, given the commitment made to children in the Statute, and the fact that children enjoy special recognition and protection under international law'.²¹⁷ These remarks imply that crimes against children are by their nature grave, thus crimes that legally qualify as crimes against children will be relatively graver than other crimes. However the ICC has no established hierarchy of crimes so it is difficult to determine whether a particular crime against children is graver than other crimes.

The gravity of crimes involving children was the subject of the *Lubanga* sentencing judgment.²¹⁸ The Court assessed the gravity of the crimes Lubanga was convicted of when deciding his sentence and stated 'the crimes of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities

²¹⁶ The Office of the Prosecutor, 'Policy on Children' [November 2016] 4

²¹⁷ Ibid [57]

²¹⁸ *Prosecutor v Thomas Lubanga Dyilo*, 'Decision on Sentence pursuant to Article 76 of the Statute', [10 July 2012] ICC-01/04-01/0 (**Lubanga Sentencing Judgment**)

are *undoubtedly very serious crimes* that affect the international community as a whole...The vulnerability of children mean that they need to be afforded particular protection that does not apply to the general population'.²¹⁹ (*Emphasis added*) The judgment emphasises the nature of the crime and its impact on vulnerable children and the international community generally that make the crime grave. There is however no mention of it being an under prosecuted crime. This illustrates that under prosecution is only one factor among many that can make a crime grave. An under prosecuted crime can be found grave even if the fact it is under prosecuted is not emphasised as a factor making it grave.

Attacks against peacekeepers

Attacks against peacekeepers are another type of crime identified as traditionally under prosecuted and that the Prosecutor will seek to focus on by aiming to highlight their gravity. The Prosecutor, in the Comoros Article 53(1) report, in addressing attacks on peacekeepers, recalled the commentary of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind. The Draft Code stated that attacks against peacekeepers are 'directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security by means of collective security measures taken to prevent and remove threats to the peace' and accordingly constitute 'violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community. These crimes are of concern to the international community as a whole because they are committed against persons who represent the international community and risk their lives to protect its fundamental interest in maintaining international peace and security of mankind'.²²⁰ From this analysis it is compelling that attacks against peacekeepers are grave and merit attention from the Prosecutor. It is the nature of these crimes however, not the fact they are under prosecuted that make them grave.

²¹⁹ Lubanga Sentencing Judgment (n 218) [37]

²²⁰ Comoros situation Article 53(1) report (n 62) [145]

Attacks against peacekeepers however do not appear to have been under prosecuted by the ICC. The *Abu Garda* case, in the Darfur situation, related to the prosecution of Mr Abu Garda for attacking and killing 12 African Union peacekeeping personnel, and attempting to kill 8 others.²²¹ Attacks against peacekeepers were also considered in the *Côte d'Ivoire authorisation decision* where the Pre-Trial authorised the opening of an investigation. The Pre-Trial Chamber concluded that 'there was a reasonable basis to believe...that pro-Gbagbo forces intentionally directed attacks against UNOCI [United Nations Operation in Côte d'Ivoire] personnel, equipment, and installations that were entitled to protection'.²²² Furthermore, in the *Georgia authorisation decision* the Pre-Trial Chamber found a reasonable basis to believe the war crime of intentionally directing attacks against peacekeepers had occurred by both South Ossetian forces against Georgian peacekeepers and by Georgian forces against Russian peacekeepers.²²³ The Pre-Trial Chamber stated that the attacks against peacekeepers had impact beyond the immediate casualties of the immediate damage and that the impact of such crimes also encompasses detriment to their ability to execute their mission.²²⁴

Attacks against peacekeepers are grave because of their nature and due to the widespread impact these attacks have on the communities that rely on the work of peacekeepers. Attacks on peacekeepers however do not appear to be under prosecuted in the ICC and so this factor does not add anything to their gravity.

Sexual Crimes

Sexual crimes are another type of crime the Prosecutor has identified as being traditionally under prosecuted that she will focus on and in doing so aim to highlight their gravity. The Prosecutor states in her policy paper on sexual crimes that 'the office recognises that sexual and gender-based crimes are amongst the gravest under

²²¹ Abu Garda confirmation of the charges decision (n 45) [21]

²²² Côte d'Ivoire authorisation decision (n 149) [139]

²²³ Georgia authorisation decision (n 8) [28]

²²⁴ Ibid [55]

the Statute. In assessing the gravity of alleged sexual and gender-based crimes, the Office will take into account the multi-faceted character and the resulting suffering, harm and impact of such acts.²²⁵ The Prosecutor has therefore stated that sexual crimes are particularly grave in and of themselves, but in addition, because they have been under prosecuted they should receive greater attention.

The Prosecutor's practice shows an increasing attention to sexual and gender based crimes. The Prosecutor's 2016 report on preliminary investigations states that in relation to its preliminary investigation in Afghanistan 'In the context of assessing whether the potential cases have been of sufficient gravity to justify further action by the Court, pursuant to the Prosecutor's policy on sexual and gender based crimes, the Office took into account the impact that sexual and gender based crimes had on victims and their communities. It found that the alleged violent acts amounting to the crime against humanity of persecution on gender grounds have had a particular broad and severe impact on the lives of the women and girls'.²²⁶ Here the Prosecutor makes a clear link between sexual crimes and gravity however this link relates to the nature and impact of the sexual crimes rather than the fact sexual crimes have been traditionally under prosecuted.

The *Bemba* sentencing judgment supports the view of the Prosecutor regarding sexual crimes. The Trial Chamber stated that 'the Statute and Rules accord a special status to sexual crimes, crimes against children, and the victims thereof. In drafting these provisions, the State Parties recognised the especially grave nature and consequences of sexual crimes in particular, against children'.²²⁷ This judgment supports prosecution of sexual crimes, particularly sexual crimes against children, but this relates more to the nature of sexual crimes being grave rather than sexual crimes being under prosecuted.

²²⁵ The Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' [June 2014] [45]

²²⁶ Prosecutor's Report on Preliminary Examinations 2016 [227]

²²⁷ *Prosecutor v Jean-Pierre Bemba Gombo*, 'Decision on Sentence pursuant to Article 76 of the Statute' [21 June 2016] ICC-01/05-01/08 [35]

Sexual crimes are by their nature very grave crimes and it is justified that the Prosecutor focuses on them. The fact they may have been under prosecuted traditionally however does not seem to have come into the Court's decisions to date. The under prosecution of sexual crimes is a factor that could make such a crime grave, however it would be only one factor among many that should be considered in assessing the crime's overall gravity.

4.2 The role and rank of the perpetrator

The case law of the ICC has required that in assessing gravity the Prosecutor must consider whether the groups of persons likely to form the object of investigation capture those who bear the greatest responsibility for the alleged crimes. Debate has existed around whether this requires focusing on the most senior leaders. The ICC case law has developed a dual approach as to whether the potential accused being a senior leader is relevant for assessing gravity: for situations the Court has found it relevant but for cases it has not.²²⁸ This creates a higher gravity standard at the earlier, more general stage of proceedings.

Why the case law developed this way is unclear and it seems unusual that there should be an additional requirement at the more general situation stage and no such requirement at the case stage. However focusing on senior leaders at the situation stage can be justified because if there is no prospect of prosecuting any senior leaders in a whole situation then it appears less relevant to open an investigation. Once an investigation is opened, if there is then only sufficient evidence against low level perpetrators, prosecution should still be allowed against lower perpetrators if they are shown to be the most responsible for the crimes, because the investigation has already progressed so far. Overall however I consider the senior role or rank of the perpetrator should be a factor that can be considered when assessing gravity at both stages.

²²⁸ Megumi Ochi, 'Gravity Threshold Before the International Criminal Court: An Overview of the Court's Practice' [January 2016] 19 International Crimes Database 1

The Prosecutor has stated publicly that the Office will focus on lower and mid level perpetrators if this helps to develop evidence and cases to focus on the most responsible. This implies that lower and mid level perpetrators are not the focus. It seems inherent in this statement that a senior role or rank is a factor relevant to responsibility. The stated approach however allows for prosecution of the most responsible even if they are not the most senior. I consider this important to allow prosecution of whoever is the most responsible for the crimes. If a perpetrator is a senior leader then this is just one qualitative factor that affects gravity. Non-senior leaders can also be prosecuted if other gravity factors render their crimes grave.

Gravity at situation stage requires focusing on the most senior leaders

The Court has interpreted the gravity assessment at the situation stage to require the perpetrators investigated to be senior leaders. The first time gravity was dealt with at the situation phase was in the *Kenya authorisation decision* where the Pre-Trial Chamber said when considering gravity it must consider potential cases with reference to: 1) The *groups of persons* likely to be the object of investigation for the purpose of future cases; and 2) The crimes allegedly committed during the incidents likely to be the focus of future cases.²²⁹ (*Emphasis added*) In relation to the groups of persons likely to be the object of future investigations (**Requirement 1**) the Pre-Trial Chamber held that this involved assessing whether such groups of persons capture those who bear *greatest responsibility* for the alleged crimes.²³⁰ (*Emphasis added*) In applying Requirement 1 to the facts the Pre-Trial Chamber referred to the Prosecutor's supporting material that stated the perpetrator's 'high ranking positions' and involvement in the violence. The Pre-Trial Chamber then concluded there was sufficient gravity to find that Requirement 1 was satisfied.²³¹ The implication of the decision is that gravity was satisfied because the groups of people that would be subject of future cases were from high-ranking positions.

²²⁹ Kenya authorisation decision (n 147) [59]

²³⁰ Ibid [60]

²³¹ Ibid [198]

The Pre-Trial Chamber in the *Côte d’Ivoire authorisation decision* followed the Kenya decision and also held that the senior rank of the persons likely to be the focus of future cases to be a factor relevant to assessing gravity. The Pre-Trial Chamber stated ‘the individuals likely to be the focus of the Prosecutor’s future investigations are high-ranking political or military figures who allegedly played a role in the violence’.²³² The Pre-Trial Chamber then stated ‘the criterion of gravity in relation to these potential cases is thus met’.²³³

The *Georgia authorisation decision* also considers the senior role and rank of the perpetrator in assessing gravity. In relation to the groups of persons likely to be the focus of future investigations the Prosecutor submitted Annex B.1 to its submissions setting out information relating to the persons likely to be subject to investigation. The Annex says ‘the information available indicates their rank in political and command positions and their alleged role in the violence’.²³⁴ The Pre-Trial Chamber, in deciding sufficient gravity, makes reference to this list stating the list is a ‘preliminary list of persons or groups that appear to be the most responsible for the most serious crimes, with an indication of the specific role’.²³⁵ Thus the Pre-Trial Chamber references the annex and the fact that it sets out the roles of the perpetrators, knowing that the potential persons were in political and command positions, before deciding there was sufficient gravity. This implies the persons being in political and command positions supported the finding of gravity.

Gravity at case stage does not require focusing on the most senior leaders

At the case stage, in comparison, there has been no requirement that the persons subject to investigation and prosecution be senior leaders. The first case to deal with this issue was the *Lubanga* Pre-Trial Chamber decision that set out a three-factor test to assess gravity. One of the factors identified by the Pre-Trial Chamber required the

²³² Côte d’Ivoire authorisation decision (n 149) [205]

²³³ Ibid [205]

²³⁴ *Situation in Georgia, Corrected Version of ‘Request for authorisation of an investigation pursuant to article 15’* (16 October 2015), ICC-01/15-4-Corr, [337]

²³⁵ Georgia authorisation decision (n 8) [36]

accused to be among the most senior leaders in the situation being investigated.²³⁶

The Appeals Chamber however overturned the Pre-Trial Chamber's decision holding that there was no requirement that the persons must be the most senior leaders.²³⁷

In the *Abu Garda* case the Court did not consider factors such as the position or role of the perpetrator in assessing gravity. Instead the Court focused on the harm caused to the victims and their families, and the affect on the wider community in Darfur.²³⁸ Instead of focusing on role and rank the Pre-Trial Chamber focused on the victim's perspective such as the damage and impact of the crimes.²³⁹ The *Mohammed Hussein Ali decision* from the Kenya situation provided further support for the contention that assessing gravity at the case stage does not require consideration of the person's role or rank. The Pre-Trial Chamber rejected the argument brought by Ali that only cases brought against principals and direct perpetrators had sufficient gravity.²⁴⁰ The level of participation, and therefore role of the person, was irrelevant to determining gravity.

In the *Goudé defence challenge decision* the defence argued that the case was insufficiently grave because Goudé was neither a 'most senior leader' nor a 'political leader of consequence nor a military leader'.²⁴¹ The Pre-Trial Chamber disregarded this argument referencing the jurisprudence from the Appeals Chamber in the *Lubanga*.²⁴² The Pre-Trial Chamber stated 'the exclusion of categories of perpetrators from potentially being brought before the Court...could severely hamper the preventive, or deterrent role of the Court'.²⁴³ The Pre-Trial Chamber further stated 'had the drafters of the Statute intended to limit its application to only the most senior

²³⁶ *Prosecutor v Thomas Lubanga Dyilo, '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'* [24 February 2006] ICC-01/04-01/06-8-US-CORR [50]

²³⁷ *Prosecutor v Thomas Lubanga Dyilo, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"'* [13 July 2006] ICC-01/04-169 (**Lubanga Appeals Chamber decision**) [73]

²³⁸ *Abu Garda confirmation of the charges decision* (n 45) [33]

²³⁹ *Megumi Ochi*, (n 228) 8

²⁴⁰ *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute'* [23 January 2012] ICC-01/09-02/11 [46]

²⁴¹ *Goudé defence challenge decision* (n 50) [16]

²⁴² *Lubanga Appeals Chamber decision* (n 237) [73]

²⁴³ *Goudé defence challenge decision* (n 50) [18]

leaders suspected of being most responsible they could have done so expressly'.²⁴⁴ Thus the fact Goudé was not a 'most senior leader' was irrelevant to deciding gravity.

These cases make it clear that whether the accused is a senior leader is not a factor relevant to the assessment of gravity at the case stage. This is in contrast to the situation stage where the senior role and rank of the persons likely to be the subject of potential cases has been considered relevant.

Prosecutor's stated approach

The Prosecutor's 2016 policy paper on case selection and prioritisation supports the position reflected in case law that the role or rank of the perpetrator is not relevant when assessing gravity at the case stage. The Prosecutor states that it is to 'conduct its investigations towards ensuring that charges are brought against those persons who appear to be the most responsible for the identified crimes'.²⁴⁵ The Prosecutor states that it may 'need to consider the investigation and prosecution of a limited number of mid-and high-level perpetrators in order to ultimately build the evidentiary foundations for case(s) against those most responsible'.²⁴⁶ The office will also consider prosecuting lower level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety.²⁴⁷ The Prosecutor also states that 'The notion of the most responsible does not necessarily equate with the *de jure* hierarchical status of an individual within a structure'.²⁴⁸ The Prosecutor therefore focuses on prosecuting those most responsible for the crime regardless of their rank.

Reasons to focus on the most senior leaders

It has been argued that focusing on the most senior leaders maximises deterrence because it is the most senior leaders who can most effectively prevent the commission of Rome Statute crimes. The Pre-Trial Chamber in *Lubanga* emphasised this point

²⁴⁴ Ibid [18]

²⁴⁵ Policy paper on case selection (n 15) [42]

²⁴⁶ Ibid [42]

²⁴⁷ Ibid [42]

²⁴⁸ Ibid [43]

stating ‘only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to prevent crimes...can they be sure they will not be prosecuted’.²⁴⁹

The focus on senior leaders is also supported by the practice of the International Criminal Tribunal for the Former Yugoslavia (**ICTY**) and other international tribunals. The ICTY’s completion strategy calls for the Tribunal to ‘concentrate on the most senior leaders suspected of being responsible’.²⁵⁰ Rule 28(A) of the ICTY’s Rules of Procedure and Evidence authorises blocking the approval of indictments if the ‘senior leaders’ standard is not met.²⁵¹ Also, Rule 11bis that sets out the criteria for referring cases from the ICTY back to national Courts, states ‘the gravity of the crimes charged and the level of responsibility of the accused’ are criteria for deciding transfers.²⁵² Furthermore Schabas states ‘From Nuremburg and Tokyo to Freetown, Arusha and The Hague, it seems clear that international criminal tribunals have virtually always focused on senior leaders’.²⁵³ The focus on the most senior leaders therefore has traction in other international criminal tribunals.

Reasons not to focus only on the most senior leaders

A problem with focusing only on senior leaders is that it excludes whole categories of offenders from prosecution and thus can decrease the Court’s deterrent function. This problem can be illustrated by the example of ‘Comrade Duch’ a former Khmer Rouge indicted before the Extraordinary Chamber in the Courts of Cambodia (**ECCC**).²⁵⁴ Comrade Duch was not a senior leader of the Khmer Rouge but because murder and torture of civilians occurred on a widespread basis under his authority at the Tuol Sleng prison this rendered him subject to the personal jurisdiction of the ECCC which

²⁴⁹ *Prosecutor v Thomas Lubanga Dyilo* (n 236) [54]

²⁵⁰ United Nations Security Council Resolution 1534 (26 March 2004) [5]

²⁵¹ Rule 28(A), International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence (**ICTY RPE**)

²⁵² Rule 11bis, ICTY RPE

²⁵³ William A. Schabas (n 99) 746

²⁵⁴ Susana SaCouto & Katherine Cleary (n 69) 813

has jurisdiction over individuals who are *senior leaders* or those *most responsible*.²⁵⁵ Had the senior leader criteria been applied strictly to Comrade Duch the ECCC would not have been able to exercise jurisdiction over him and thus Duch, complicit in crimes against humanity, would have been free from prosecution. However because Comrade Duch was the most responsible for the crimes the ECCC could exercise jurisdiction over him.

The Appeals Chamber in the *Lubanga* case supports the view that not excluding categories of offenders increases deterrence. The Appeals Chamber stated that requiring persons to be most senior leaders would undermine rather than promote deterrence since it would leave certain types of perpetrators out of the ICC's reach.²⁵⁶ The Appeals Chamber states: 'that the deterrent effect is highest if all other categories of perpetrators *cannot* be brought before the Court is difficult to understand. It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court'.²⁵⁷ The Appeals Chamber then states 'The predictable exclusion of many perpetrators...could severely hamper the preventive, or deterrent role, of the Court... Individuals who are not at the very top of an organization may still carry considerable influence and commit...very serious crimes. In other words, the predetermination of inadmissibility on the above grounds [i.e most senior leader] could easily lead to the automatic exclusion of perpetrators of most serious crimes in the future'.²⁵⁸

The wording of the Rome Statute also supports the view that prosecution should not be limited to the most senior leaders. The Rome Statute speaks of 'perpetrators' of the 'most serious crimes' and not the 'most senior perpetrators' and therefore mandates prosecution of those who are responsible for the most serious crimes whoever they are.²⁵⁹ Had the drafters intended to limit the Court's jurisdiction to only the most senior leaders responsible they could have done so expressly.²⁶⁰

²⁵⁵ Susana SaCouto & Katherine Cleary (n 69) 813

²⁵⁶ Lubanga Appeals Chamber decision (n 237) [73]

²⁵⁷ Ibid [73]

²⁵⁸ Ibid [77]

²⁵⁹ Rome Statute, Preamble [5]

²⁶⁰ Lubanga Appeals Chamber decision (n 237) [79]

Overall, to deter the widest array of perpetrators and to fulfill the Court's mandate to prosecute the most serious crimes, the Court should not apply the criteria of most senior leaders strictly when making its gravity assessments. Non-senior leaders should be investigated and prosecuted if they are most responsible for the crimes. The most senior leader criteria should be one factor among all factors that are considered when assessing the overall gravity of the crimes committed by the perpetrator. This should be the case at the situation and the case stages.

Implications of the current status of the law regarding the role and rank of the perpetrator

As the preceding analysis of the ICC case law shows, the role and rank of perpetrators is a factor considered when assessing gravity at the situation stage but not at the case stage. Why the Court has established this different standard is unclear. It seems irrational to have a lower gravity requirement at the case stage given it is at this stage that an individual's rights are infringed due to arrest and detention. However there are practical reasons that provide some justification for having a lower standard at the case stage.

Why the criteria should be higher at the case stage

The case stage is where an investigation in relation to specific individuals and specific conduct occurs and leads to the arrest of the suspect. This significantly impacts on the rights of the accused and so it would seem the higher criteria (i.e requiring the suspects to be senior leaders) would apply at this stage. At the situation stage the rights of individuals are not yet implicated because the Prosecutor deals with a whole situation and considers only potential cases.

At the situation stage the Prosecutor is assessing the possibility of a case based on publicly available knowledge and is providing evidence of admissibility to justify spending a budget to further investigate specific cases. At the situation stage the Prosecutor does not enjoy investigative powers, other than receiving testimony at the

Court, and cannot invoke cooperation from States under Part 9 of the Rome Statute.²⁶¹ The information available to the Prosecutor at the situation stage is less comprehensive and conclusive compared to the evidence gathered at the point when a case is opened.²⁶² This suggests a lower standard, (i.e. not requiring the suspect to be a senior leader) would be more appropriate at the situation stage. It seems unusual to have the stricter requirement at the situation stage but not at the case stage.

Justifications for focusing on the most senior leaders at the situation stage

There are however practical reasons that justify having a senior leader requirement at the situation stage. By the point a case has reached the case stage it has already overcome many obstacles. It has passed the reasonable basis to believe test under article 53(1) which requires considering complementarity and a first gravity consideration, as well as obtaining State cooperation in investigation and arrest. The gravity analysis has already occurred at the preliminary stage and situation stage with the ‘potential case’ in mind. It would undermine the work done up until this point to then have a high criteria for gravity, requiring the suspect to be a most senior leader at the last stage in the procedure.

Having a senior leader requirement at the situation stage means a situation will not be opened unless there is a chance a senior leader may be prosecuted. If a situation is opened with only the possibility that foot soldiers could be prosecuted for crimes the ICC may be ridiculed for focusing its attention on unimportant perpetrators. Then once a situation is opened the Prosecutor can prosecute whoever she finds to be most responsible, regardless of role and rank. This allows prosecution of all serious crimes within a situation once it is opened but means the Court won’t open a whole new situation just to focus on insignificant perpetrators.

The problem with this approach is that if at the situation stage evidence shows a crime of severe gravity has been committed but by a lower down perpetrator this would not

²⁶¹ Prosecutor’s Policy Paper on Preliminary Examinations (n 30) [85]

²⁶² Geert-Jan Alexander Knoops and Tom Zwart (n 105) 1082

allow for a situation to be opened. This would allow impunity in such instances and is not acceptable. A strict senior leaders requirement at the situation stage should therefore not be a requirement for assessing gravity and should be just one factor to be considered among other gravity factors.

Whether the accused is a senior leader is a legitimate factor that weighs in favour of finding gravity. Senior leaders have more power and influence than foot soldiers and so a crime is graver if committed by a senior leader. However being a senior leader must be one gravity factor among many that are considered. If a low level perpetrator commits a crime that is grave due to other factors it should still be prosecuted. This is the approach adopted by the Prosecutor at the case selection stage and will ensure no categories of perpetrators are left un-prosecuted.

The distinction between requiring senior leaders at the situation stage and not the case stage is contentious. It means situations cannot be opened if it appears that prosecutions are only possible against lower down perpetrators. However having no senior leader requirement at the case stage allows the Prosecutor to continue with prosecutions once a situation is opened even if it subsequently finds there is only evidence against low ranked perpetrators. The fundamental problem with this approach however is that if evidence at the situation stage shows a crime of severe gravity has been committed by a low ranked perpetrator a situation could not be opened. This would allow impunity in such instances and is not acceptable.

Conclusion

This Chapter analyses the additional factors that the Prosecutor has focused on in assessing gravity and the appropriateness of focusing on these additional factors. These factors have included crimes traditionally under prosecuted as well as the role and rank of the perpetrator. Focusing on additional gravity factors is legitimate to ensure all relevant factors affecting gravity in the circumstances are considered. It should not be accepted that the existing four mandatory gravity factors cover every circumstance that affects the gravity assessment.

Focusing on traditionally under prosecuted crimes and the role and rank of the perpetrator are relevant to assessing the gravity of crimes. Neither of these gravity factors should be strict requirements that if present mandate a finding of gravity. If the crime is under prosecuted or if the perpetrator is a senior leader will not necessarily make the crimes grave. These are factors relevant to the assessment of gravity that should be considered along with all other gravity factors and given appropriate weight according to the circumstances. If these factors are emphasised as the key gravity factor that justifies the opening of a situation or case this must be clearly justified and reasons must be given as to why. This will ensure transparency in the Prosecutor's consideration of additional gravity factors.

Chapter 5: Discussion and recommendations

This chapter discusses the key conclusions from my analysis of the role of gravity in the law of the ICC and how gravity should be assessed. This chapter also makes recommendations for the improvement of the role and assessment of gravity in the ICC.

5.1 Assessing gravity requires considering all relevant factors

Each situation or case will be more or less grave due to different circumstances that will be reflected in different gravity factors. There is therefore a need to consider all relevant factors that can affect the potential gravity of a situation or case. This is why the ICC has developed the four mandatory gravity factors of scale, nature, manner of commission and impact of crimes that must be considered when assessing gravity. These factors encompass a wide range of circumstances that the Prosecutor must consider. This is desirable because it ensures as many factors as possible that affect the gravity of a crime are considered and ensures factors cannot be ignored or overlooked.

The four mandatory gravity factors have wide scope but do not cover every element that could affect the gravity of a crime and therefore consideration of additional gravity factors is appropriate. The Prosecutor has focused on crimes that are traditionally under prosecuted, and the role and rank of the perpetrator, as additional factors affecting gravity. The link between under prosecuted crimes and their gravity cannot always be convincingly established however. Such an example is the prosecution of property crimes that are less grave than crimes against people. It is legitimate to focus on under prosecuted crimes to prevent impunity for such crimes but justifying this focus on the grounds of gravity is not always convincing. Likewise it is legitimate to consider the senior rank of a perpetrator as making a crime more grave but this does not mean crimes committed by low ranked perpetrators cannot also be grave. The additional factors of under prosecuted crimes and the role and rank

of the perpetrator are therefore additional factors that can be considered but in conjunction with other gravity factors in an overall gravity assessment.

To ensure consistency and transparency when gravity factors, including additional factors, are considered by the Prosecutor they must be clearly set out in decisions and thorough justifications must be given for their use. This allows for scrutiny of the factors considered in assessing gravity. Precise documentation is important so that affected parties, and the Pre-Trial Chamber if asked to review, know the criteria used for assessing gravity.

5.2 The Prosecutor is the most appropriate person to assess gravity

Assessing gravity requires analysing the gravity factors in relation to the particular circumstances of a situation or case. It is unavoidable that such an assessment requires subjective opinion and analysis. Having mandatory gravity factors that must be considered provides some objectivity as well as some consistency and predictability in gravity decision-making however deciding what weight to put on each gravity factor in the circumstances requires a subjective analysis.

The Prosecutor is the appropriate figure within the ICC to make these subjective assessments. The Prosecutor is in charge of investigations and prosecution from the point of receiving information on potential crimes from interested parties, through the preliminary investigation stage, the situation stage and the case stage. The Prosecutor is aware of all the information relevant to gravity, not only of the particular situation or case in question, but also of other situations and cases being investigated. The Prosecutor also has the experience of making many gravity determinations in many different circumstances. The Prosecutor therefore has the knowledge and experience to make these subjective assessments and their assessments should be paid a lot of deference.

The Pre-Trial Chamber's role in reviewing the Prosecutor's gravity assessments should be limited to where the Prosecutor has abused its discretion. The Pre-Trial

Chamber judges do not have the same knowledge and experience as the Prosecutor and so should not replace the Prosecutor's assessment of gravity with their own. The Pre-Trial Chamber judges also do not have the same knowledge of all situations and cases before the Court and have not made the vast number of gravity determinations made by the Prosecutor. This makes the Pre-Trial Chamber more susceptible to making gravity determinations in isolation that fail to make sense of the wider context of the Court. This was exemplified in the Pre-Trial Chamber's review of the Prosecutor's decision in *Comoros* where the Pre-Trial Chamber thought there was sufficient gravity to open an investigation despite the Comoros situation clearly not being as grave as other situations before the ICC. I therefore consider it to be appropriate for the Pre-Trial Chamber to limit its review of the Prosecutor's decisions to ensuring they have not abused their discretion. Such abuse of discretion would be where the Prosecutor was clearly affected by bias or has not fairly considered arguments for all sides.

5.3 Need for a hierarchy of crimes

It would be useful for the Prosecutor in a policy paper to set out a hierarchy of crimes to assist in assessing a crime's gravity. The hierarchy of the gravity of some crimes is obvious, for example the difference in gravity between murder and crimes against property. However distinguishing between other crimes, of similar gravity, is more difficult. If the Prosecutor provided guidance on the gravity of crimes this would provide more clarity and consistency in the assessment of the 'nature of the crimes' gravity factor. A hierarchy of crimes will also assist relative gravity considerations because it will make it more feasible to compare the gravity of the crimes committed in different situations and cases to decide which contains the graver crimes.

The hierarchy will not always be determinative of a gravity decision because there will always be a multitude of factors to consider. If the nature of the crimes score low in terms of their hierarchy but they occur on a large scale this could still justify opening a situation or prosecuting a case. However having a clear set out hierarchy will provide better clarity and transparency in assessing the nature of the crimes and therefore gravity assessments overall.

5.4 Gravity threshold concept has its limits

The concept of gravity as a threshold is useful to help explain the role gravity plays in the ICC however the concept has its limits. The threshold concept helps explain how situations and cases must reach a certain level of seriousness to warrant investigation or prosecution by the Court. The threshold concept also explains how gravity has the important purpose of controlling the Court's caseload by excluding less grave cases.

The threshold concept has its limits because an objectively set threshold level is not possible. The level of the threshold will change depending on the current situation faced by the Court. If the Court has an increase in funding it would be able to hear more cases. This would cause the threshold to drop because the less grave cases, that previously would not have passed, would now pass the threshold. Similarly, if at a certain point in time there are a large number of extremely grave conflicts within the ICC's jurisdiction the threshold would increase because the Court would only have capacity to hear the gravest of these. Situations and cases that may have passed the threshold when there were less serious conflicts occurring would now not pass the threshold. The relative gravity of other situations and cases will impact the level of any such threshold.

5.5 Relative gravity should be a mandatory gravity factor

I consider that relative gravity should be made a mandatory gravity factor along with the four factors that currently exist. Assessing the relative gravity of crimes is reflected strongly in the practice of the ICC already however it is not a mandatory consideration. Relative gravity is used to compare crimes at the preliminary investigation stage, to compare the gravity of situations at the situation opening stage and is considered in selecting and prioritising cases at the case stage. Despite the common use of relative gravity, it is not a mandatory consideration meaning that decisions can be made without first comparing the situation or case to others that may be more deserving of the Court's attention.

The relative gravity comparison helps to ensure only the gravest situations and cases among those within the Court's jurisdiction are investigated and prosecuted. If only the gravest situations and cases are investigated and prosecuted this helps to uphold the Court's legitimacy internationally.

The Comoros case is a good illustration of the positive impact the inclusion of relative gravity as a mandatory factor would have on gravity assessments. The Prosecutor considered the gravity of the Comoros situation and decided it was insufficiently grave to justify opening a situation. The Prosecutor made a relative gravity assessment by comparing the Comoros situation to other situations the ICC had jurisdiction over. This was evidenced by the Prosecutor saying the total number of victims 'reached relatively limited proportions as compared, generally, to other cases'.²⁶³ This shows a relative assessment, in relation to the scale gravity factor, between the Comoros situation and other situations that have come before the ICC. The Pre-Trial Chamber, in contrast, focused very narrowly on the specific facts and evidence of the individual situation, found them to be contested and that this contestation weighed in favour of finding sufficient gravity to open a situation. The Pre-Trial Chamber did not adequately compare the Comoros situation to other situations before the ICC. Had it done so the Pre-Trial Chamber would have had more context for making its decision and it seems hard to see how it could have concluded the Comoros situation was sufficiently grave to justify opening an investigation.

Comparing the relative gravity of the Comoros situation to other situations before the ICC illustrates clearly that the Comoros situation was insufficiently grave to justify opening a situation. The comparison also illustrates the usefulness of using relative gravity to make gravity assessments. The scale in Comoros involved 10 killings, 50-55 injuries and potentially hundreds of outrages on personal dignity.²⁶⁴ The CAR II situation in comparison, involved hundreds of murders and thousands of victims of the violence perpetrated from both sides of the conflict.²⁶⁵ The Georgia situation related to 51-113 killings, over 5,000 destroyed dwellings and forced displacement of

²⁶³ Comoros Pre-Trial Chamber decision (n 104) [25]

²⁶⁴ Ibid [25]

²⁶⁵ CAR II situation, Article 53(1) report (n 40) [260]

between 13,400 and 18,500 persons.²⁶⁶ The geographical and temporal spread of the crimes in Comoros was limited to an event on board the Mavi Mamara ship. In the CAR II situation the crimes by the Séléka occurred in each of the prefectures in the CAR (i.e. the whole country).²⁶⁷ In Kenya the post-election violence ‘affected six of the eight Kenyan provinces’.²⁶⁸ When considering scale, the number of victims and the geographical and temporal spread, in Comoros seems significantly less than other situations.

The nature of the crimes in Comoros were severe however not as severe as other situations before the ICC. The crimes in Comoros were war crimes of willful killings, and committing outrages upon personal dignity but not crimes against humanity.²⁶⁹ There was debate as to whether the treatment of the captured passengers amounted to torture. In the CAR II situation the murders were found to potentially constitute war crimes and crimes against humanity.²⁷⁰ The CAR II Situation also involved other grave crimes such as sexual violence, torture, recruitment of children under the age of 15 and attacks on humanitarian personnel.²⁷¹ The *Georgia authorisation decision* found a reasonable basis to believe the war crimes of willful killing, murder, destruction of property, pillage, intentional attacks against peacekeepers and crimes against humanity of persecution and forcible transfer of population.²⁷² The nature of the willful killings in Comoros is undoubtedly grave however they are arguably less grave than other situations before the ICC. Other situations have included a wider variety of extremely grave crimes and also crimes against humanity that are arguably graver than war crimes.

The manner of commission of the crimes in Comoros also seems less grave than other situations before the ICC. It was contested whether live fire was used before the boarding of IDF troops onto the Mavi Marmara and also whether the rough treatment of captured passengers amounted to torture or outrages on personal dignity. If these

²⁶⁶ Georgia authorisation decision (n 8) [54]

²⁶⁷ CAR II situation Article 53(1) report (n 40) [255]

²⁶⁸ Kenya authorisation decision (n 147) [190]

²⁶⁹ Comoros Article 53(1) Report (n 62) [132]

²⁷⁰ CAR II situation Article 53(1) report (n 40) [256]

²⁷¹ Ibid [256]

²⁷² Georgia authorisation decision (n 8) [7]

factors were confirmed it would make the manner of commission of the crimes graver as it would show there was a plan to kill civilians and that torture occurred. However even if these elements were proven the manner of commission would still be less severe when compared to the Kenya, CAR II or Georgia situations. In Kenya the crimes were committed by burning victims alive, attacking places sheltering IDPs [Internally Displaced Persons], beheadings, and using pangas and machetes to hack people to death'.²⁷³ In CAR II the manner of commission of the crimes included victims being tortured before being killed, burnt alive, pregnant women were raped and rape occurred in the presence of family members.²⁷⁴ The manner of commission of the crimes in the Georgia situation involved a 'consistent pattern of deliberate killing, beating and threatening civilians, detention, looting properties and burning houses'.²⁷⁵

The impact of the crimes in Comoros also seems less severe than in other situations. In Comoros the Prosecutor stated there was no evidence of impact of the crimes beyond the direct victims of the attacks.²⁷⁶ The Pre-Trial Chamber said evidence beyond the direct victims is not required to find sufficient gravity.²⁷⁷ This may be true but evidence beyond direct victims will make the impact of the crimes graver. In Comoros the humanitarian aid was subsequently delivered to Gaza thus making the impact on indirect victims of the attacks negligible. In *Abu Garda* the disruption of humanitarian aid as a result of the crimes committed was seen as making the impact of the crimes more severe. In Comoros there was no evidence of subsequent extreme impact on the victims like the subsequent impact experienced in the Kenya situation where many victims of the sexual violence contracted HIV and were ostracized from society.²⁷⁸

This simple relative gravity comparison of the Comoros situation with other situations before the ICC illustrates how the gravity factors in Comoros are not as severe as

²⁷³ Kenya authorisation decision (n 147) [199]

²⁷⁴ CAR II situation Article 53(1) report (n 40) [257]

²⁷⁵ Georgia authorisation decision (n 8) [54] and [20]

²⁷⁶ Comoros Pre-Trial Chamber decision (n 104) [46]

²⁷⁷ Ibid [47]

²⁷⁸ Kenya authorisation decision (n 147) [194]

other situations. This leads to the logical conclusion that the Comoros situation as a whole is of insufficient gravity to justify opening an investigation. Had the Pre-Trial Chamber conducted such a systematic relative analysis it seems difficult to see how it could have come to the conclusion that the Comoros situation is sufficiently grave to warrant opening an investigation.

I consider it appropriate that such a relative gravity assessment should be a mandatory consideration in gravity assessments. This relative comparative assessment already occurs at the case selection stage, as stated in the Prosecutor's case selection and prioritisation document, and has been reflected in the prosecutor's practice at the preliminary investigation stage and the situation stage. However making it a mandatory consideration will further entrench the role of relative gravity at all stages of ICC proceedings where gravity is assessed.

A relative assessment requires knowledge of other situations and cases before the ICC. This is the knowledge that is in the possession of the Prosecutor. This provides further support for the argument that the Prosecutor is the most appropriate person to make gravity assessments.

Conclusion

This thesis addresses the question: *What is the role of 'gravity' in the law of the International Criminal Court and how should 'gravity' be assessed?*

Firstly gravity plays a pivotal role in admissibility decisions at the ICC. These decisions control the situations and cases investigated and prosecuted by the Court. Gravity therefore acts as a 'gatekeeper' to ensure the Court hears only the gravest situations and cases. The assessment of gravity therefore has significant implications for the Court's perceived legitimacy internationally.

Gravity decision-making has been analysed with reference to the concepts of a 'gravity threshold', 'relative gravity' and the Prosecutor's discretion. The concepts of a 'gravity threshold' and 'relative gravity' are implicit in gravity assessments in admissibility decisions. The 'gravity threshold' means a case or situation must exceed a certain level for the Court to exercise jurisdiction over it. 'Relative gravity' is a concept used to compare the relative seriousness of different situations and cases in order to prioritise the most grave among them. The assessment of gravity is also inseparable from the exercise of the Prosecutor's discretion and it is argued that the Prosecutor is the most appropriate person to make the important gravity decisions.

The ICC has established four mandatory factors that the Prosecutor must consider when assessing gravity: scale, nature, manner of commission and impact. These are both quantitative and qualitative in nature and are appropriately broad to ensure a wide array of circumstances, that potentially affect gravity, are considered. Assessing the breadth of circumstances that these factors encompass is desirable and is a great strength of the gravity assessment process.

Additional factors are legitimate for the Prosecutor to consider when assessing gravity to ensure consideration of all relevant circumstances however these must be assessed together with all other gravity factors. To date the Prosecutor has focused on crimes that are traditionally under prosecuted as well as the role and rank of the perpetrator.

These factors are appropriate to consider if they impact on gravity in the circumstances but must not be considered in isolation as the sole gravity factor. Any use of additional factors must be thoroughly justified and decisions made public to ensure transparency.

This thesis has argued that the concept of a ‘gravity threshold’ is useful however should remain an implicit rather than mandatory aspect of the gravity assessment. This is because thresholds are likely to change over time in response to fluctuations in ICC resources and the severity of atrocities at different points in time. It is argued however that relative gravity should become a mandatory factor in assessing gravity during admissibility to ensure only the gravest situations and cases come before the ICC.

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