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Gravity and the Legitimacy of the International Criminal Court

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Margaret M. deGuzman

Abstract

References to gravity are threaded throughout the Rome Statute's provisions relating to jurisdiction and its exercise. These references reflect the drafters' philosophical vision for the Court, but fail to provide the institution with clear legal guidance. Part II begins by examining the relevant statutory provisions, exploring ambiguities in the text and suggesting how it should be interpreted. It then canvases the legislative history for indications of the drafters' intent and evaluates the approaches to gravity adopted thus far by the Court's judges and Prosecutor. The analysis in this Part demonstrates that gravity plays two essential and distinct roles for the ICC. First, it serves as a statutorily required "threshold" below which the Court should not exercise its jurisdiction. The Prosecutor must consider this threshold in selecting situations and cases and the judges are required to reject cases below the threshold when the issue is properly raised. The second role relates to the Prosecutor's discretion. In addition to considering the gravity threshold, the Statute's emphasis on gravity strongly suggests the Prosecutor should consider relative gravity in selecting among situations and cases above the threshold. The task of implementing the concept of gravity, both as a threshold and as a relative consideration in the exercise of discretion, requires an understanding of the theoretical bases for gravity's prominent place in the ICC regime. Part III therefore turns to the justifications for the gravity threshold and discretionary relative gravity considerations, rooting them in the Court's moral and sociological legitimacy. The study of institutional legitimacy is a vast and rapidly growing field of scholarly inquiry. This Article does not seek to contribute to that literature, but rather employs extant accounts of legitimacy to demonstrate the relationship between gravity and the ICC's actual and perceived legitimacy. The Article argues that gravity acts to legitimize the Court in two interrelated ways: the gravity threshold helps to ensure the moral legitimacy of the Court's exercise of jurisdiction, and the Prosecutor's discretionary use of relative gravity strongly affects perceptions of the Court's legitimacy. These observations about gravity's role in legitimizing the ICC lead to some important conclusions in Part IV about how the Court should operationalize gravity in its work. With regard to gravity threshold determinations, a relatively straightforward factor-based analysis is suggested. The Article sets forth the relevant factors and argues that only cases scoring at the bottom of the gravity spectrum on all factors should be excluded based on the gravity threshold.

GRAVITY AND THE LEGITIMACY OF THE INTERNATIONAL CRIMINAL COURT

Margaret M. deGuzman*

I. INTRODUCTION

The concept of gravity or seriousness¹ resides at the epicenter of the legal regime of the International Criminal Court (“Court” or “ICC”). The Court’s founding document, the Rome Statute of the ICC (“Rome Statute” or “Statute”), declares as the Court’s purpose to end impunity for “the *most serious* crimes of concern to the international community as a whole.”² The Statute describes these crimes as “unimaginable atrocities,” and “grave crimes” that “deeply shock the conscience of humanity.”³ The Court’s jurisdiction is restricted to “the most serious crimes” and the judges are to reject as inadmissible crimes “not of sufficient gravity.”⁴ Thus, the concept of gravity is central to the ICC’s purpose and its application will be an integral part of the Court’s work.

The ICC’s emphasis on gravity reflects the importance of this concept in international criminal law more generally.⁵ Poli-

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1. Gravity and seriousness are used synonymously herein. See OXFORD ENGLISH DICTIONARY (2d ed. 1989).

2. Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (emphasis added). This Article focuses on the importance of seriousness, leaving to the side the issue of what other factors contribute to crimes being “of concern to the international community as a whole.” For a discussion of that question, see, for example, BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 44-51 (Ian Brownlie & Vaughan Lowe eds., 2003); RONALD C. SLYE & BETH VAN SCHACK, ESSENTIALS: INTERNATIONAL CRIMINAL LAW 107-19 (2008).

3. Rome Statute, *supra* note 2, pmbl.

4. *Id.* art. 17.

5. The term “international criminal law” is employed herein in its narrow sense,

ticians invoke gravity in establishing international criminal courts and in explaining their support for such courts;⁶ international criminal tribunals cite the gravity of the offenses before them in justifying their jurisdiction;⁷ and academic endeavors on international criminal law refer to their subject matter by its gravity, using such terms as the “most serious crimes,”⁸ “extreme evil,”⁹ and “mass atrocities.”¹⁰

Yet despite the acknowledged centrality of gravity to international criminal law, there is virtually no discussion in academic or judicial sources of the theoretical basis and doctrinal contours of this concept.¹¹ This silence stems in part from an understandable reluctance to rank or quantify extreme human suffering. How can one delimit “mass atrocities” or “grave harm”? Must

referring to the body of law concerning the “core crimes” prescribed in the Rome Statute of the International Criminal Court (“Rome Statute” or “Statute”) (aggression, war crimes, crimes against humanity, and genocide), in contrast with broader usages, which can include any crime that is the subject of an international cooperative regime, such as counterfeiting currency or cutting submarine cables. For a discussion of the various usages of “international criminal law,” see BROOMHALL, *supra* note 2, at 9-24.

6. *See, e.g.*, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); U.N. GAOR, 61st Sess., 27th plen. mtg. at 1, U.N. Doc. A/61/PV.27 (Oct. 9, 2006). Addressing the General Assembly on behalf of African Member States to the International Criminal Court Statute, Mr. Sabelo Sivuyile Manguo stated:

The horrors of crimes against humanity committed in the former Yugoslavia and in Sierra Leone and the genocide committed in Rwanda brought to the fore the sad fact that sometimes national justice systems are just not enough to deter or prosecute crimes that are of the greatest seriousness to the international community. Therefore, there is a need for the international community to augment these national justice systems when they are unable or unwilling to act.

Id.

7. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 57 (Oct. 2, 1995) (holding that the jurisdiction of the international tribunal was justified in part because “of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.”).

8. BROOMHALL, *supra* note 2, at 10.

9. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 4 (2007).

10. CHANDRA LEKHA SRIRAM, GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY ix (2005).

11. Scholarly works analyzing the Rome Statute generally contain little or no discussion of the gravity threshold. *See, e.g.*, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 1999); THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE (Roy S. Lee ed., 2008); THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Antonio Cassese et al. eds., 2002).

there be millions of victims before the international community will adjudicate the crimes? Thousands? Hundreds? What about one crime committed for particularly heinous reasons? There are no satisfactory answers to such questions.

The undertheorization of gravity is also due to the historical evolution of international criminal law as a response to atrocities that were undeniably grave. There was no questioning that the systematic slaughter of six million Jews was an exceptionally serious crime. The Nuremberg trials represent, in part, an expression of that universal moral judgment. Subsequent international and internationalized¹² criminal tribunals have addressed crimes evoking similar levels of moral condemnation—large-scale “ethnic cleansing” in Former Yugoslavia, genocides claiming close to one and two million lives respectively in Rwanda and Cambodia, and tens of thousands killed and tortured in Sierra Leone and East Timor.¹³ Historically, there has been little need to explain the concept of “grave crimes” meriting international adjudication because, in the famous words U.S. Supreme Court Justice Potter Stewart used in reference to pornography, we “know it when [we] see it.”¹⁴

For the ICC, however, the concept of gravity has taken center stage because, unlike its predecessor tribunals, the ICC’s jurisdiction is not limited to particular conflicts. Instead, as a standing court, the ICC makes its own determinations about which situations and cases merit international adjudication.¹⁵ Gravity is at the heart of those determinations and, as a result, the task of developing appropriate theoretical and doctrinal approaches to gravity has gained new urgency. The Court has taken only a few faltering steps toward elaborating a gravity jurisprudence and policy, and academic analysis remains sparse. This Article seeks to fill that gap by proposing a theoretical framework for understanding the roles of gravity in the ICC re-

12. “Internationalized tribunals” include the “hybrid” courts, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, that blend national and international elements in various proportions.

13. The tribunals created to address these crimes are, respectively: the International Criminal Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, and the Serious Crimes Panels of the District Court in Dili.

14. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, P., concurring).

15. See generally Rome Statute, *supra* note 2.

gime, and suggesting prescriptive approaches that flow from that framework.

References to gravity are threaded throughout the Rome Statute's provisions relating to jurisdiction and its exercise.¹⁶ These references reflect the drafters' philosophical vision for the Court, but fail to provide the institution with clear legal guidance. Part II begins by examining the relevant statutory provisions, exploring ambiguities in the text and suggesting how it should be interpreted. It then canvases the legislative history for indications of the drafters' intent and evaluates the approaches to gravity adopted thus far by the Court's judges and Prosecutor.

The analysis in this Part demonstrates that gravity plays two essential and distinct roles for the ICC. First, it serves as a statutorily required "threshold" below which the Court should not exercise its jurisdiction. The Prosecutor must consider this threshold in selecting situations and cases and the judges are required to reject cases below the threshold when the issue is properly raised. The second role relates to the Prosecutor's discretion. In addition to considering the gravity threshold, the Statute's emphasis on gravity strongly suggests the Prosecutor should consider *relative gravity* in selecting among situations and cases above the threshold.

The Court lacks the resources needed to pursue all admissible situations and cases, and the task of selecting where to focus the Court's resources falls essentially to the Prosecutor. The Statute is largely silent as to how the Prosecutor should make selection decisions. In fact, the provisions of the Statute leave some doubt as to when the Prosecutor has discretion to reject situations and cases. Nonetheless, the regime's focus on gravity leaves little doubt that relative seriousness should inform at least some of the Prosecutor's most important decisions. In other words, in exercising his discretion to select and reject situations and cases, the Prosecutor should consider, among other things, the degree of gravity each situation or case presents in relation to others the Court might pursue.

16. See LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 124 (2002); Mohamed M. El Zeidy, *The Gravity Threshold Under the Statute of the International Criminal Court*, 19 CRIM. L. F. 35, 35 (2008); Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L. F. 281, 294 (2006). The gravity of the crime is also a sentencing factor, a use that is not examined herein. Rome Statute, *supra* note 2, art. 78(1).

The task of implementing the concept of gravity, both as a threshold and as a relative consideration in the exercise of discretion, requires an understanding of the theoretical bases for gravity's prominent place in the ICC regime. Part III therefore turns to the justifications for the gravity threshold and discretionary relative gravity considerations, rooting them in the Court's moral and sociological legitimacy. The study of institutional legitimacy is a vast and rapidly growing field of scholarly inquiry. This Article does not seek to contribute to that literature, but rather employs extant accounts of legitimacy to demonstrate the relationship between gravity and the ICC's actual and perceived legitimacy. The Article argues that gravity acts to legitimize the Court in two interrelated ways: the gravity threshold helps to ensure the moral legitimacy of the Court's exercise of jurisdiction, and the Prosecutor's discretionary use of relative gravity strongly affects perceptions of the Court's legitimacy.

Because the Court's moral legitimacy is largely secured by other factors, including the seriousness limits on the Court's subject matter jurisdiction, the gravity threshold plays a relatively minor part in ensuring the Court's normative legitimacy. In contrast, the Court's sociological legitimacy—perceptions that the Court is acting appropriately—will likely be strongly affected by the Prosecutor's selection decisions. The relationship between gravity as a selection criterion and perceptions of the Court's legitimacy is complicated by the conflicting views relevant audiences often hold. For example, a decision to prosecute only the leaders responsible for the most heinous crimes may increase the Court's legitimacy in some audiences, while others may require prosecutions of all sides of the conflict to consider the Court legitimate.

These observations about gravity's role in legitimizing the ICC lead to some important conclusions in Part IV about how the Court should operationalize gravity in its work. With regard to gravity threshold determinations, a relatively straightforward factor-based analysis is suggested. The Article sets forth the relevant factors and argues that only cases scoring at the bottom of the gravity spectrum on all factors should be excluded based on the gravity threshold. In practice, this will mean rejecting small-scale, isolated war crimes committed by followers without an elevated intent. A higher threshold would conflict with the Court's

jurisdictional regime and undermine its ability to accomplish a range of potentially important goals.

The Prosecutor's approach to gravity as a selection criterion is both more important and more complex than the gravity threshold determination. When the Prosecutor selects among admissible situations and cases he necessarily prioritizes competing ICC goals, asserting a particular vision of the Court's role in the international legal and moral order. The international criminal law system remains in its infancy and no consensus has emerged regarding the appropriate goals for the ICC or priorities among them. In the absence of such consensus, the Prosecutor is required to reach a subjective conclusion about whether it is more important, for example, to prosecute a case involving many direct victims or one resulting in widespread environmental harm. There are no objectively correct answers to such questions and different audiences are likely to reach significantly different conclusions. Perhaps as the system matures, greater consensus will be reached regarding the appropriate goals of international criminal tribunals. Until then, the Prosecutor's best hope of enhancing the ICC's legitimacy lies in the careful consideration of different perspectives and widespread dissemination of the bases for his selection decisions.

II. GRAVITY'S ROLES IN THE ICC REGIME

Gravity plays two important and distinct roles in the ICC regime.¹⁷ First, the concept of gravity provides a legal and normative basis for the Court's jurisdiction as well as the exercise of that jurisdiction; and second, consideration of *relative* gravity is an important factor in the Prosecutor's discretionary selection of situations and cases to pursue. The first function is embedded in the Rome Statute's provisions regarding jurisdiction and its exercise, including admissibility.¹⁸ Nothing in Statute addresses,

17. In addition to the roles discussed herein, gravity has other functions in the Rome Statute, including in such areas as arrest proceedings, penalties, and sentences. See Rome Statute, *supra* note 2, arts. 59, 77, 78.

18. See Rome Statute, *supra* note 2, arts. 1, 5(1), 15(2), 17(1)(d), 53(1)-(2). The Rome Statute's gravity threshold is included under the heading "admissibility," while a different article headed "exercise of jurisdiction" sets forth the ways in which the International Criminal Court's ("ICC"'s or "Court"'s) exercise of jurisdiction can be "triggered," including initiation of a case by the Prosecutor or referral by a State Party or the Security Council. Rome Statute, *supra* note 2, arts. 13, 17. However, as the International Law Commission ("ILC") noted in drafting the gravity provision, the determina-

however, whether or when the Prosecutor should consider relative gravity in making selection decisions. In fact, the Statute is ambiguous about the extent of the Prosecutor's discretion to reject potential situations and cases.

This Part examines the relevant statutory provisions to elucidate gravity's place in the Court's jurisdictional regime, identify when the Prosecutor and Court are required to consider the gravity threshold, and suggest when the Prosecutor has discretion to consider relative gravity. Next, the discussions of gravity in the Statute's drafting history are explored for indications of the intent behind these provisions. Finally, the approaches to gravity adopted thus far by the Court's judges and Prosecutor are described and critiqued.

A. *Relevant Provisions of the Rome Statute*

1. Subject Matter Jurisdiction

The concept of gravity is central to the ICC's subject matter jurisdiction. Article 1 of the Statute grants the ICC "power to exercise its jurisdiction over persons for *the most serious crimes* of international concern, as referred to in this Statute,"¹⁹ and Article 5 limits the Court's jurisdiction to "*the most serious crimes* of concern to the international community as a whole."²⁰ Article 5 goes on to list the four categories of crimes within the Court's subject matter jurisdiction: genocide, crimes against humanity, war crimes, and aggression. The Statute defines these crimes (with the exception of aggression),²¹ and their elements are further elaborated in the Elements of Crimes, an additional source of law for the Court.²²

The Statute thus implies that genocide, crimes against humanity, war crimes, and aggression are "the most serious crimes

tion of gravity is part of the Court's decision whether to exercise jurisdiction. Int'l Law Comm'n [ILC], *Report of the International Law Commission on the Work of Its Forty-sixth Session*, 49 U.N. GAOR Supp. (No. 10), ¶ 91, art. 35 cmt., U.N. Doc. A/49/10 (1994), reprinted in [1994] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) [hereinafter *Report of the ILC's 46th Sess.*]. This Article therefore refers to admissibility considerations as part of the process of deciding whether to exercise the Court's jurisdiction.

19. Rome Statute, *supra* note 2, art. 1 (emphasis added).

20. *Id.* art. 5 (emphasis added).

21. The Court may not exercise jurisdiction over aggression until it is defined. *See* Rome Statute, *supra* note 2, art. 5(2).

22. *Id.* art. 21.

of concern to the international community.”²³ The question of what gives rise to the international community’s “concern” over particular crimes is complex and beyond the scope of this discussion.²⁴ Regardless of any additional grounds that might be identified, however, some element of gravity is clearly required for a crime to concern the international community.²⁵ International crimes will not always be more serious than domestic crimes. In fact, some international crimes, such as incitement to genocide, may not even be criminalized in all domestic systems. Nonetheless, at least under the Rome Statute, international jurisdiction is not permitted unless the crime bears some indicia of gravity.

For genocide and crimes against humanity, the contextual aspects of the definitions seek to distinguish these crimes from “ordinary” crimes at least in part through elements suggesting gravity. Thus, for genocide the Statute requires intent to destroy a listed group in whole or in part,²⁶ and the Elements of Crimes mandate that the conduct occurred “in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”²⁷ Likewise, crimes against humanity are defined as one or more enumerated inhumane acts “committed as part of a widespread or systematic attack” against a civilian population.²⁸ The requisite “attack” is “a course of conduct involving the multiple commission of [enumerated] acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack”²⁹ Additionally, some of the enumerated acts contain references to gravity. For example, forms of sexual violence other than those listed must be of “comparable gravity” to the listed acts and “other inhumane acts” must be “of a similar character.”³⁰ Thus, the elements of genocide and crimes against humanity seek to ensure that only serious conduct is captured through such requirements as group targeting, scale, and systematicity.

23. *Id.* pmb1.

24. *See supra* note 2.

25. *See* Rome Statute, *supra* note 2, pmb1., arts. 1, 5.

26. *Id.* art. 6.

27. *See* Assembly of State Parties to the Rome Statute of the Int’l Criminal Court [ICC-ASP], Elements of Crimes, art. 6, ICC-ASP/1/3 (part II-B) (Sept. 9, 2002) [hereinafter Elements of Crimes].

28. Rome Statute, *supra* note 2, art. 7.

29. *Id.*

30. *Id.* art. 7(1)(g), (k).

The definition of war crimes, on the other hand, does not contain *required* elements ensuring their gravity. This was a source of significant debate at the Rome Conference, at which some participants preferred to limit the Court's jurisdiction over war crimes to those "committed as part of a plan or policy or as part of a large-scale commission of such crimes."³¹ Proponents of the restriction argued that only systematic and large-scale crimes are sufficiently serious to concern the international community, while opponents countered that the Court's deterrent capacity would be undermined by such a jurisdictional limitation.³² The compromise adopted grants the Court jurisdiction over war crimes "in particular" when they meet the threshold.³³ The Court is thus discouraged from exercising jurisdiction over small-scale, isolated war crimes but retains the ability to do so.

The inclusion within the Court's jurisdiction of small-scale, isolated war crimes that are arguably *not* "the most serious crimes of international concern"³⁴ suggests a contradiction within the Statute. As discussed below, one way to resolve that contradiction is to treat the gravity threshold provision as applying primarily to war crimes falling below the definition's optional threshold. In other words, the gravity threshold ensures that cases involving war crimes that are not large-scale or systematic are excluded unless they present some other indicia of gravity.

2. Decision to Exercise Jurisdiction

In addition to the jurisdictional provisions addressing the gravity of *crimes*, the judges and Prosecutor are required to consider the gravity of actual or potential *cases* in deciding whether to act in particular situations and cases.³⁵ These decisions take

31. See Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 11, at 79, 107-08.

32. *See id.*

33. Rome Statute, *supra* note 2, art. 8.

34. *Id.* art. 1.

35. The concepts of "situation" and "case" are not defined in the Statute and are subject to various interpretations. *See, e.g.*, Int'l Criminal Court, Office of the Prosecutor [ICC-OTP], Informal Expert Paper: The Principle of Complementarity in Practice 9 n.10, ICC-01/04-01/07-1015 (Jan. 4, 2009), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc656350.pdf>. The current Prosecutor defines a "case" as comprising one or more alleged suspects and one or more alleged crimes within the Court's juris-

place in several stages. First, the Prosecutor conducts a preliminary examination of information he receives or requests from any reliable source;³⁶ second, the Prosecutor opens a formal investigation into a situation, a process that sometimes requires judicial authorization;³⁷ third, the Prosecutor selects particular cases within the situation for prosecution or declines to prosecute any case;³⁸ and finally, a relevant state or party to a case may challenge admissibility or the Court may raise admissibility on its own motion.³⁹ Throughout this process, the Prosecutor and sometimes the judges must consider whether potential or actual cases meet the gravity threshold for admissibility.⁴⁰ Additionally, although the Statute is not always clear on the matter, there are several points in the process when the Prosecutor appears to have discretion to consider *relative gravity* in selecting among potential situations and cases.

a. Preliminary Examination of a Situation

The process of deciding whether to exercise the Court's jurisdiction begins when that jurisdiction is triggered. Such triggering can derive from the Prosecutor acting *proprio motu*, or from a referral by the Security Council or a State Party to the Statute.⁴¹ In either case, the Prosecutor conducts a preliminary examination of the information he has received from any reliable source, and may request additional information and receive written or oral testimony at the seat of the Court.⁴² In this preliminary phase, the Prosecutor must "analyse the seriousness of

diction, while "situation" is a broader concept referring to a territorial and temporal context in which such crimes have allegedly been committed. See ICC-OTP, *Draft for Discussion: Criteria for Selection of Situations and Cases 1* (June 2006) (on file with author) [hereinafter *Draft: Criteria for Selection*].

36. Rome Statute, *supra* note 2, arts. 15(2), 53(1); ICC-ASP, Rules of Procedure and Evidence, R.104, ICC-ASP/1/3 (Part.II-A) (Sept. 9, 2002) [hereinafter Rules of Procedure and Evidence].

37. Rome Statute, *supra* note 2, arts. 15(3)-(4), 53(1); Rules of Procedure and Evidence, *supra* note 36, R. 48 (making factors set forth in Article 53(1) applicable to investigations initiated *proprio motu*).

38. The Statute contains no provision regarding how to select among admissible cases, but does include a provision regarding the decision not to prosecute any case. Rome Statute *supra* note 2, art. 53(2).

39. *Id.* art. 19.

40. *Id.* arts. 15, 53, 19.

41. Rome Statute, *supra* note 2, art. 13.

42. *Id.* art. 15; Rules of Procedure and Evidence, *supra* note 36, R. 104.

the information received.”⁴³

When a situation is referred to the Prosecutor, he *must* determine if there is a reasonable basis to investigate any case and, if so, he *must* initiate an investigation.⁴⁴ As such, the Prosecutor does not appear to have discretion to reject a referred situation at this preliminary stage based on a *relative* gravity determination. As discussed below, the only way to read the Statute as granting the Prosecutor such discretion for referred situations is to locate that discretion within the “reasonable basis” analysis required for initiating investigations.

With regard to investigations initiated *proprio motu*, on the other hand, the Statute contains contradictory provisions concerning the extent of the Prosecutor’s discretion. On the one hand, Article 15, which governs such investigations, begins with the statement that the Prosecutor “may” initiate investigations *proprio motu*, indicating the decision is entirely discretionary.⁴⁵ On the other hand, the same article states that the Prosecutor “shall” analyze the seriousness of the information received and “shall” request authorization for an investigation from the Pre-Trial Chamber if he concludes there is a reasonable basis to do so.⁴⁶ To further complicate matters, Article 53, entitled “Initiation of an investigation,” makes no distinction between referred and *proprio motu* investigations, and states that the Prosecutor “shall” initiate an investigation after evaluating the information made available to him unless he determines there is no reasonable basis to proceed.⁴⁷

Some commentators interpret Article 53 to govern all investigations, including those initiated by the Prosecutor, and would thus require the Prosecutor to request authorization for an in-

43. Rome Statute, *supra* note 2, art. 15; Rules of Procedure and Evidence, *supra* note 36, R. 104.

44. Rome Statute, *supra* note 2, art. 53(1). Although referrals must be for situations rather than cases, Article 53 requires the Prosecutor to consider the admissibility of “the case” in determining whether a reasonable basis exists. Since no case has yet been identified at this stage, Article 53 appears to require the Prosecutor to forecast the likely nature of cases in situations under consideration. *See id.*

45. *Id.* art. 15(1).

46. *Id.* arts. 15(2)-(3).

47. Due to complexities in the drafting process, the relationship between Article 15 and Article 53 was not considered in detail until after the Statute was finalized. *See* HECTOR OLASOLO, *THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT* 70-71 (2005).

vestigation *proprio motu* whenever there is a reasonable basis to do so.⁴⁸ If this interpretation were correct, any individual or organization in the world could effectively trigger the Court's jurisdiction by providing the Prosecutor with information demonstrating a reasonable basis for an investigation. This would greatly increase the power of non-governmental organizations ("NGOs") and significantly limit the Prosecutor's discretion.

Another way to reconcile these competing provisions is to consider Article 15 *lex specialis* with regard to the initiation of investigations *proprio motu*.⁴⁹ This interpretation finds support in Rule of Procedure 48, which requires the Prosecutor to consider the factors set forth in Article 53(1) in determining whether there is a reasonable basis to proceed *proprio motu*.⁵⁰ By applying the factors only, the rule suggests that the rest of Article 53(1)—including the compulsion to determine reasonable basis—does not apply to *proprio motu* investigations.

Instead, Article 15 can be read to create an intermediate step between the receipt of information and the reasonable basis determination. In other words, upon receiving information, the Prosecutor can evaluate its seriousness and decide not to reach a decision regarding the existence of a reasonable basis when the potential cases presented are relatively less serious than other actual or potential cases available to the Court. This interpretation is not clear from the language of Article 15, which states both that the Prosecutor "may initiate" investigations *proprio motu* and that he "shall submit . . . a request for authorization" if he concludes a reasonable basis exists.⁵¹ However, interpreting the Statute in this way avoids the absurd result that any individual or organization can essentially force the Prosecutor to pursue a situation where a reasonable basis exists to investigate at least one case.

48. See, e.g., Morten Bergsmo & Pieter Kruger, *Article 53: Initiation of an Investigation*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, *supra* note 11, at 1065, 1067; Giuliano Turone, *Powers and Duties of the Prosecutor*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1137, *supra* note 11, at 1147-51.

49. See OLASOLO, *supra* note 47, at 72.

50. Rules of Procedure and Evidence, *supra* note 36, R. 48.

51. See Rome Statute, *supra* note 2, art. 15(1), (3).

b. Initiating Investigation of a Situation

Questions of gravity arise again at the second stage of the process: the reasonable basis determination. Regardless of the triggering mechanism, the Prosecutor cannot initiate an investigation unless he determines there is a reasonable basis to proceed based on three factors: (1) there is a reasonable basis to believe a crime within the Court's jurisdiction was or is being committed; (2) the case is or would be admissible; and (3) "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."⁵²

The first factor mandates consideration of gravity through the definitional requirements of the crimes, particularly for genocide and crimes against humanity, as discussed above.⁵³ The second factor requires the Prosecutor (and sometimes the judges) to determine whether the potential cases in a situation meet the gravity threshold for admissibility, that is, whether they are "of sufficient gravity to justify further action by the Court."⁵⁴ This threshold is mandatory—the Prosecutor may not initiate investigation of a situation where the likely cases are insufficiently grave. Unlike the Prosecutor's discretionary consideration of relative gravity in deciding whether to use his *proprio motu* powers, here gravity serves as a floor below which the Prosecutor's activities may not reach. The Prosecutor has sometimes elided this important distinction, as discussed below.

The final factor is whether, considering the gravity of the crime and interests of victims, the investigation would nonetheless not serve the interests of justice. The concept of interests of justice is not defined in the Statute, but was aimed at least in part at providing the Court some leeway in situations where a relevant state opts to employ non-prosecutorial responses to mass violence such as truth commissions and perhaps even amnesties.⁵⁵ Some commentators have suggested that the reference to gravity here provides the Prosecutor a second opportunity to de-

52. *Id.* art. 53(1); Rules of Procedure and Evidence, *supra* note 36, R. 48 (stating that, in determining whether there is a reasonable basis to seek an investigation *proprio motu*, the prosecutor shall consider the factors in Article 53(1)).

53. *See supra* Part II.A.1.

54. *See* Rome Statute, *supra* note 2, art. 17(1)(d).

55. *See, e.g.,* Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commission and the International Criminal Court*, 14 *EUR. J. INT'L L.* 481 (2003).

cline to investigate on the grounds that the situation is not serious enough even if it meets the gravity threshold for admissibility.⁵⁶ In other words, the Prosecutor could cite the interests of justice to reject any situation, regardless of the trigger, on the grounds that he considers the situation relatively less serious than other current or potential situations and would prefer to allocate the Court's resources elsewhere.

Reading the Prosecutor's discretion to consider relative gravity into the "interests of justice" provision strains the language of the Statute, however. The Statute's use of the term "nonetheless" indicates gravity should not be considered an element of the interests of justice here, but rather a factor to be balanced *against* those interests—whatever they may be.⁵⁷ Although the drafters intentionally left the concept of "interests of justice" ambiguous, it seems doubtful many of them would have accepted an interpretation that determined those interests solely on the basis of the Prosecutor's discretionary relative gravity judgments. Some states were quite intent on curtailing the Prosecutor's discretion,⁵⁸ so a provision allowing him to reject state or Security Council referrals based purely on his own relative gravity judgments would, at the very least, have been controversial.

Furthermore, the Court was conceived as an institution available to states and the Security Council.⁵⁹ Although there might be some benefit in allowing the Prosecutor to reject politically motivated state referrals, it would certainly seem inappropriate for the Prosecutor to refuse to investigate a situation that the Security Council has determined presents a threat to peace

56. See, e.g., Bergsmo & Kruger, *supra* note 48, at 1071; Turone, *supra* note 48, at 1153.

57. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 244 (3d ed. 2007).

58. See Silvia A. Fernández de Gurmendi, *The Rome of the International Prosecutor*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, *supra* note 11, at 175, 181.

59. William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 734 (2008) (quoting ILC, Working Group on a Draft Statute for an Int'l Criminal Court, *Report of the Working Group*, at 2, U.N. Doc. A/CN.4/L.491/Rev.2/Add.2 (July 18, 1994), *reprinted in* ILC, *Report of the International Law Commission on the Work of Its Forty-sixth Session*, 49 U.N. GAOR Supp. (No. 10), ¶ 91, art. 25 cmt. 1, U.N. Doc. A/49/10 (1994), *reprinted in* [1994] Y.B. Int'l L. Comm'n pt. 2, 1, 45, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2)).

and security simply based on his relative gravity judgments.⁶⁰

Ultimately, the problem may be one of form rather than substance. Even if the Statute is read to require the Prosecutor to investigate all referred situations where a reasonable basis exists, he probably has discretion to decline to prosecute any cases in such situations on the basis of relative gravity as discussed below. Furthermore, nothing in the Statute precludes the Prosecutor from allocating scant resources to investigations he feels do not deserve the Court's attention. Additionally, the Statute has other safeguards against inappropriate referrals, including the complementarity regime⁶¹ and the Security Council's ability to defer investigations and prosecutions pursuant to its Chapter VII authority.⁶²

Finally, the Prosecutor's decisions not to investigate a referred situation either based on the gravity threshold or relative gravity (assuming that is part of the "interests of justice" determination) are subject to judicial review at the request of the referring entity.⁶³ Furthermore, if the decision is based solely on the "interests of justice," the Pre-Trial Chamber may initiate review on its own motion, in which case the Prosecutor's decision is ineffective unless confirmed.⁶⁴ If the Prosecutor's consideration of relative gravity forms part of the interests of justice analysis, therefore, the Pre-Trial Chamber would have the power to override the Prosecutor's decision not to investigate a situation he finds insufficiently serious.

In sum, regardless of the triggering mechanism, the Prosecutor must decline to proceed in a situation where the potential

60. Cf. Jens David Ohlin, *Peace, Security, & Prosecutorial Discretion*, in *THE EMERGING PRACTICE OF THE ICC* 185 (Carsten Stahn & Goran Sluiter eds., 2009) (arguing that basic principles of international law preclude the Prosecutor from declining to investigate situations referred by the Security Council).

61. See Rome Statute, *supra* note 2, art. 17 (declaring inadmissible cases that a state with jurisdiction is already investigating or prosecuting in good faith).

62. *Id.* art. 16.

63. See *id.* art. 53(3). In contrast, the Prosecutor's decision to investigate a referred situation is not reviewable.

64. *Id.* art. 53(3)(b). In practice, the Pre-Trial Chamber's power to mandate an investigation appears limited, however, since the Prosecutor controls his office's resources. *But see* Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, in *FUTURE DIRECTIONS IN INTERNATIONAL CRIMINAL JUSTICE* (Carsten Stahn & Larissa van den Herik eds., forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270369 (arguing that situational gravity decisions should be subject to judicial review).

cases fail to satisfy the gravity threshold for admissibility. In addition, the Prosecutor probably has discretion under the Statute to consider the relative gravity of potential cases in deciding whether to initiate investigations *proprio motu*, but it is much less clear that such discretion is available to him when situations are referred.

c. Case Selection

Considerations of the gravity threshold and relative gravity also factor into case selection. The Prosecutor may only select cases within a situation for prosecution that meet the gravity threshold for admissibility.⁶⁵ The Prosecutor has complete discretion, however, in selecting among admissible cases. In fact, the Statute is silent as to how the Prosecutor should make these important decisions.⁶⁶ The Statute's overall emphasis on gravity strongly suggests, however, that one of the key criteria for case selection should be the relative gravity of the case in comparison to other cases the Court could prosecute.

The Prosecutor may also decide, after investigating, that there is insufficient basis to prosecute any case in a situation. In this context, the Prosecutor is again required to consider the gravity threshold, as well as whether “[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”⁶⁷ Nothing in the Statute addresses whether the Prosecutor can decline to investigate any case in a situation based on relative gravity. However, here the language of the “interests of justice” provision, unlike the similar provision discussed above, does seem to envision a relative gravity analysis. Rather than pitting gravity *against* the interests of justice, here gravity is one of the circumstances the Prosecutor should consider in determining the interests of justice. Thus, the Statute appears to grant the Prosecutor authority to determine that no case in a situation warrants prosecution based on the relative gravity of cases the Court is prosecuting or consider-

65. Rome Statute, *supra* note 2, art. 17(1)(d).

66. The Statute emphasizes the independence of the Prosecutor's office. *See id.* art. 42(1).

67. *Id.* art. 53(2).

ing. As with investigations, a decision based solely on this ground is subject to review and confirmation by the Pre-Trial Chamber on its own initiative.⁶⁸

d. Admissibility

Finally, once a case is selected for prosecution, the accused, the Prosecutor, or a relevant state can challenge the admissibility of the case on the grounds of insufficient gravity.⁶⁹ The Court is also permitted, but not required, to raise the issue on its own motion.⁷⁰ Thus, the Court must dismiss an insufficiently grave case if the question is properly raised, but has the discretion not to consider the issue of gravity at all if admissibility is not challenged by the accused or a state.

B. *Legislative History*

As the foregoing discussion demonstrated, the concept of gravity is enshrined in the Rome Statute's provisions regarding jurisdiction and its exercise. The Statute provides little indication, however, of the purposes gravity is intended to serve in the regime. The legislative history provides little additional insight. The prospect that the Prosecutor would consider relative gravity in selection decisions did not feature prominently in the discussions, and the gravity threshold for admissibility provoked virtually no controversy. Nonetheless, the legislative history is instructive because it highlights the great importance the drafters placed on the concept of gravity as a limit on the Court's subject matter jurisdiction. Additionally, the very absence of significant discussion of the gravity threshold serves to counter claims that it should be interpreted as a high bar to the exercise of that jurisdiction.

1. Gravity as a Limit on Subject Matter Jurisdiction

When the International Law Commission ("ILC" or "Commission") began discussions of a draft statute for an international criminal court ("Draft Statute") in the aftermath of World War II, the focus was on preventing war, rather than on the in-

68. *Id.* art. 53(3).

69. *Id.* art. 19(2).

70. *Id.* art. 19(1).

herent gravity of crimes.⁷¹ As such, the ILC's 1951 Draft Statute, like the Nuremberg Charter, only prescribed "inhuman acts . . . against any civilian population" (crimes against humanity) when committed in connection with other crimes in the Statute—essentially acts related to aggression and genocide.⁷² Similarly, early discussions of a draft code of crimes against the peace and security of mankind ("Draft Code") focused less on the gravity of the crimes than on their "political element."⁷³

However, when consideration of the Draft Code resumed in the 1980s after a Cold War-induced hiatus, the focus shifted to the gravity of the crimes.⁷⁴ In fact, in 1983 the Commission unanimously agreed that "seriousness," rather than the presence of a political element, would be its criterion for selecting crimes for inclusion in the Draft Code.⁷⁵ The ILC decided to exclude

71. Gravity was not entirely absent from the discussions, however. For example, in concluding his report on the question of an international criminal jurisdiction Special Rapporteur Ricardo Alfaro stated: "The community of States is entitled to prevent crimes against the peace and security of mankind *and crimes against the dictates of the human conscience, including therein the hideous crime of genocide.*" ILC, *Question of International Criminal Jurisdiction*, ¶ 136, U.N. Doc. A/CN.4/15 (prepared by Ricardo J. Alfaro), reprinted in ILC, *Report of the International Law Commission Covering Its Second Session*, 5 U.N. GAOR, Supp. (No. 12), ¶ 136, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 1, 17, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

72. ILC, *Draft Code of Offenses Against the Peace and Security of Mankind*, ¶ 59, art. 2(10), U.N. Doc. A/CN.4/L.15, reprinted in ILC, *Report of the International Law Commission on the Work of Its Third Session*, 6 U.N. GAOR Supp. (No. 9), ¶ 59, art. 2(10), U.N. Doc. A/1858, reprinted in [1951] 2 Y.B. Int'l L. Comm'n 133, 136, U.N. Doc. A/CN.4/SER.A/1951/Add.1.

73. ILC, *Report of the International Law Commission Covering Its Second Session*, 5 U.N. GAOR Supp. (No. 12), ¶ 149, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 1, 379-80, U.N. Doc. A/CN.4/SER.A/1950/Add.1. The discussions surrounding the draft code of crimes against the peace and security of mankind ("Draft Code") form part of the Rome Statute's legislative history inasmuch as the purpose of the Code was, in part, to elaborate the crimes that would ultimately be the subjects of an international criminal jurisdiction.

74. See, e.g., ILC, *Comments and Observations Received Pursuant to General Assembly Resolution 36/106*, U.N. Doc. A/CN.4/358 (1982), reprinted in [1982] 2 Y.B. Int'l L. Comm'n pt. 1, 273, 276, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 1) (reporting German government statement that "[i]n view of the purpose and objective of the code, it would seem appropriate the gravest international crimes which constitute a serious threat and an immediate danger to the peace and security of mankind, be included in it.").

75. See ILC, *Report of the International Law Commission on the Work of Its Thirty-fifth Session*, 38 U.N. GAOR Supp. (No. 10), ¶¶ 47-48, U.N. Doc. A/38/10 (1983), reprinted in [1983] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 13-14, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part 2) (noting that the Commission "unanimously agreed" that the Draft Code should cover "the most serious of the most serious offenses").

from the Code such transnational crimes as forging passports on the grounds that the Code should be reserved for "offences distinguished by their especially horrible, cruel, savage and barbarous nature."⁷⁶ It also reversed an earlier decision not to limit war crimes by gravity and included only "exceptionally serious" war crimes in the 1991 Draft Code.⁷⁷ Thus, beginning in the early 1980s the concept of gravity took center stage in discussions of international criminal law at the ILC.

Despite the acknowledged importance of gravity, however, the ILC spent little time attempting to identify the contours of the concept. Some members suggested the Commission should develop precise criteria for identifying offenses against the peace and security of mankind, including, for example, the inspiration for the act, the identity of the victims, and the nature of the interest infringed.⁷⁸ The Commission ultimately found this suggestion impracticable, however, concluding:

The seriousness of an act was judged sometimes according to the motive, sometimes according to the end pursued, sometimes according to the particular nature of the offence (the horror and reprobation it arouses), sometimes according to the physical extent of the disaster caused. Furthermore, these elements seemed difficult to separate and were often combined in the same act.⁷⁹

76. ILC, *Report of the International Law Commission on the Work of Its Thirty-sixth Session*, 39 U.N. GAOR Supp. (No. 10), ¶ 63, U.N. Doc. A/39/10 (1984), reprinted in [1984] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 17, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (Part 2).

77. ILC, *Report of the International Law Commission on the Work of Its Forty-third Session*, 46 U.N. GAOR Supp. (No. 10), ch. IV(D)(2), art. 22, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 104-07, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2); see also ILC, *Report of the International Law Commission on the Work of Its Forty-first Session*, 44 U.N. GAOR Supp. (No. 10), ¶¶ 94-98, U.N. Doc. A/44/10 (1989), reprinted in [1989] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 52-53, U.N. Doc. A/CN.4/SER.A/1989/Add.1 (Part 2).

78. *Report of the International Law Commission on the Work of Its Thirty-sixth Session*, supra note 76, ¶ 34, reprinted in [1984] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 11-12, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (Part 2).

79. *Id.*, reprinted in [1984] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 11-12, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (Part 2); see also ILC, *Report of the International Law Commission on the Work of Its Thirty-ninth Session*, 42 U.N. GAOR Supp. (No. 10), ¶ 66, art. 1 cmt. 2, U.N. Doc. A/42/10 (1987), reprinted in [1987] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 13, U.N. Doc. A/CN.4/SER.A/1987/Add.1 (Part 2) ("Seriousness can be deduced either from the nature of the act in question (cruelty, monstrousness, barbarity, etc.) or from the extent of its effects (massiveness, the victims being peoples, populations or ethnic

Thereafter, the ILC continued to invoke gravity in its work on the Draft Code, but without defining or elaborating the concept.

When the ILC resumed consideration of the Draft Statute at the end of the Cold War,⁸⁰ one of the first questions that arose was which crimes from the Draft Code should be included in the Court's jurisdiction. Although early work on the Draft Statute had focused chiefly on crimes involving aggression, as one Commission member pointed out, the "collective conscience" had since evolved to recognize the need for "effective protection of fundamental human rights."⁸¹ Some members took the view that the "criterion of gravity" should be used to select the appropriate crimes from the Code for inclusion in the Statute.⁸² The Court should only try the "principal perpetrators" of crimes "of an extremely serious nature which had grave consequences for the international community," leaving other crimes and perpetrators to domestic courts.⁸³ According to this view, even some war crimes would not be sufficiently serious for ICC jurisdiction.⁸⁴ Members preferring to limit the Court's jurisdiction to "a very small category of crimes of extreme gravity," felt it would make the Court more acceptable to states.⁸⁵

Other participants, however, wanted the Statute to encompass international crimes more generally, including crimes pro-

groups), or from the motive of the perpetrator (for example, genocide), or from several of these elements.").

80. In 1989, at the request of Trinidad and Tobago, the General Assembly asked the ILC to include within its consideration of the Draft Code a discussion of the potential for an international criminal court or other mechanism with jurisdiction over the crimes in such a code. G.A. Res. 44/39, ¶ 1, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/39 (Dec. 4, 1989). This request set in motion a process that ultimately led to the adoption of the Rome Statute in 1998. For a detailed history, see M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT*, VOL. I, at 54-121 (2005).

81. ILC, *Summary Record of the 2156th Meeting*, ¶ 2, U.N. Doc. A/CN.4/SR.2156 (1990), *reprinted in* [1990] 1 Y.B. Int'l L. Comm'n 42, U.N. Doc. A/CN.4/SER.A/1990.

82. ILC, *Summary Record of the 2155th Meeting*, ¶ 5, U.N. Doc. A/CN.4/SR.2155 (1990), *reprinted in* [1990] 1 Y.B. Int'l L. Comm'n 37, U.N. Doc. A/CN.4/SER.A/1990.

83. *Id.*, *reprinted in* [1990] 1 Y.B. Int'l L. Comm'n 37, U.N. Doc. A/CN.4/SER.A/1990.

84. *Id.* ¶ 9, *reprinted in* [1990] 1 Y.B. Int'l L. Comm'n at 37, U.N. Doc. A/CN.4/SER.A/1990.

85. *Report of the International Law Commission on the Work of Its Forty-third Session*, *supra* note 77, ¶ 119, *reprinted in* [1991] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 87, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

scribed in treaties.⁸⁶ A third group wanted to include all crimes in the Draft Code, but exclude other international crimes as insufficiently serious.⁸⁷ Members also had different views on whether the Court's jurisdiction should be compulsory or optional for States Parties,⁸⁸ a question that had significant bearing on gravity's role in the Court's jurisdiction. As one member pointed out, if the Court's jurisdiction were compulsory, "the crimes would have to be exceptionally serious, fundamental and genuinely prejudicial to the dignity of mankind as a whole."⁸⁹

Ultimately, the ILC adopted the broader approach to subject matter jurisdiction, including in its 1994 Draft Statute not only the "core crimes" of genocide, crimes against humanity, war crimes, and aggression, but also "treaty crimes" such as hijacking aircraft.⁹⁰ This expansive approach to subject matter jurisdiction was balanced, however, by a more conservative provision regarding the acceptance of jurisdiction, which allowed States Parties to "opt in" to the court's jurisdiction for all crimes except genocide, over which jurisdiction was inherent in ICC membership.⁹¹ Furthermore, gravity remained central to the discussions of the Court's jurisdiction.⁹² In fact, between 1993 and 1994, the treaty crimes provision was amended to exclude from the Court's jurisdiction treaty crimes that did not "constitute exceptionally serious crimes of international concern."⁹³

86. *Id.* ¶ 120, *reprinted in* [1991] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 87, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

87. *Id.* ¶ 121, *reprinted in* [1991] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 87, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

88. See ILC, *Report of the International Law Commission on the Work of Its Forty-fourth Session*, 47 U.N. GAOR Supp. (No. 10), ¶¶ 36-38, U.N. Doc. A/47/10 (1992), *reprinted in* [1992] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 10-11, U.N. Doc. A/CN.4/SER.A/1992/Add.1 (Part 2).

89. *Id.* ¶ 37, *reprinted in* [1992] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 10, U.N. Doc. A/CN.4/SER.A/1992/Add.1 (Part 2) (1994).

90. See *Report of the ILC's 46th Sess.*, *supra* note 18, ¶ 91, art. 20(e), *reprinted in* [1994] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 38, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) (1997).

91. See *id.* ¶ 91, art. 22, *reprinted in* [1994] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 42-43, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

92. See, e.g., ILC, *Summary Record of the 2346th Meeting*, ¶ 22, U.N. Doc. A/CN.4/SR.2346 (1994), *reprinted in* [1994] 1 Y.B. Int'l L. Comm'n 120, 123, U.N. Doc. A/CN.4/SER.A/1994 [hereinafter *Summary Record of ILC's 2346th Mtg.*] (comment of Mr. Villagran Kramer: "It was essential to accentuate the concept of gravity as one of the main parameters in defining the crimes.").

93. Compare *Report of the ILC's 46th Sess.*, *supra* note 18, ¶ 91, art. 20, *reprinted in* [1994] Y.B. Int'l L. Comm'n pt. 2, 38, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2),

In Rome, the delegations rejected the ILC's broad approach to subject matter jurisdiction, opting instead to include only the four "core crimes" within the Court's jurisdiction and to make jurisdiction inherent over all of them.⁹⁴ This decision stemmed in part from concerns that "treaty crimes" might be insufficiently serious, and thus "trivialize" the Court.⁹⁵ Limiting the Court's subject matter to "hard-core crimes" would also make it easier for states to accept the Court's jurisdiction.⁹⁶ In sum, the deliberations that led to the Rome Statute demonstrate an early and consistent commitment to the concept of gravity as a limit on the Court's subject matter jurisdiction.

2. Gravity as an Admissibility Requirement

In the ILC's 1994 discussions of the Draft Statute, the idea surfaced of using gravity not only in determining the Court's jurisdiction but also as a consideration in the exercise of that jurisdiction. James Crawford, the Australian member of the Commission and Chairman of its Working Group on a Draft Statute for an ICC, suggested that the Working Group consider "whether the international court should not have the power to stay a prosecution on specified grounds" including "the existence of an adequate national tribunal with jurisdiction over the offense or the fact that the acts alleged were not of sufficient gravity to warrant trial at the international level."⁹⁷ According to Professor Crawford, this would help avoid overburdening the court and ensure that the Court supplemented, rather than replaced, national

with ILC, *Report of the Working Group on a Draft Statute for an International Criminal Court*, art. 22, U.N. Doc. A/CN.4/L.488 (1993), reprinted in ILC, *Report of the International Law Commission on the Work of Its Forty-fifth Session*, 48 U.N. GAOR Supp. (No. 10), annex, ch. B, art. 22, U.N. Doc. A/48/10 (1993), reprinted in [1993] 2 Y.B. Int'l L. Comm'n pt. 2, 100, 106-07, U.N. Doc. A/CN.4/SER.A/1993/Add.1 (Part 2).

94. At the insistence of a small minority of states, the Rome Conference's Final Act recommends future consideration of the inclusion of crimes of terrorism and drug crimes. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, *Final Act*, 7-8, U.N. Doc. A/CONF.183/10 (July 17, 1998).

95. See, e.g., Ad Hoc Comm. on the Establishment of an Int'l Criminal Court, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 50 U.N. GAOR Supp. (No. 22), ¶ 81, U.N. Doc A/50/22 (Sept. 6, 1995) [hereinafter *Report of the Ad Hoc Comm.*]; see also von Hebel & Robinson, *supra* note 31, at 86.

96. See *Report of the Ad Hoc Comm.*, *supra* note 95, ¶ 38.

97. ILC, *Summary Record of the 2330th Meeting*, ¶ 9, U.N. Doc. A/CN.4/SR.2330 (1994), reprinted in [1994] 1 Y.B. Int'l L. Comm'n 7, 9, U.N. Doc. A/CN.4/SER.A/1994.

courts.⁹⁸

The idea of allowing the Court to exclude cases on the basis of gravity may have been motivated at least in part by the Draft Code's inclusion of "treaty crimes," which could be less serious than the "core crimes" of genocide, crimes against humanity, war crimes, and aggression. In supporting the suggestion, the U.S. member of the Commission noted that it would help alleviate concerns about the inclusion of such crimes as drug trafficking and terrorism in the Draft Statute.⁹⁹ Mr. Eiriksson of Iceland also commented that it would be desirable to give the Court some discretion "in deciding whether or not to take up a case even when that case clearly fell within its jurisdiction," so that the Court would "deal solely with the most serious crimes, would not encroach on the functions of national courts and would be sufficiently realistic to adapt its case-load to the resources available."¹⁰⁰

As a result of these suggestions, the ILC included in its 1994 Draft Statute a provision entitled "issues of admissibility," which represents the first draft of what would become Article 17 of the Rome Statute.¹⁰¹ That provision allowed the Court to find inadmissible a case that had been or was being investigated by a state with jurisdiction or a case that was "not of such gravity to justify

98. *Id.*, reprinted in [1994] 1 Y.B. Int'l L. Comm'n 7, 9, U.N. Doc. A/CN.4/SER.A/1994 (1996).

99. ILC, *Summary Record of the 2332nd Meeting*, ¶ 59, U.N. Doc. A/CN.4/SR.2332 (1994), reprinted in [1994] 1 Y.B. Int'l L. Comm'n 20, 27, U.N. Doc. A/CN.4/SER.A/1994 (1996).

100. ILC, *Summary Record of the 2333rd Meeting*, ¶ 22, U.N. Doc. A/CN.4/SR.2333 (1994), reprinted in [1994] 1 Y.B. Int'l L. Comm'n 30, 33, U.N. Doc. A/CN.4/SER.A/1994; see also ILC, *Summary Record of the 2358th Meeting*, ¶ 58, U.N. Doc. A/CN.4/SR.2358 (1994), reprinted in [1994] 1 Y.B. Int'l L. Comm'n 202, 210, U.N. Doc. A/CN.4/SER.A/1994 ("It was indeed useful to state that only exceptional serious crimes of international concern were subject to the court's jurisdiction, and it must be remembered that article 35 provided for the discretion of the court not to exercise jurisdiction."); *Report of the ILC's 46th Sess.*, *supra* note 18, ¶ 50, reprinted in [1994] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 22, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2). Stating:

There were also suggestions that the court should have discretion to decline to exercise its jurisdiction if the case was not of sufficient gravity or could be adequately handled by a national court. This suggestion was explained in terms of ensuring that the court would deal solely with the most serious crimes, it would not encroach on the functions of national courts, and it would adapt its caseload to the resources available.

Id.

101. See *Report of the ILC's 46th Sess.*, *supra* note 18, ¶ 91, art. 35, reprinted in [1994] 2 Y.B. Int'l L. Comm'n pt. 2, 1, 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

further action by the Court.”¹⁰² In introducing the revised draft, Professor Crawford stated that the provision was included to allow the Court discretion to decline jurisdiction, taking into account that the Court was intended for “the most serious crimes of concern to the international community” and was to complement national courts.¹⁰³

The commentary to the 1994 Draft Statute notes that the admissibility provision addresses the exercise of jurisdiction as opposed to its existence and is intended to ensure the Court “only deals with cases in circumstances outlined in the preamble, that is to say where it is really desirable to do so.”¹⁰⁴ In deciding the question of admissibility, the Court is directed to consider the purposes of the Statute as set forth in the preamble,¹⁰⁵ which include prosecuting “the most serious crimes of concern to the international community as a whole,” and complementing national systems.¹⁰⁶ The commentary notes that some members of the Commission believed the admissibility provision was superfluous, because the relevant issues could be considered in the context of the Court’s subject matter jurisdiction, particularly the seriousness requirement for treaty crimes, as well as the preconditions to the exercise of jurisdiction.¹⁰⁷ Other members responded that “circumstances of particular cases could vary widely and could anyway be substantially clarified after the court assumed jurisdiction” so that the power to exclude cases based on gravity and complementarity would enable the Court to hew to its mandate.¹⁰⁸

After the “treaty crimes” provision was eliminated from the Statute, broad support nonetheless remained for the gravity

102. See *id.* ¶ 91, art. 35(c), *reprinted in* [1994] 2 Y.B. Int’l L. Comm’n pt. 2, 1, 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

103. ILC, *Summary Record of the 2356th Meeting*, ¶ 60, U.N. Doc. A/CN.4/SR.2356 (1994), *reprinted in* [1994] 1 Y.B. Int’l L. Comm’n 185, 191, U.N. Doc. A/CN.4/SER.A/1994 (1996).

104. *Report of the ILC’s 46th Sess.*, *supra* note 18, ¶ 91, art. 35, *reprinted in* [1994] 2 Y.B. Int’l L. Comm’n pt. 2, 1, 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

105. *Id.*, *reprinted in* [1994] 2 Y.B. Int’l L. Comm’n pt. 2, 1, 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

106. *Id.* ¶ 91, pmb., *reprinted in* [1994] 2 Y.B. Int’l L. Comm’n pt. 2, 1, 27, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

107. *Id.* ¶ 91, art. 35 cmt. 3, *reprinted in* [1994] 2 Y.B. Int’l L. Comm’n pt. 2, 1, 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

108. *Id.*, *reprinted in* [1994] 2 Y.B. Int’l L. Comm’n pt. 2, 1, 52, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

threshold.¹⁰⁹ Although some delegations preferred to move or delete the provision,¹¹⁰ their efforts gained little momentum. Similarly, questions raised about whether the defendant should be entitled to invoke insufficient gravity, were not taken up.¹¹¹ When the Chilean delegation suggested at the Rome Conference that “there was a need to explain more clearly the vague reference . . . to sufficient gravity in regard to the justification to the Court’s further action”,¹¹² the plea fell on deaf ears. Thus, the gravity threshold provision was subject to very little debate among state delegations and appears in the Rome Statute virtually unchanged from the ILC’s 1994 draft.¹¹³

In sum, the legislative history reveals a fairly consistent commitment to gravity as a core principle in determining the appropriate reach of the ICC’s jurisdiction. The primary mechanism by which gravity was ensured in the Statute was to limit the Court’s subject matter jurisdiction to the four “core crimes.” The gravity threshold for admissibility was added to the Statute at a time when the Court’s jurisdiction was envisioned to extend beyond the core crimes, and retained with little discussion once that vision narrowed. The legislative history therefore reveals little about the appropriate content of the gravity threshold determination. Nonetheless, the very absence of any substantial discussion of this question suggests the drafters did not envision the

109. See JOHN T. HOLMES, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41, 47 (Roy S. Lee ed., 2002).

110. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, n.44, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998) (“Some delegations believed that this subparagraph should be included elsewhere in the Statute or deleted.”).

111. See *Report of the Ad Hoc Comm.*, *supra* note 95, ¶ 162.

112. U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, *Committee of the Whole, Summary Record of the 11th Meeting*, ¶ 29, U.N. Doc. A/CONF.183/C.1/SR.11 (Nov. 20, 1998), *reprinted in* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, *Official Records: Volume II: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* at 211, 215, U.N. Doc A/CONF.183/13 (Vol. II) (2002).

113. The language of the provision changed slightly from “such gravity” to “sufficient gravity,” and it became mandatory rather than discretionary for the Court to declare inadmissible a case of insufficient gravity when a challenge is properly raised. *Compare Report of the ILC’s 46th Sess.*, *supra* note 18, ¶ 91, art. 35(c), *reprinted in* [1994] 2 Y.B. Int’l L. Comm’n pt. 2, 1, 52, U.N. Doc. A/CN.4/SERA/1994/Add.1 (Part 2), *with* Rome Statute, *supra* note 2, art. 17(1)(d).

threshold as a very substantial limit on the exercise of the Court's jurisdiction. Rather, a reasonable inference can be drawn that the drafters intended to exclude only the kind of *de minimis* conduct the International Criminal Tribunal for Former Yugoslavia ("ICTY") excludes based on the "seriousness" requirement in its statute, such as a combatant's theft of a loaf of bread in an occupied village.¹¹⁴

C. *Judicial Interpretation*

The ICC's judges have yet to examine any issue relating to the Prosecutor's discretionary consideration of relative gravity (for example, whether relative gravity can warrant rejecting a situation under the "interests of justice"), and have opined on the gravity threshold for admissibility in only one case.¹¹⁵ In early 2006 a three-judge Pre-Trial Chamber ("PTCI") issued a decision setting forth a test for the gravity threshold.¹¹⁶ Five months later, the Appeals Chamber overturned the decision without announcing an alternate test.¹¹⁷ The issue arose in the context of the Prosecutor's application for arrest warrants for Thomas Lubanga and Bosco Ntaganda, both of whom are accused of conscripting child soldiers in the Democratic Republic of Congo.¹¹⁸ PTCI held that a finding of admissibility, including

114. See Schabas, *supra* note 59, at 736 (citing Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 94 (Oct. 2, 1995)).

115. This may change in the near future. For example, a defendant recently filed the first motion challenging admissibility. See generally Prosecutor v. Katanga, Case No. ICC-01/04-01/07-949, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2)(a) of the Statute (Nov. 3, 2009).

116. See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-8-Corr, 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, annex I, ¶¶ 41-63 (Feb. 24, 2006) [hereinafter Lubanga Arrest Warrant Decision] (Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58).

117. See Prosecutor v. Ntaganda Dyilo, Case No. ICC-01/04-169, 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" (July 13, 2006) [hereinafter DRC Appeals Chamber Judgment]. Curiously, the appellate decision remained sealed until September 2008 even though the Appeals Chamber had explicitly acknowledged the importance of addressing the issue to the Court's future work. See *id.* ¶ 54 (stating that the interpretation of the gravity threshold for admissibility "could have an impact on the Court as a whole" and that the Pre-Trial Chamber's erroneous interpretation "could lead to future cases being declared inadmissible on grounds that are incorrect").

118. See *id.* ¶ 5.

sufficient gravity, is a precondition to the issuance of an arrest warrant.¹¹⁹ PTCI interpreted the gravity threshold for admissibility to require that the conduct at issue was “systematic (pattern of incidents) or large-scale.”¹²⁰ In this regard, PTCI stated that “due consideration must be given to the social alarm such conduct may have caused the international community.”¹²¹ PTCI did not, however, explain what it meant by “social alarm.” Additionally, PTCI declared that the gravity threshold requires the Court to prosecute only “the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court . . . in any given situation.”¹²² PTCI justified the latter requirement by reference to the Court’s deterrent mission, stating that prosecuting senior leaders will maximize deterrence because “other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.”¹²³ Applying these requirements to the cases against Lubanga and Ntaganda, PTCI found that the former met the gravity threshold,¹²⁴ but the latter did not and was thus inadmissible.¹²⁵

The Appeals Chamber disagreed with essentially every aspect of PTCI’s decision regarding Ntaganda. In the operative part of the judgment, the Appeals Chamber held that a finding of admissibility is not a prerequisite to the issuance of an arrest warrant under the Statute; nor was it an appropriate exercise of discretion in this case since the suspect’s rights were insufficiently protected.¹²⁶ The Appeals Chamber proceeded in *dictum*¹²⁷ to reject every aspect of the lower court’s test for the grav-

119. See Lubanga Arrest Warrant Decision, *supra* note 116, ¶ 18.

120. *Id.* ¶ 46.

121. *Id.*

122. *Id.* ¶ 50.

123. *Id.* ¶ 54.

124. See *id.* ¶ 75.

125. See DRC Appeals Chamber Judgment, *supra* note 117, ¶ 65 (describing sealed section of PTCI decision).

126. See *id.* ¶¶ 41-53.

127. A recent decision of the Court notes that the Appeals Chamber statements regarding the threshold test are *obiter dicta*. See Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 48 n.51 (Mar. 4, 2009) [hereinafter Bashir Arrest Warrant Decision].

ity threshold. First, the Appeals Chamber stated that PTCI's requirement of large-scale or systematic conduct for admissibility is inconsistent with the definitions of the crimes within the Court's jurisdiction, in particular, the definition of war crimes, for which the drafters explicitly rejected such a requirement.¹²⁸ Next, the Appeals Chamber rejected the "social alarm" criterion, agreeing with the Prosecutor that it "depends upon subjective and contingent reactions to crimes rather than upon their objective gravity."¹²⁹ Third, the Appeals Chamber disagreed that admissibility is limited to cases against the most senior leaders most responsible for relevant crimes. It opined that, contrary to PTCI's contention, such a restriction could detract from the Court's deterrent and preventive missions by creating a large category of perpetrators *per se* excluded from the Court's reach.¹³⁰ The Chamber also commented that the Statute's provision regarding the irrelevance of superior orders would be superfluous if admissibility were limited to top leaders.¹³¹ Finally, the Appeals Chamber noted that the Statute's drafters rejected a proposal to restrict admissibility to cases of "exceptional" gravity.¹³²

Although it resoundingly rejected the Pre-Trial Chamber's conclusions and reasoning, the majority of the Appeals Chamber did not pronounce its own interpretation of the gravity threshold provision. One judge wrote separately, however, dissenting on the appropriate remedy and articulating his own understanding of gravity as an admissibility criterion.¹³³ Judge Pikiš echoed much of the reasoning in the majority opinion with regard to the gravity provision, but added that the plain meaning of the words "not of sufficient gravity to justify further action by the Court" indicate the provision aims to exclude only cases "unworthy of consideration by the Court."¹³⁴ He elaborated:

Which cases are unworthy of consideration by the International Criminal Court? The answer is cases insignificant in themselves; where the criminality on the part of the culprit is

128. See DRC Appeals Chamber Judgment, *supra* note 117, ¶¶ 69-71.

129. *Id.* ¶ 72.

130. See *id.* ¶¶ 73-75.

131. See *id.* ¶ 78.

132. See *id.* ¶ 81.

133. Prosecutor v. Lubango Dyilo, Case No. ICC-01/04 (July 13, 2006) (Pikiš, J., Separate and Partly Dissenting) [hereinafter Lubango Opinion of Judge Pikiš].

134. *Id.* ¶¶ 38-39.

wholly marginal; borderline cases. A crime is insignificant in itself if, notwithstanding the fact that it satisfies the formalities of the law, i.e., the insignia of the crime, bound up with the mens rea and the actus reus, the acts constituting the crime are wholly peripheral to the objects of the law in criminalising the conduct. Both, the inception and the consequences of the crime must be negligible. In those circumstances the Court need not concern itself with the crime nor will it assume jurisdiction for the trial of such an offence, when national courts fail to do so. Any other construction of Article 17(1)(d) of the Statute would neutralize its avowed objects and purposes and to a large extent empty it of content. The subject-matter must be minimal, so much so that it can be ignored by the Court.¹³⁵

Thus, at least one judge appears to support the interpretation suggested herein that the gravity threshold should exclude only fairly *de minimis* conduct.

The Appeals Chamber was certainly correct to reject PTCI's broad interpretation of the gravity provision.¹³⁶ That interpretation was inconsistent with the language of the provision, its context in the Statute, and the intent of the drafters. Most importantly, PTCI's exceptionally high gravity threshold risked detracting from the Court's ability to fulfill its most important objectives. As the Appeals Chamber noted, the lower court's approach unduly restricted the ICC's deterrent potential because lower-level perpetrators would have nothing to fear from the Court, and national governments would lose an incentive to prosecute.¹³⁷ Furthermore, the lower chamber's interpretation would also have restricted the ICC's ability to pursue goals of retribution, reconciliation, and truth-telling, which may sometimes require prosecuting those most directly responsible for the crimes, in addition to their leaders.¹³⁸ Finally, the language and

135. *Id.* ¶ 40.

136. See generally Stephen Eliot Smith, *Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences*, 8 INT'L CRIM. L. REV. 331 (2008) (critiquing PTCI's gravity decision on many of the same grounds cited in the Appeals Chamber judgment).

137. See DRC Appeals Chamber Judgment, *supra* note 117, ¶ 77.

138. Cf. Steve Heder, *Reassessing the Role of Senior Leaders and Local Officials in Democratic Kampuchea Crimes: Cambodian Accountability in Comparative Perspective*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 377 (Jaya Ramji & Beth Van Schaack eds., 2005) (making a similar argument in the Cambodian context).

purpose of the gravity threshold provision support Judge Piki's view that it should exclude only cases involving conduct "wholly peripheral to the objects of the law in criminalising the conduct."¹³⁹

D. *The Prosecutor's Approach*

In his first two years in office, Prosecutor Luis Moreno-Ocampo did not seem to pay significant attention to the issue of gravity.¹⁴⁰ This omission is perhaps unsurprising given the lack of consideration the issue had garnered in diplomatic, academic, and practitioner circles. Thereafter, however, gravity came to occupy an increasingly prominent place in the Prosecutor's policy statements as well as his pronouncements regarding particular cases. The Prosecutor now routinely emphasizes the importance of gravity considerations in his office's selection of situations to investigate and cases to prosecute. The Prosecutor's pronouncements are often unclear, however, about whether he is applying the Statute's gravity threshold for admissibility or exercising his discretion to consider relative gravity in making selection decisions.¹⁴¹ As already discussed, these are two quite distinct inquiries. The former is a theoretically static line below which the Court should not exercise its jurisdiction, whereas the latter is one of a number of criteria the Prosecutor may consider in the exercise of his discretion. The Prosecutor tends to conflate these disparate inquiries, sometimes citing the "floor" of the gravity threshold to justify selecting situations and cases over others based on his conclusion that those selected are more serious.¹⁴²

139. Lubango Opinion of Judge Piki, *supra* note 133, ¶ 40.

140. See William A. Schabas, *Prosecutorial Discretion and Gravity*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 229, 229-34 (Carsten Stahn & Göran Sluiter eds., 2009).

141. See WAR CRIMES RESEARCH OFFICE, AMERICAN UNIV. WASH. COLLEGE OF LAW, *THE GRAVITY THRESHOLD OF THE INTERNATIONAL CRIMINAL COURT* 52 (2008) ("[I]t has not always been clear when the Prosecutor is talking about gravity as a requirement under the Rome Statute versus gravity as one of presumably many factors leading to the OTP's decision to prosecute certain crimes over other crimes.").

142. Scholars sometimes also conflate these inquiries. See, e.g., Schabas, *Prosecutorial Discretion and Gravity*, *supra* note 140, at 241 (criticizing the Lubanga Pre-trial Chamber for "assess[ing] gravity in a vacuum" rather than employing a relative gravity analysis of the gravity threshold for admissibility).

1. Gravity and the Decision to Investigate a Situation

As discussed above, the Statute is unclear about the degree of discretion it grants the Prosecutor in selecting situations to investigate. The Prosecutor implicitly acknowledged this ambiguity when he asked States Parties in mid-2005 to reflect on the question: “Must the Prosecutor initiate an investigation in all situations that appear to fall within the jurisdiction of the Court? Or, should the Prosecutor select amongst them the most grave and urgent situations within the limits of his resources?”¹⁴³ In his policy statements, the Prosecutor has not attempted to resolve this lack of clarity by proposing a viable statutory interpretation or requesting a statutory amendment, but has instead left the matter ambiguous. On the one hand, the Prosecutor has claimed that the Statute grants him significant discretion:

[N]either referrals nor private communications automatically ‘trigger’ the powers of the Prosecutor. Under the Statute, the Prosecutor is entrusted with a broad measure of discretion with respect to what additional steps should be taken in relation to information received. Indeed, in the light of its limited resources, the Office of the Prosecutor is required to set priorities, taking into account the limits and requirements set out in the Statute, the general policy of the Office and all other relevant circumstances, including the feasibility of conducting an effective investigation in a particular territory.¹⁴⁴

However, contrary to the interpretation suggested above,¹⁴⁵ the Prosecutor also takes the position that in all cases—whether referred or *proprio motu*—he must determine whether there is a “reasonable basis to proceed,” using the criteria elaborated in Article 53.¹⁴⁶ Since the Statute mandates that once a reasonable

143. Luis Moreno-Ocampo, Prosecutor of the ICC, Statement at Informal Meeting of Legal Advisors of Ministries of Foreign Affairs 6 (Oct. 24, 2005) [hereinafter *Moreno-Ocampo Statement at Informal Meeting*], available at http://www2.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf.

144. ICC-OTP, *Annex to the “Paper on Some Policy Issues before the Office of the Prosecutor”: Referrals and Communications 1* [hereinafter *Annex on Referrals & Communications*], available at http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf (last visited Mar. 29, 2009).

145. See *supra* Part II.A.2.a.

146. See *Annex on Referrals & Communications*, *supra* note 144, at 2-3; see also *Draft: Criteria for Selection*, *supra* note 35, at 7.

basis is found, the Prosecutor “shall” pursue an investigation,¹⁴⁷ it is unclear where the Prosecutor finds authority for his discretion to “set priorities” with regard to potential situations. As explained above, one way to find such authority in the Statute for *proprio motu* investigations is in the first paragraph of Article 15, which states that the Prosecutor “may” initiate such investigations.¹⁴⁸ Although Article 15 also mandates that the Prosecutor “shall” request authorization if he finds a reasonable basis, he arguably need not reach that determination if he excludes the situation based on a relative gravity analysis.

The Prosecutor has not taken this view, however, perhaps because it applies only to *proprio motu* investigations and does not allow him similar discretion in referred situations. Nor has the Prosecutor sought to interpret the “interests of justice” provision as allowing him to reject referred situations based on relative gravity. In fact, the Prosecutor has issued a policy paper adopting a rather restrictive vision of the “interests of justice.”¹⁴⁹ Instead, the Prosecutor has sought to locate his discretion to prioritize situations by to their *relative* gravity in the Statute’s gravity *threshold* provision. According to the Prosecutor, the Statute’s inclusion of gravity as an admissibility criterion “seems to reflect the wish of [the] founders that the ICC should focus on the *gravest* situations in the world.”¹⁵⁰ In justifying his selection of situations, therefore, the Prosecutor tends to reference the gravity threshold. For example, the Prosecutor stated:

With regard to the selection of situations, once the requirements of temporal and subject-matter jurisdiction are met, the Office is guided by the standard of gravity. Although any crime falling within the jurisdiction of the Court is a serious matter, the Rome Statute . . . clearly foresees and requires an additional consideration of “gravity” whereby the Office must determine that a case is of sufficient gravity to justify further

147. See Rome Statute, *supra* note 2, arts. 15(3), 53(1).

148. See *supra* Part II.A.2.a.

149. See ICC-OTP, Policy Paper on the Interests of Justice (Sept. 2007), available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> (declaring that the exercise of the Prosecutor’s discretion under the interests of justice provision is “exceptional in its nature” and that “there is a presumption in favour of investigation or prosecution” whenever the other criteria in Article 53 are met).

150. Moreno-Ocampo Statement at Informal Meeting, *supra* note 143, at 8-9 (emphasis added).

action by the Court. . . . After thorough analysis, the Office concluded that the situations in the Democratic Republic of the Congo (“DRC”) and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court.¹⁵¹

The Prosecutor thus tends to imply that his selection decisions are justified or even required by the Statute’s gravity threshold for admissibility.

The Prosecutor explicitly conflated the gravity threshold for admissibility with his relative gravity discretion in explaining his refusal to pursue *proprio motu* the situation of British war crimes in Iraq. Although he determined there was a reasonable basis to believe British soldiers had committed war crimes, including four to twelve willful killings, he declared that the situation did not meet the gravity threshold for admissibility because the number of victims alleged “was of a different order” than that in other situations before the Court, which involve thousands of deaths.¹⁵² Thus, the “threshold” was treated as a relative analysis based primarily on the number of victims in each situation.

While the Prosecutor’s conflation of the gravity threshold and discretionary relative gravity affords him significant leeway in deciding which situations to pursue, strong arguments mitigate against this approach. Most importantly, the text of the Statute—“not of *sufficient* gravity to justify further action”—indicates a threshold is required, rather than a comparison.¹⁵³ This is confirmed by the legislative history, including, for example, the statement of the provision’s original drafter that the requirement would exclude crimes that do not “warrant trial at the international level.”¹⁵⁴

There are also important policy reasons to maintain the distinction between the gravity threshold and the exercise of the

151. ICC-OTP, Report on the Activities Performed During the First Three Years (June 2003-June 2006), at 6-7 (Sept. 12, 2006).

152. ICC-OTP, Luis Moreno-Ocampo, *Letter Concerning Situation in Iraq* (Feb. 9, 2006), available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf. The Prosecutor also found that the situation did not appear to meet the permissive threshold of Article 8(1), which grants the Court 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.” *Id.* at 8-9.

153. See Rome Statute, *supra* note 2, art. 17(1)(d).

154. ILC, *Summary Record of the Meetings of the Forty-sixth Sess.*, ¶ 9 U.N. Doc. A/CN.4/SR.2346 (1994), reprinted in [1994] 1 Y.B. Int’l L. Comm’n 1, 9, U.N. Doc. A/CN.4/SER.A/1994.

Prosecutor's relative gravity discretion. One of the Court's chief objectives is to encourage states to fulfill their obligations to prosecute grave international crimes. A declaration that a situation involves no sufficiently grave cases may well have the opposite effect by removing an incentive for states to act. Furthermore, declining a situation based on inadmissibility sends a signal that all similar cases are outside the Court's purview, limiting whatever deterrent reach the Court may have. In contrast, a rejection based on resource prioritization simply indicates the Court's resources are currently insufficient to handle the situation, a circumstance that may change in the future. Finally, defendants and certain states may challenge admissibility¹⁵⁵ but have no standing to object to the Prosecutor's legitimate exercise of his discretion. By basing his relative gravity decisions on the gravity threshold, the Prosecutor therefore opens the door to litigation surrounding the question of which situations are graver.

The above critique does not imply that the Prosecutor's decision not to pursue the Iraq situation was necessarily wrong; but rather, that he should have framed the decision differently. If the decision was in fact based on the gravity threshold for admissibility, the Prosecutor should have explained why the potential cases involved are insufficiently grave to be admissible before the Court. For example, he might have decided the situation was inadmissible because each of the alleged murders was isolated (not connected through a plan or policy) and had no broader impact beyond the immediate victims. In that case, he would have to take the position that, as a general matter, isolated individual murders in war are outside the purview of the Court. If, on the other hand, his decision was based on a comparison of the number of victims in the proposed Iraq situation and those in other situations before the Court, he should have articulated the decision in terms of his discretion to consider relative gravity in initiating investigations *proprio motu*.

2. Gravity as a Criterion for Case Selection

In the context of case selection, the Prosecutor has acknowledged the distinction between gravity as an admissibility criterion and his discretionary consideration of relative gravity. For

155. Rome Statute, *supra* note 2, art. 19.

example, in his draft policy paper on selection criteria, the Prosecutor notes that not all admissible cases will be prosecuted and asserts that, in selecting among admissible cases, his office “will consider factors such as the policy of focusing on persons most responsible for the most serious crimes”¹⁵⁶ Nonetheless, in other pronouncements, the Prosecutor has pointed to the gravity threshold provision as the basis for his relative gravity discretion to select cases. For example, in a 2006 report on prosecutorial strategy, the Prosecutor stated that, “cases inside [a] situation are selected according to their gravity.”¹⁵⁷ He explained this strategy by reference to the Statute’s requirement that cases must be “of sufficient gravity to justify further action by the Court,” in other words, the gravity threshold.¹⁵⁸

The Prosecutor’s failure to distinguish clearly between the gravity threshold for admissibility and his discretionary use of relative gravity has led to unfortunate misunderstandings. For example, when the Prosecutor explained his decision to investigate initially Ugandan rebels but not government forces in terms of the relatively graver nature of the rebel offences,¹⁵⁹ several generally well-informed human rights organizations understood him to be declaring that the government offences were insufficiently grave to be admissible before the Court.¹⁶⁰

With regard to case selection, therefore, the Prosecutor has

156. *Draft: Criteria for Selection*, *supra* note 35, at 11.

157. ICC-OTP, *Report on Prosecutorial Strategy*, at 5 (Sept. 14 2006), available at http://www.iccnw.org/documents/ProsecutorialStrategy_06Sep14.pdf [hereinafter *Report on Prosecutorial Strategy*].

158. *See id.*

159. ICC-OTP, *Statement by the Chief Prosecutor on the Uganda Arrest Warrants*, at 2-3, delivered at the Hague (Oct. 14, 2005), available at http://www.icc-cpi.int/NR/rdonlyres/3255817D-FD00-4072-9F58-FDB869F9B7CF/143834/LMO_20051014_English1.pdf.
Stating:

The criteria for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA.

Id.

160. *See* HUM. RTS. CENTER, *WHEN THE WAR ENDS: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN NORTHERN UGANDA* 18 (Dec. 2007), available at [http://www.reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/EMAE-79ZSZP-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/EMAE-79ZSZP-full_report.pdf/$File/full_report.pdf) (“The ICC, for its part, has stressed that the UPDF has committed fewer crimes than the LRA and that such crimes do not meet the gravity threshold required to open an investigation.”).

appropriately adopted relative gravity as an important criterion in his decision-making process.¹⁶¹ The Prosecutor should be clearer, however, about when he is rejecting a case on the grounds of insufficient gravity for admissibility and when he is prioritizing cases based on relative gravity.¹⁶²

In conclusion, the language of the Statute and the legislative history demonstrate the importance of gravity as a limit on the ICC's jurisdiction. These sources also suggest that the gravity requirement is largely fulfilled by the definitional elements of the Statute's crimes. The gravity threshold for admissibility, in contrast, appears to play the more limited role of ensuring that cases involving only insignificant instances of the relevant crimes do not clog the Court's docket. Gravity's prominent place in the Statute also suggests that the Prosecutor should consider relative gravity in making some discretionary selection decisions, although the provisions of the Statute are unclear as to when such discretion is available. The lack of clarity surrounding these issues in the ICC's constitutive documents highlights the importance of clear statements from the Court's judges and Prosecutor regarding the appropriate roles for gravity in the ICC regime. The Court must articulate a sound approach to the gravity threshold determination and the Prosecutor must develop a relative gravity policy that recognizes the distinction between the two inquiries. The following theoretical analysis and prescriptive suggestions aim to assist in these endeavors.

III. GRAVITY'S ROLES IN LEGITIMIZING THE ICC

To develop appropriate gravity doctrines and policies, an understanding of gravity's purposes in the ICC regime is required. As the forgoing discussion demonstrated, gravity is central to the Court's normative framework. But why is gravity so important? The answer, perhaps unsurprisingly, lies in the Court's legitimacy. Gravity helps to legitimize one of the Court's most important decisions—the decision to act—and thereby serves to legitimize the Court itself. Of course, gravity is not the

161. See, e.g., *Reports of the Secretary-General on Sudan*, Statement of Luis Moreno-Ocampo, U.N. SCOR, 60th Sess., 5321st mtg., at 2, U.N. Doc. S/PV.5321 (Dec. 13, 2005) (stating that with regard to the situation in Sudan, the Prosecutor's office "identified particularly grave events, involving a large number of killings, mass rapes and other forms of extremely serious gender violence, for full investigation.")

162. See WAR CRIMES RESEARCH OFFICE, *supra* note 141, at 53.

sole criterion on which the Court's legitimacy rests. On the contrary, a host of considerations impact upon the Court's actual and perceived legitimacy from the professionalism of its staff to the quality of its rulings and procedures, particularly those related to defendants' rights.¹⁶³ In fact, fairness of procedures and punishments may provide the key to the institution's overall legitimacy.¹⁶⁴ Nevertheless, the Court's decisions when to investigate, prosecute, and adjudicate cases will strongly affect the institution's legitimacy because they proclaim a particular vision of the Court's role in the international legal order. By helping to legitimize those decisions, gravity contributes to the institutional legitimacy of the ICC.

The term "legitimacy" is often used without definition to connote a sense of generalized acceptability or success.¹⁶⁵ At the same time, substantial scholarship has been devoted to elaborating the meaning and sources of legitimacy in domestic and international contexts.¹⁶⁶ This Article does not propose a general theory of the ICC's legitimacy; but rather employs theories reflected in the existing literature to elucidate the links between gravity and legitimacy for the ICC.

Legitimacy is used herein to denote "justified authority."¹⁶⁷ Three categories of legitimacy are distinguished according to the primary character of the justification each employs.¹⁶⁸

163. Cf. Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court: A Liberal Defence*, 4 J. INT'L CRIM. JUST. 765, 775 (2006) (arguing that the ICC's legitimacy hinges on its respect for individual rights).

164. See David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law* 13-15 (Georgetown Law Faculty Working Papers, Paper No. 1154177, 2008), available at <http://ssrn.com/abstract=1154177>.

165. See, e.g., Luis Moreno-Ocampo, Prosecutor of the ICC, The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law, Speech at the London School of Economics 6 (Oct. 8, 2008), available at <http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20081007LuisMorenoOcampo.pdf> ("The court's legitimacy is not dependant on having cases from all over the world, its success will instead depend on the world supporting its cases whenever and wherever the Court decides to proceed.").

166. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 556 (1993) (citing legitimacy literature).

167. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 601 (1999).

168. See Richard H. Fallon, Jr., *Legitimacy and The Constitution*, 118 HARV. L. REV. 1787, 1789 (2005). For a critique of Fallon's tripartite legitimacy framework, see David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1856 (2005) (arguing that moral and legal illegitimacy are really no different than "morally wrong" and "legally wrong").

Claims of legal legitimacy suggest the correct application of laws and legal principles;¹⁶⁹ moral legitimacy refers to the moral justifiability of a judicial regime or decision;¹⁷⁰ and sociological legitimacy considers the perceptions of relevant audiences that such regime or decision is justified.¹⁷¹ Much of the legitimacy scholarship conflates these categories.¹⁷² In particular, scholars tend to blend moral and sociological legitimacy by incorporating justice into a framework oriented toward perceptions of legitimacy.¹⁷³ The intermingling of these concepts can lead to confusion because perceptions of legitimacy may have little to do with actual, normative legitimacy.¹⁷⁴

At the same time, these distinctions are rarely clear-cut.¹⁷⁵ Perceptions of legitimacy often derive from normative factors,¹⁷⁶ and those perceptions in turn influence the development of the norms. If a regime is in fact just, it may therefore be perceived as such and the resulting conception of justice may then influence the development of the justice norm. Defining legitimacy to exclude entirely an objective conception of justice, as Hurd does,¹⁷⁷ thus seems to miss the mark. It is beyond the scope of this analysis, however, to engage the substantial body of scholarship addressing the content of the concept of legitimacy. In-

169. See Fallon, *supra* note 168, at 1794; see also Bodansky, *supra* note 167, at 605 (citing Oxford English Dictionary definition of legal legitimacy: “the condition of being in accordance with law or principle.”).

170. See Fallon, *supra* note 168, at 1796-97. Natural law scholars dispute that legal and moral legitimacy can be separated in this way. See *id.* at 1801-02.

171. See *id.* at 1795-96; see also Bodansky, *supra* note 167, at 601 (distinguishing sociological and normative dimensions of legitimacy).

172. See, e.g., G. C. A. Junne, *International Organizations in a Period of Globalization: New (problems of) Legitimacy*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 189, 191 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001) (citing as sources of legitimacy: justice, correct procedure, representation, effectiveness, and charisma).

173. See Jose E. Alvarez, *The Quest for Legitimacy: An Examination of The Power of Legitimacy Among Nations* by Thomas M. Franck, 24 N.Y.U. J. INT’L L & POL. 199, 207 (1991) (book review) (discussing Dencho Georgiev’s critique of Franck on this point).

174. See IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* 32 (2007) (“Although insiders may perceive an indissoluble connection between [justice and legitimacy], an outsider’s assessment of the justness of a system is irrelevant to the insider’s perception of its legitimacy.”).

175. See Fallon, *supra* note 168 at 1792-93; see also Bodansky, *supra* note 167, at 601.

176. See, e.g., Robert Howse, *The Legitimacy of the World Trade Organization*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS*, *supra* note 172, at 363 (“[T]he empirical acceptance by citizens of formally valid rules as legitimate depends significantly on their conformity with values and interests broadly shared among those citizens.”).

177. See HURD, *supra* note 174, at 32.

stead, it is sufficient for present purposes to highlight the distinction between sociological legitimacy—“what people think is legally or morally legitimate”—and normative legitimacy—“what really is legally or morally legitimate.”¹⁷⁸ This distinction helps to explain the two primary roles gravity plays in the ICC regime. As an admissibility threshold, gravity’s chief role is to provide the Court normative legitimacy, while the Prosecutor’s discretionary use of relative gravity is an important determinant of perceived or sociological legitimacy. The Court’s normative legitimacy is an intrinsically important question and its sociological legitimacy is a critical component of its effectiveness.¹⁷⁹

A. *The Gravity Threshold and the ICC’s Moral Legitimacy*

The moral legitimacy of international rules and institutions was traditionally considered to rest on state consent.¹⁸⁰ Thus, one author writes that the ICC “relies principally on state consent to validate its political and moral legitimacy.”¹⁸¹ However, theorists have increasingly questioned this correlation between consent and legitimacy because it depends on the often-flawed assumption that the consenting governments represent the will of the individuals they govern.¹⁸² As Allen Buchanan writes, “state consent is of dubious moral significance in a system in which many states often do not represent all or the majority of their citizens or take their basic interests seriously.”¹⁸³ In fact, state consent may not confer moral legitimacy even when gov-

178. See Fallon, *supra* note 168, at 1851; see also Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT’L AFFAIRS* 405, 405 (2006).

179. See Bodansky, *supra* note 167, at 602-03; see also Buchanan & Keohane, *supra* note 178, at 407 (“The perception of legitimacy matters because, in a democratic era, multilateral institutions will only thrive if they are viewed as legitimate by democratic publics.”).

180. See, e.g., ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION* 234 (2004); Bodansky, *supra* note 167, at 604-05; Howse, *supra* note 176, at 359 (“The consent of sovereigns provides a powerful basis for the legitimacy of the rules that constitute the WTO treaties.”). Cf. Fallon, *supra* note 168, at 1797-98 (citing consent as a basis for ideal theories of moral legitimacy).

181. STEVEN C. ROACH, *POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW* 82 (2006).

182. See, e.g., BUCHANAN, *supra* note 180, at 234; Buchanan & Keohane, *supra* note 178, at 412-13; Fichtelberg, *supra* note 163, at 775 (stating that under a “republican model of legitimacy” institutions are only legitimate if they represent the will of the people).

183. BUCHANAN, *supra* note 180, at 234.

ernments represent the majority because the will of the majority can cause governments to perpetrate or abide widespread crimes against minorities.¹⁸⁴

Nonetheless, as Allen Buchanan and Robert Keohane write, “the on-going consent of rights-respecting democratic states” is a necessary if not sufficient condition for the legitimacy of global governance institutions such as the ICC.¹⁸⁵ In addition to such consent, Buchanan and Keohane posit three substantive criteria for the moral legitimacy of global governance institutions: the institutions adhere to at least minimal standards of justice, they provide a benefit not otherwise obtainable, and they exhibit institutional integrity by hewing to the goals that justify their existence.¹⁸⁶

For the ICC, the Rome Statute seeks to establish a framework in which each of these three conditions is fulfilled. First, the Statute’s provisions, particularly those affecting the accused, aim to ensure substantially more than minimal standards of justice.¹⁸⁷ Second, the complementarity regime, whereby the Court cannot act if a state with jurisdiction is already doing so in good faith, ensures the Court provides a benefit that is otherwise unavailable. Finally, the gravity threshold for admissibility, along with the Statute’s jurisdictional provisions, aims to ensure the Court’s institutional integrity. The Statute’s preamble leaves no doubt that a key component of such integrity is the adjudication of *serious* crimes.¹⁸⁸ If the Court were routinely to exercise jurisdiction over crimes that are generally considered minor, for example, isolated instances of property theft in war, its integrity and thus its normative legitimacy would be questioned.

Understanding the gravity threshold’s role as helping to ensure the ICC’s integrity helps us to determine the content of this requirement. Since the normative requirement of gravity is already substantially ensured by the definitions of the crimes within the Court’s jurisdiction, the threshold should not be interpreted as a substantial barrier to the exercise of that jurisdic-

184. See Fichtelberg, *supra* note 163, at 776-77.

185. Buchanan & Keohane, *supra* note 178, at 415.

186. *Id.* at 419-24.

187. See, e.g., Rome Statute, *supra* note 2, arts. 31 (“Grounds for Excluding Criminal Responsibility”), *id.* art. 55 (“Rights of Persons During an Investigation”), *id.* art. 66 (“Presumption of Innocence”), *id.* art. 67 (“Rights of the Accused”).

188. See *id.* pmb. (mentioning gravity or seriousness in multiple paragraphs).

tion. Thus, the Lubanga Pre-Trial Chamber's approach discussed above, presents a vision of gravity that is unnecessarily restrictive in terms of ensuring the Court's integrity. In fact, far from assisting the Court in accomplishing the goals for which it was established, such an interpretation would detract from the Court's ability to prevent, deter and punish the range of serious crimes prescribed by the Statute.¹⁸⁹

Instead, the gravity threshold appears essentially to provide a backstop ensuring that the Court rejects cases of crimes that technically meet the definitions in the Statute, but are nonetheless minor. Since the threshold needs to exclude only minor crimes to fulfill its purpose, it cannot be applied through a relative comparison as the Prosecutor has sometimes suggested. Instead, the absolute gravity of a case or potential cases within a situation must be determined. The line cannot be drawn in the abstract, but will evolve through the Court's jurisprudence. A suggested methodology for making gravity threshold decisions is proposed below. As former ICTY prosecutor Louise Arbour has noted, however, the real challenge will not be to weed out unworthy cases but "to choose from many meritorious complaints the appropriate ones for international intervention."¹⁹⁰ As such, the gravity threshold for admissibility is likely to be less critical to the Court's work than the Prosecutor's use of relative gravity in making selection decisions to which we now turn.

B. *The Prosecutor's Discretionary Relative Gravity Decisions and the Court's Sociological Legitimacy*

While the Court's normative legitimacy is linked to the gravity threshold, such legitimacy generally will not depend on the Prosecutor's relative gravity decisions. As long as the Prosecutor selects only cases above the threshold he is unlikely to jeopardize the Court's moral legitimacy even if the cases and situations selected are not always at the very top of the gravity spectrum. That said, in the unlikely event the Prosecutor routinely selects the least serious cases, ignoring more egregious cases without

189. See *supra* Part II.C.

190. Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 520 (2003) (quoting Louise M. Arbour, *Statement to the Preparatory Commission on the Establishment of an International Criminal Court* (Dec. 8, 1997), 1997 ICTY Y.B. 229, 232, U.N. Sales No. E.99.III.P.2).

good reason, he could call into question the Court's integrity and thus its moral legitimacy. However, in the more likely event the Prosecutor focuses primarily on cases well above the gravity threshold, his relative gravity decisions will primarily impact upon the ICC's sociological legitimacy.

Sociological legitimacy refers to the perception of relevant audiences that an institution or decision is justified and deserves support independent of any sanction or reward associated with such support.¹⁹¹ Sociological legitimacy can attach to an institution in a diffuse sense or to particular exercises of the institution's authority, with each of these influencing the other.¹⁹² Where an institution enjoys broad diffuse legitimacy, relevant audiences may be predisposed to consider its actions legitimate. In turn, the perception of relevant audiences regarding the legitimacy of an institution's actions can affect the diffuse support it enjoys.¹⁹³

Scholars have advanced various theories for understanding the sources of sociological legitimacy. For example, Max Weber posited that such legitimacy arises from a belief in legality, the sanctity of tradition, or a leader's charisma.¹⁹⁴ More recent scholarship tends to focus on "favorable outcomes," fairness, or procedural correctness as the primary source of perceived legitimacy.¹⁹⁵ The debate has also been framed in terms of "input legitimacy," which focuses on procedural factors, and "output legitimacy," which highlights substantive outcomes as the legitimating force.¹⁹⁶

The ICC's sociological legitimacy is strongly affected by the Prosecutor's discretionary decisions which situations and cases to pursue.¹⁹⁷ As a new institution, the ICC does not yet enjoy broad

191. Fallon, *supra* note 168, at 1795; *see also* MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 325 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947) (arguing that belief in legitimacy is normally one of the elements that influences obedience).

192. *See* Fallon, *supra* note 168, at 1828.

193. The degree to which individual decisions influence institutional legitimacy may depend on the depth of diffuse support the institution enjoys. For example, Fallon notes that despite criticism of the U.S. Supreme Court's decision in *Bush v. Gore*, the decision had virtually no impact on the Court's diffuse support. *Id.* at 1829.

194. WEBER, *supra* note 191, at 328.

195. HURD, *supra* note 174, at 67-73 (discussing scholarship).

196. *Id.* at 66.

197. As already noted, such decisions are by no means the only factor affecting perceptions of the Court's legitimacy. In particular, such perceptions are likely to be

diffuse support. As such, content legitimacy—perceptions regarding the legitimacy of the Court's actions—will greatly affect perceptions of the ICC's institutional legitimacy. When the Prosecutor decides to pursue a particular situation or case, he asserts a vision of the Court's role in the international legal and moral order. These decisions, particularly the broader decisions regarding situations, will tend to shape perceptions of the Court's legitimacy. Since sociological legitimacy is critical to the ICC's effectiveness, it is important to understand how the Prosecutor's relative gravity decisions are likely to affect perceptions in relevant audiences. Such perceptions will not necessarily determine selection policies, but should at least be taken into account as discussed in Part IV below.

The current Prosecutor's approach to gravity as a selection criterion suggests he believes—or at least hopes—that the legitimacy of his gravity-based selection decisions will be assessed according to a “procedural correctness” model. As discussed above, the Prosecutor tends to link his discretionary use of relative gravity in selection decisions to the Statute's gravity threshold. For example, the Prosecutor has stated: “In selecting its cases, the Office is guided by the standard of *gravity as mandated* by the Rome Statute.”¹⁹⁸ In asserting that his selections are “mandated” by the Statute, the Prosecutor seems to be signaling that they should derive sociological legitimacy from this legal genesis. In other words, the Prosecutor appears to believe that if he is viewed to be following legally mandated procedures for selecting situations and cases his decisions will be considered legitimate.

The flaw in this approach is that there are no “correct procedures” for selecting among situations and cases above the gravity threshold.¹⁹⁹ The Statute tells the Prosecutor very little about how to accomplish this task. In fact, as already shown, the Statute is not even clear about the extent of the Prosecutor's discre-

affected by the Court's treatment of defendants. See, e.g., DRUMBL, *supra* note 9, at 161-62 (erratic sentencing practices can affect the legitimacy of international criminal tribunals).

198. ICC-OTP, *Report on the Activities Performed During the First Three Years*, *supra* note 151, at 2 (second emphasis added).

199. Cf. HURD, *supra* note 174, at 72 (“One difficulty with the procedural approach is that it depends on a prior understanding of what constitutes an appropriate procedure for the subject in question.”).

tion to select situations and cases based on relative gravity.²⁰⁰

A solution that has been proposed to the Prosecutor's legitimacy dilemma is to promulgate prosecutorial guidelines concerning such issues as the selection of cases and situations.²⁰¹ This proposal assumes that the Prosecutor can enhance perceptions of legitimacy by adhering to good process, in particular impartiality, in his decision-making.²⁰² However, prosecutorial guidelines cannot solve the legitimacy problem for questions that are not susceptible to rule-based decision-making.²⁰³ The Prosecutor's discretionary selection decisions fall into this category because, as discussed below, they require context-specific prioritization of competing ICC goals. Since there is no consensus in the international community regarding the appropriate goals and priorities for the ICC, selection decisions are necessarily subjective. Thus, at least until greater consensus is achieved, no "correct process" can imbue these selection decisions with sociological legitimacy.²⁰⁴

Since the Prosecutor's selection decisions cannot be judged according to their procedural correctness—at least for now, perceptions of their legitimacy may hinge on whether the outcomes are viewed as fair or favorable by a particular audience. Testing this hypothesis would involve an immense empirical project. For present purposes, however, it is sufficient to note the complexity of identifying relevant audiences and to suggest some (admittedly speculative) differences in the ways such audiences likely perceive the Prosecutor's selection decisions. These observations will inform the subsequent discussion of how the Prosecutor should operationalize his consideration of relative gravity in making decisions.

Traditionally, states were considered the core legitimacy audience for international organizations; an organization was considered legitimate if states were satisfied with its performance.²⁰⁵ Globalization has broadened the discourse, however, such that

200. See *supra*, Part II.A.2.a-c.

201. See generally Danner, *supra* note 190.

202. See *id.* at 536-37.

203. See Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 654-55 (2007).

204. In contrast, the gravity threshold determination can be reduced to a factor-based analysis as discussed below.

205. See Junne, *supra* note 172, at 192.

few would contest that the ICC's legitimacy audiences extend well beyond states. In fact, the Internet has drastically increased the potential for any individual to become an important actor with potential relevance for the legitimacy of an international organization. These global changes make it increasingly difficult to group individuals into "audiences" for which generalization is meaningful. Nonetheless, for the purpose of illustrating the complexities of the relationship between the ICC's legitimacy and the Prosecutor's relative gravity selection decisions, three potential "audiences" are proposed: global society, states, and affected populations.

1. Global Society

For present purposes, "global society" comprises all groups and individuals with an opinion about the legitimacy of the ICC, from NGOs to multinational corporations, social movements, and informed individuals.²⁰⁶ Assuming any meaningful generalization can be made about the views of this massive and diverse category, it seems reasonable to suggest that such a consensus would be based on commonalities in expectations for the organization. That is to say, "global society" will consider the ICC's actions legitimate when they conform to the common understanding of the Court's purpose.

At the meta-level, there is a common story about the genesis and purpose of the ICC. The ICC is widely viewed as a product of the International Military Tribunal at Nuremberg, a court established to try the leaders of a genocide that killed six million people. Many people also associate the establishment of the ICC with the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"), each of which was established to address crimes involving hundreds of thousands of murders, rapes, tortures, and other forms of horrendous mistreatment. Although the mandates of those tribunals were not originally limited to leaders, the cases that have garnered the most media attention have been those of leaders like Milošević and Karadžić.²⁰⁷

206. *See id.* (discussing the meaning of "global society").

207. *See, e.g.,* David Rohde & Marc Lacey, *Arrest Helps Tribunals Prosecuting War Crimes*, N.Y. TIMES, July 23, 2008, at A10 (citing former prosecutors, legal experts and human rights groups as opining that the arrest of Bosnian Serb senior leader Radovan Karadžić lends credibility not just to the ICTY where he will be prosecuted, but to international criminal tribunals generally).

As a result of this historical background to the ICC's creation, global society likely expects the ICC to try the leaders of the conflicts in the world where the greatest numbers of victims have died, been raped, or suffered similar levels of harm. Therefore, selection decisions that are perceived as failing to focus on both leadership and the numbers of victims of the most egregious crimes could be viewed as producing unfair outcomes and diminish the Court's global sociological legitimacy.²⁰⁸

2. States

Setting aside states that consider the ICC institutionally illegitimate, states will tend to consider selection decisions legitimate when they produce outcomes that benefit, or at least do no harm to, their perceived interests and those of their allies. Thus, a state intent on making the Court operational may support a decision to pursue a low-level perpetrator if higher-ups are out of reach. On the other hand, a budget-conscious state may not want to waste resources on a Court that is seen to be pursuing perpetrators too low on the responsibility spectrum. Most importantly, states will generally view selection decisions that target their nationals or territory without their specific consent as illegitimate. Thus, the Sudanese government has protested the legitimacy of the Court's actions in that country,²⁰⁹ and Sudan's allies have generally supported the government.²¹⁰ Additionally, the British government and many of its allies would surely have challenged the legitimacy of a decision to prosecute the British soldiers accused of war crimes in Iraq.

The extent to which objecting states can influence broader perceptions of the Court's legitimacy will depend in large part on the whether the objecting government is itself considered legitimate. When the Sudanese government protests against the Court's legitimacy, for example, the impact of its challenge is muted by the widely shared perception that the government is

208. Note that it is not the actual decisions that matter here so much as perceptions of those decisions, which are influenced by factors extrinsic to the prosecutor's selection process such as media coverage, NGO advocacy, and government propaganda.

209. See, e.g., Derek Kilner, *Protests Continue in Khartoum as Sudanese Government Blasts ICC Decision*, VOICE OF AMERICA NEWS, Mar. 5, 2009, <http://www.voanews.com/english/archive/2009-03/2009-03-05-voa16.cfm>.

210. See, e.g., *id.*; Michael Slackman & Robert F. Worth, *Often Split, Arab Leaders Unite for Sudan's Chief*, N.Y. TIMES, Mar. 31, 2009, at A5.

engaged in widespread atrocities against its own population. In recent years, the U.S. perspective has also been widely discounted in much of the world due to the U.S. government's blatant disregard for international law, in particular human rights. In fact, U.S. opposition to the Court may have actually enhanced its legitimacy in the non-Western world.²¹¹ In this sense, the legitimacy perspectives of some states matter significantly more than others.

3. Affected Populations

Many observers of international criminal law consider the populations directly affected by the ICC's activities to be the Court's most important legitimacy audiences.²¹² Local sociological legitimacy will likely correlate strongly to whether the Prosecutor's selection decisions are considered favorable and/or fair. Within affected populations there will likely be widely divergent views on such questions. For example, with regard to situation selection, some African populations perceive the Court's current focus on Africa as unfair, charging that it is reminiscent of colonialism.²¹³ The Prosecutor's protestations that the African situations are the gravest²¹⁴ have not stemmed this criticism. Some local populations also object to the ICC's decision to act in their particular situation on the grounds that they prefer other kinds of responses, such as amnesties, truth commissions, and

211. See BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* 166 (2008).

212. See, e.g., Lawyers Committee for Human Rights, *Effective Public Outreach for the International Criminal Court*, HUM. RTS. FIRST, Jan. 2004, http://www.humanrightsfirst.org/international_justice/icc/outreach_brief_paper011404.pdf ("Whether the ICC will be seen as a legitimate and credible institution will largely depend on its ability to inform and engage about its work with the broader populations in the countries where it takes up cases.").

213. See, e.g., NICHOLAS WADDELL & PHIL CLARK, *Introduction*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 8-9 (2008) ("[T]he Court's focus on Africa has stirred African sensitivities about sovereignty and self-determination—not least because of the continent's history of colonisation and a pattern of decisions made for Africa by outsiders."); see also Joe Bavier, *Congo Protesters Demand Release of Arrested Ex-VP*, REUTERS, May 27, 2008, reprinted in 3 *WAR CRIMES PROSECUTION WATCH* (June 9, 2008) (citing one Congolese observer as stating, "It looks as though the ICC is just for Congolese. [U.S. President George W.] Bush has killed so many people in Iraq and nothing happens . . .").

214. See, e.g., ICC-OTP, *Report on the Activities Performed During the First Three Years*, *supra* note 151, at 2.

local justice modalities.²¹⁵ On the other hand, some local populations have indicated support for the Court's activities in their country.²¹⁶

With regard to case selection, local populations also exhibit divergent views on gravity-related issues. For example, some local audiences will consider it unfair for the Court to prosecute only one side of a conflict even when that side committed substantially more serious violations. The ICTY's focus on prosecuting ethnic Serbs caused many Serbs to oppose the tribunal,²¹⁷ while Bosnian Muslims unsurprisingly tended to be more supportive.²¹⁸ Similarly, in Rwanda there have been calls for the ICTR to prosecute crimes committed by members of the government forces²¹⁹ even though those forces are widely credited with halting the genocide. At the same time, many in Sierra Leone were unhappy that the Special Court for Sierra Leone convicted members of the Civil Defense Forces, whom they consider heroes.²²⁰

The question of which groups deserve prosecution has already given rise to some of the most serious charges of illegiti-

215. For example, a survey conducted in Uganda in 2005 and repeated in 2007, showed that population preferences had shifted away from criminal trials toward amnesties apparently based on widespread fear that trials might hinder the newly viable peace process. See HUM. RTS. CENTER, *WHEN THE WAR ENDS*, *supra* note 160, at 4, 34-35. Furthermore, transitional societies often place criminal trials quite low on their list of priorities, with necessities such as peace, health, and food taking precedence. See *id.* at 22. Finally, there is an increasing focus in some populations affected by atrocities (as well as external actors) on local justice and traditional methods of approaching post-conflict reconciliation. See *id.* (showing increase from 2005 to 2007 in numbers of respondents familiar with and supportive of traditional justice systems); see also DRUMBL, *supra* note 9, at 145.

216. See, e.g., INT'L CENTER FOR TRANSNAT'L JUST., *LIVING WITH FEAR, A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN EASTERN DEMOCRATIC REPUBLIC OF CONGO* 47-48 (2008), available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/ASAZ-7HVBFR?OpenDocument> (discussing levels of support for ICC activities in eastern Congo).

217. See DIANE F. ORENTLICHER, *OPEN SOC'Y JUST. INITIATIVE, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA* 123 (2008) (discussing "Serbian perceptions of anti-Serb bias").

218. See *id.* at 14.

219. See, e.g., Luc Reydams, *The ICTR Ten Years On*, 3 J. INT'L CRIM. JUST. 977, 985 (2005).

220. See, e.g., Clarence Roy-Macaulay, *Sierra Leone War Criminals' Sentences Extended*, FOXNEWS.COM, May 28, 2008, http://www.foxnews.com/prINTER_FRIENDLY_WIRES/2008_May28/0,4675,sierraleonewarcrimes,00.html (noting that original lenient sentences reflected fact that "many Sierra Leoneans see the CDF as key to restoring order to a war-ravaged country . . .").

macy against the ICC. For example, in the Congo and Uganda situations, the Prosecutor has thus far pursued members of the rebel militias but not government actors who are also widely believed to have committed grave crimes. Although the Prosecutor has sought to justify his decisions on the basis of gravity, charges of illegitimacy have arisen regarding both situations.²²¹

Popular views are also complex on the vertical question of what levels of responsibility should be targeted for prosecution within each group. When local populations support prosecutions at all they tend to favor targeting leaders.²²² International tribunals have thus been criticized for failing to pursue the most responsible leaders.²²³ In fact, some populations prefer that *only* leaders be held accountable for their crimes,²²⁴ or that only leaders be prosecuted while other mechanisms are employed for lower-level perpetrators.²²⁵ At the same time, many victims express a strong preference that their particular tormentor be punished.²²⁶

221. See, e.g., CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 25-26 (Sept. 12, 2008), available at <http://ftp.fas.org/sgp/crs/tow/RL34665.pdf>; OFF. OF U.N. HIGH COMMISSIONER FOR HUM. RTS., MAKING PEACE OUR OWN: VICTIMS' PERCEPTIONS OF ACCOUNTABILITY, RECONCILIATION AND TRANSITIONAL JUSTICE IN NORTHERN UGANDA 69 (2007) [hereinafter MAKING PEACE OUR OWN] ("[M]any focus groups underscored the failure of the ICC to follow through on the arrests of the LRA senior leadership, as well their perception that the ICC is one-sided for not having indicted any UPDF personnel.").

222. See, e.g., MAKING PEACE OUR OWN, *supra* note 221, at 69; AFGHAN INDEP. HUM. RTS. COMMISSION, A Call For Justice: A National Consultation on Past Human Rights Violations in Afghanistan 21 ("[A] majority of respondents were of the view that trials could be restricted either to those who had committed serious violations and their commanders, or commanders only.").

223. See ORENTLICHER, *supra* note 217, at 15 (citing such criticisms regarding the ICTY); HUM. RTS. WATCH, WORLD REPORT 277 (2005) (discussing "widespread cynicism among the East Timorese public, who questions the fairness of a process that leads to the prosecution of relatively low-ranking Timorese in Dili while the sponsors of the violence remain free—and in many cases politically prominent—in Indonesia"); Smith, *supra* note 136, at 338-39 (discussing perception that ICTY lacked fairness due to its early focus on "small fry").

224. See HUM. RTS. CENTER, WHEN THE WAR ENDS, *supra* note 160, at 33; INT'L CENTER TRANSITIONAL JUST. & HUM. RTS. CENTER, FORGOTTEN VOICES: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA 26 (2005).

225. MAKING PEACE OUR OWN, *supra* note 221, at 26, 54, 69.

226. Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1820 (2005); Madeline Morris, *Complementarity and Conflict: States, Victims, and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 195, 196, 200 (Sarah B. Sewall & Carl Kaysen eds., 2000).

This preliminary discussion suggests some of the ways in which the Prosecutor's use of relative gravity in selecting situations and cases may affect perceptions of legitimacy among relevant audiences. With time, the Court may gain increased diffuse institutional legitimacy, diminishing the impact upon its legitimacy of individual selection decisions. Furthermore, the Court may eventually be in a position to adopt guidelines and policies that reflect a consensus on the organization's primary goals. Until then, however, the Prosecutor must think strategically about how such decisions will affect the ICC's sociological legitimacy among the various relevant audiences. As the following discussion demonstrates, such considerations should not necessarily dictate the Prosecutor's selection decisions, but should at least be taken into account.

IV. TOWARD AN OPERATIONAL GRAVITY THRESHOLD AND POLICY

One of the ICC's most important challenges as it seeks to interpret its Statute and establish its normative and sociological legitimacy is to develop a sound approach to gravity, both as a threshold requirement for admissibility and as a discretionary relative consideration in the selection of situations and cases. The foregoing discussion illuminated gravity's roles in the framework of the Rome Statute and developed the theoretical basis for gravity's centrality to the ICC regime, explaining the links between gravity and the Court's legitimacy. This Part draws on this legal and theoretical analysis to suggest a way forward for the Court as it seeks to operationalize the concept of gravity in its work. The suggested procedures establish a clear distinction between the gravity threshold for admissibility and the discretionary use of gravity in selecting situations and cases. The gravity threshold analysis requires the Prosecutor and Court to balance the various factors affecting gravity, while the Prosecutor's selection decisions necessitate prioritizing certain ICC objective and sometimes audiences over others.

A. *Factors Affecting Gravity*

As a preliminary matter, it is important to identify the factors that affect the gravity of a case or potential cases within a situation. In determining these factors for the purpose of the

gravity threshold, the Court must look to its applicable law. Although the Prosecutor is not restricted to such sources when he considers gravity in the exercising his discretion, the relevant factors will generally be the same for both inquiries. The Court's applicable law looks first to the Statute and the Rules and Elements of Crimes, next to applicable treaties and principles and rules of international law, and, finally, to general principles of law derived from national laws.²²⁷ The Statute's jurisdictional provisions provide some indication of the content of the concept of gravity, for example by limiting crimes against humanity to those committed on a widespread or systematic basis. Additionally, international and national laws, especially those related to sentencing, suggest factors relevant to the gravity of cases before the ICC.²²⁸ Finally, the ICTY's jurisprudence addressing gravity in the context of whether cases should be transferred to domestic courts is helpful.²²⁹

Most of the sources above distinguish between the gravity of a *crime* and the responsibility of the perpetrator.²³⁰ The Prosecutor has followed this precedent in his policy statements regarding the gravity threshold, elaborating criteria for determining gravity as to crimes only.²³¹ The Prosecutor has separately stated a policy of selecting the "persons most responsible for most serious crimes," but has not made this part of the gravity threshold

227. Rome Statute, *supra* note 2, art. 21.

228. International sentencing decisions have been criticized for failing to reflect adequately the perpetrator's level of moral responsibility. See DRUMBL, *supra* note 9, at 66. Nonetheless, such decisions are useful inasmuch as they identify the factors international judges consider relevant to gravity. See *id.* at 64 (examining aggravating circumstances in jurisprudence of international tribunals); see also Andrea Carcano, *Sentencing and the Gravity of the Offence in International Criminal Law*, 51 INT'L & COMP. L.Q. 583, 588-90 (2002).

229. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, 11 *bis*, U.N. Doc. IT/32/Rev. 41 (Feb. 28, 2008).

230. See, e.g., Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶¶ 698-705 (Aug. 2, 2001) (separating the gravity of the offense from other "aggravating factors" such as the form of participation). The jurisprudence of international criminal courts recognizes that there is significant overlap in these concepts, however. See *id.* at ¶ 702; see also Robert D. Sloane, *Sentencing for the "Crime of Crimes": The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda*, 5 J. INT'L CRIM. JUST. 713, 722-23 (2007) (noting need for clarification about whether "gravity of the offence" refers to the culpability of the actor, the consequences of his conduct, or both).

231. See *Draft: Criteria for Selection*, *supra* note 35, at 4; see also *Report on Prosecutorial Strategy*, *supra* note 157, at 5.

inquiry.²³² Article 17 of the Rome Statute, however, requires that the gravity threshold be determined in reference to cases, not crimes. As such, the Prosecutor and judges must consider factors relevant to both the crimes and potential perpetrators in making gravity threshold determinations. That said, when such determinations relate to *situations*, the perpetrator-related factors will often be irrelevant since the likely perpetrators may not yet be known. Nonetheless, in some circumstances, the Prosecutor may already have substantial evidence regarding likely perpetrators and should consider perpetrator-related factors in determining the gravity threshold for situations. For example, the Prosecutor could conceivably decline a situation on the grounds that all of the persons most responsible have been killed. Furthermore, when the Prosecutor considers relative gravity for the purposes of the exercise of his discretionary, he generally should take account of perpetrator-related factors when possible. As such, while the factors proposed below include those that the Prosecutor has adopted with regard to the gravity of crimes,²³³ they also encompass factors related to perpetrators.

1. Scale of the Crimes

In determining the scale of a crime, international jurisprudence looks primarily to the number of victims,²³⁴ but also considers the geographic and temporal scope of the harm caused.²³⁵ Thus, a crime that harms few people for a significant duration could be considered more serious than a crime that harms a

232. *Draft: Criteria for Selection*, *supra* note 35, at 11; *Report on Prosecutorial Strategy*, *supra* note 157, at 5. Interestingly, in an early policy document, the Prosecutor seemed to take the opposite approach stating: "The concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission." ICC-OTP, Paper on Some Policy Issues Before the Office of the Prosecutor 7 (Sept. 2003), available at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

233. *Draft: Criteria for Selection*, *supra* note 35, at 4; see also *Report on Prosecutorial Strategy*, *supra* note 157, at 5.

234. See, e.g., Prosecutor v. Jankovic, Case No. IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *Bis*, ¶ 19 (July 22, 2005) (citing sixteen victims of torture and rape in referring case to national courts); Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 702 (Aug. 2, 2001) ("the number of victims and their suffering are relevant factors"); Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶ 852 (Feb. 26, 2001) (citing hundreds dead and thousands expelled as evidence of gravity).

235. See, e.g., Prosecutor v. Ljubicic, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia & Herzegovina Pursuant to Rule 11 *bis*, ¶ 18 (Apr. 12, 2006) (citing "limited . . . geographic scope and temporal frame" in referring the case).

great many people only briefly. Harm that spans a large geographic area might also be deemed more significant than similar harm with more limited spatial scope.

2. Nature of the Crimes

The question of which crimes are the most serious has been addressed in relation to the application of the death penalty.²³⁶ In that context, many national and international sources concur that intentional murder is the most serious crime and probably the only crime where the death penalty should be permitted if it is permitted at all.²³⁷ Crimes of sexual violence are also generally placed at the top of the seriousness scale, with some jurisdictions permitting the death penalty for such crimes as well.²³⁸ Finally, as a rule, crimes such as torture that involve physical and/or psychological suffering are considered very serious.²³⁹ Crimes against property, on the other hand, generally rank at the low end of the gravity spectrum.²⁴⁰

236. For example, the International Covenant on Civil and Political Rights and the American Convention on Human Rights restrict application of the death penalty to "the most serious crimes." International Covenant on Civil and Political Rights art. 6, Mar. 23, 1976, 999 U.N.T.S. 171, 6 I.L.M. 368; American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. This has been interpreted to mean "intentional crimes with lethal or other extremely grave consequences." Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR, 1st Sess., Supp. No. 1, at 33, U.N. Doc. E/1984/84 (1984). For a discussion of the relevant law, see William A. Schabas, *Most Serious Crimes and the Imposition of the Death Penalty, Presentation at the Impact of International Conventions Towards China's Death Penalty Reform* (Beijing, Oct. 30, 2008) (on file with *Fordham International Law Journal*).

237. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2660 (2008) (holding the death penalty unconstitutional for the crime of child rape and concluding that intentional first-degree murder is more severe than other crimes "in terms of moral depravity and of the injury to the person and to the public") (citation omitted); Schabas, *Most Serious Crimes and the Imposition of the Death Penalty*, *supra* note 236 (discussing human rights law sources).

238. See, e.g., *Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990*, Rwandan Organic Law No. 08/96, arts. 2, 14 (Aug. 30, 1996) (perpetrators of "sexual torture" subject to death penalty).

239. See, e.g., *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶ 703 (Aug. 2, 2001) (considering "the physical and psychological suffering inflicted upon witnesses to the crime" in assessing the gravity of the crimes).

240. See, e.g., Schabas, *Most Serious Crimes and the Imposition of the Death Penalty*, *supra* note 236, at 7 (citing U.N. Human Rights Committee comments suggesting that property offences are not sufficiently serious for the death penalty).

3. Manner of Commission of the Crimes

The ways in which crimes are committed can render them particularly serious under national and international laws. In particular, the Statute indicates that crimes committed in a systematic manner or pursuant to a plan or policy are considered especially serious.²⁴¹ This factor also includes whether crimes are committed in a particularly heinous way,²⁴² such as a deliberately slow killing, and whether they target particularly vulnerable victims, including, for example, women, children and the elderly.²⁴³ The Prosecutor also includes in this category whether the crimes involve discrimination or abuse of power.²⁴⁴ These factors are more properly considered relevant to the role and intent of the perpetrator as discussed below. Finally, Professor Schabas has suggested that the commission of crimes in the context of an aggressive war should be an aggravating factor for the gravity analysis.²⁴⁵

4. Impact of the Crimes

The impact of the crimes is an important factor for the gravity analysis.²⁴⁶ When a crime results in broad “social, economic, and environmental damage”²⁴⁷ beyond the immediate victims, the importance of adjudicating the crime increases, helping to justify ICC jurisdiction in the absence of state action. Thus, for example, the Prosecutor has noted that attacks on humanitarian workers in Darfur threaten the delivery of humanitarian assistance and impact the prospects for peace and stability in the re-

241. See Rome Statute, *supra* note 2, arts. 7(1), 8(1).

242. See, e.g., Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 703 (Aug. 2, 2001) (citing “‘indiscriminate, disproportionate, terrifying’ or ‘heinous’ means and methods used to commit the crimes”); U.S. SENTENCING GUIDELINES MANUAL §2A1.2 (2008) [hereinafter U.S. Sentencing Guidelines] (“If the defendant’s conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure [in sentence] may be warranted”).

243. See *Krstic*, Case No. IT-98-33-T at ¶ 702 (considering treatment of women, children, elderly men, and young boys in determining gravity).

244. Draft: *Criteria for Selection*, *supra* note 35, at 5.

245. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, *supra* note 59, at 10.

246. This factor is not found in sentencing jurisprudence because, in the absence of intent, it does not affect the perpetrator’s moral blameworthiness.

247. Draft: *Criteria for Selection*, *supra* note 35, at 5.

gion.²⁴⁸ As such, the Prosecutor notes that “[i]n some instances, those crimes may fall within the jurisdiction of the Court.”²⁴⁹ In fact, attacks on humanitarian workers in internal armed conflict always fall within the *jurisdiction* of the Court.²⁵⁰ What the Prosecutor likely means is that under some circumstances they may be grave enough to be admissible and/or prioritized over other crimes even though their harm to the *immediate* victims may not be very serious. Similarly, the assassination of a single important political leader may have a broad impact on peace and security in a region even though only one victim was directly harmed. The Security Council invoked this rationale when it established the Special Tribunal for Lebanon for the primary purpose of prosecuting those responsible for the assassination of Lebanon’s former prime minister.²⁵¹ This factor also encompasses crimes that have a broad global impact, for example because they are widely perpetrated and under-prosecuted. Gender crimes in war and the recruitment and use of child soldiers are examples of such crimes.

5. Role/Position of the Perpetrator

The role of the accused or suspected perpetrator will also be relevant to the gravity analysis for cases and, in some circumstances, for situations as discussed above. This factor includes both the leadership position of the accused, if any, and the role of the accused in committing the crimes at issue, for example, whether the accused planned, ordered or instigated the crimes.²⁵² National and international decisions factor both of these considerations into assessments of gravity²⁵³ and the ICTY considers them in determining whether it is appropriate to refer

248. *Reports of the Secretary-General on Sudan*, Statement of Luis Moreno-Ocampo, *supra* note 161, at 2.

249. *Id.*

250. See Rome Statute, *supra* note 2, art. 8(2)(e)(iii).

251. See S.C. Res. 1644, ¶¶ 5-6, U.N. Doc. S/RES/1644 (Dec. 15, 2005).

252. See Smith, *supra* note 136, at 347-50 (discussing “functional responsibility vs. example setters”).

253. See, e.g., U.S. Sentencing Guidelines, *supra* note 242, §§ 3B1.1, 3B1.3 (including leadership role in the offense and abuse of position of trust as aggravating factors); Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶¶ 708-09 (Aug. 2, 2001); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment & Sentence, ¶ 469 (Dec. 6, 1999) (“[T]he fact that a person in a high position abused his authority and committed crimes is to be viewed as an aggravating factor.”).

a case to national courts.²⁵⁴ Some authors have also suggested that gravity is increased when the perpetrator is acting on behalf of the government.²⁵⁵

6. Intent of the Perpetrator

Finally, the Statute indicates that the perpetrator's intent can be an important factor in assessments of gravity. A crime cannot constitute genocide unless the perpetrator has the specific intent to destroy a particular group in whole or in part.²⁵⁶ There can be little doubt that murder committed with genocidal intent is more serious than "regular" murder. Similarly, a crime only rises to the level of moral condemnation associated with crimes against humanity when the perpetrator knows that the crime is part of a broader attack against a civilian population.²⁵⁷ Finally, for a war crime, the perpetrator must be aware of the context of armed conflict.²⁵⁸

Scholars and judges debate whether these differences in intent result in a normative hierarchy of international crimes for sentencing.²⁵⁹ Whether or not a hierarchy exists, however, the

254. See *Prosecutor v. Ademi & Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis, ¶ 29 (Sept. 14, 2005).

255. See Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, *supra* note 59, at 10; Heller, *supra* note 64, at 14.

256. See Rome Statute, *supra* note 2, art. 6.

257. See *id.* art. 7(1); Elements of Crimes, *supra* note 26, art. 7.

258. See Rome Statute, *supra* note 2, art. 8(1); Elements of Crimes, *supra* note 27, art. 8.

259. See, e.g., Allison Marston Danner, *Constructing A Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 420 (2001) (arguing "that the chapeaux of the crimes under international law should be read to form a hierarchy of crimes, connoting increasing levels of harm caused by a defendants actions"); *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶ 700 (Aug. 2, 2001) (noting that it can be argued genocide is the most serious crime because of the elevated intent requirement, but the individual circumstances of each case must be considered in determining punishment); *Prosecutor v. Tadic*, Case No. IT-94-1-A & IT-94-1-Abis, Judgment in Sentencing Appeals, ¶ 69 (Jan. 26, 2000) ("After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime."); *Prosecutor v. Tadic*, Case No. IT-94-1-A & IT-94-1-Abis, ¶ 16 (Cassese, J., Separate Opinion) ("[W]henever an offence committed by an accused is deemed to be a 'crime against humanity', it must be regarded as inherently of greater gravity, all else being equal (*ceteris paribus*), than if it is instead characterised as a 'war crime.'"); *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Sentence, ¶ 15 (Feb. 5, 1999) ("[T]he Chamber is of the opinion that genocide constitutes the 'crime of crimes', which must be taken into account when deciding the sentence."); *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, ¶ 14 (Sept. 4, 1998)

perpetrator's intent is certainly one of the factors the Court should consider in deciding whether a case is sufficiently grave for ICC adjudication. For example, while an isolated war crime might be inadmissible, one committed with the intent to spark genocide is likely to be sufficiently grave. National and international sources confirm that the perpetrator's intent is relevant to gravity assessments, particularly when the perpetrator acts with premeditation²⁶⁰ or with a discriminatory motive.²⁶¹

B. Gravity Threshold Determination

When the Prosecutor and judges apply the gravity threshold for admissibility they should consider each of these factors to determine whether the case or potential cases in a situation merit international adjudication. Each inquiry will be context-specific such that it is impossible to draw a line in the abstract. The ILC abandoned an effort to detail the precise content of gravity early in its deliberations,²⁶² opting instead for the "vague" reference to "sufficient gravity" that the Chilean delegation lamented at the Rome Conference.²⁶³ Nonetheless, the preceding analysis suggests some important guidelines for the Court as it seeks to determine "sufficient gravity" with regard to cases and situations.

("The Chamber has no doubt that despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as lesser crimes than genocide or crimes against humanity. On the other hand, it seems more difficult for the Chamber to rank genocide and crimes against humanity in terms of their respective gravity."); *Prosecutor v. Erdemovic*, Case No. IT-96-22, Appeals Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 20 (Oct. 7, 1997) ("*All things being equal*, a punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime.").

260. *See, e.g.*, U.S. Sentencing Guidelines, *supra* note 242, §§ 2A1.1, 2A1.2 (assigning higher "base offense level" for offenses involving premeditated killing compared to other types of homicide); *Krstic*, Case No. IT-98-33-T at ¶ 711.

261. *See, e.g.*, U.S. Sentencing Guidelines, *supra* note 242, § 3A1.1 (increasing sentence for "hate crime motivation"); *Prosecutor v. Blaškic*, Case No. IT-95-14-T, Judgment, ¶ 785 (Mar. 3, 2000) ("The motive of the crime may also constitute an aggravating circumstance when it is particularly flagrant. Case-law has borne in mind the following motives: ethnic and religious persecution, desire for revenge and sadism.") (citations omitted).

262. *See Report of the International Law Commission on the Work of Its Thirty-sixth Session*, *supra* note 78, at 11-12.

263. *See Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, *supra* note 112, at 215.

First, as already discussed, the language of the provision and its context in the Statute indicate that gravity should be treated as a threshold and not a relative determination for admissibility purposes. The provision does not, as the Prosecutor suggests, require the Court to focus only on “the gravest situations in the world,”²⁶⁴ nor does the Statute limit the exercise of the Court’s jurisdiction to the *most serious* cases within a given situation. The gravity of other cases or situations unrelated to those in question should have no bearing on the gravity threshold determination.

Second, the Court should proceed with great caution in ruling particular cases to be below the gravity threshold. Each judicial determination regarding the threshold will have a tendency to influence future decisions in similar cases. Although the Statute does not require the Court to adhere to its precedents, the judges are permitted to consider prior decisions as a source of law.²⁶⁵ Furthermore, in order for its gravity threshold decisions to be considered procedurally and substantively fair, the Court will have to attempt a semblance of consistency. As such, gravity threshold decisions will be quasi-judicial in that they will have a tendency to limit the Court’s exercise of jurisdiction not only in the case at hand but also for future cases and situations. These decisions therefore have the potential to impact significantly the Court’s usefulness and should be reached carefully.

Third, although the judges and Prosecutor should apply the above criteria as consistently as possible, the context-specific nature of the enterprise means that no rigid formula should be adopted. The Court must not, for example, set a particular number on the victims harmed or mandate a certain leadership rank for perpetrators. Rather, it should use the relevant factors, considered in the particular context, to answer the ultimate question: does this case truly involve the most serious crimes of concern to the international community or, is the conduct at issue “wholly peripheral to the objects of the law in criminalising the conduct?”²⁶⁶

Fourth, because the crimes of genocide and crimes against humanity require, by virtue of their definitions and the Elements

264. Moreno-Ocampo Statement at Informal Meeting, *supra* note 143, at 8-9.

265. Rome Statute, *supra* note 2, art. 21(2).

266. See DRC Appeals Chamber Judgment, *supra* note 117, ¶ 40 (Pikis, J., Separate and Partly Dissenting Opinion).

of Crimes, significant levels of gravity,²⁶⁷ the threshold should generally not be used to exclude cases of those crimes. Rather, the threshold should be applied mainly to cases involving exclusively war crimes. Furthermore, cases of war crimes should generally be held admissible when they exhibit gravity indicators similar to those required for the other two crimes; for instance, when they involve the large-scale or systematic commission of such crimes or are committed with intent to destroy or significantly harm groups. The gravity threshold should therefore exclude primarily war crimes that score low in each of the categories identified above: those committed in isolation from other crimes, causing the least harm, and by the lowest level perpetrators. Furthermore, situations should be rejected on the basis of the gravity threshold only when they present no likely case that passes the threshold.

Interpreting the gravity threshold to exclude primarily cases and situations involving insignificant war crimes comports with the Statute's legislative history as well as with the threshold's role in ensuring the Court's moral legitimacy. Nothing in the drafting history indicates the participants intended the threshold as a very substantial limit on the Court's exercise of jurisdiction. On the contrary, some delegations felt the threshold was completely unnecessary as the requisite level of gravity was already enshrined in other provisions of the Statute.²⁶⁸ Had the drafters placed the kind of importance on the gravity provision that PTCI found in the Lubanga arrest warrant decision, there would surely have been *some* discussion of the provision at the Rome Conference. Instead, the moral requirement that the Court act only in very serious cases is primarily ensured by the limitations on the Court's jurisdiction. The gravity threshold serves to backstop these jurisdictional provisions in the event a case is technically within the Court's jurisdiction but nonetheless does not truly constitute a serious crime of concern to the international community. Any interpretation of this provision that goes beyond excluding fairly *de minimis* conduct would undermine the jurisdictional regime of the Statute.

Allowing the Court substantial flexibility in the types of cases it can adjudicate also enhances its ability to accomplish a

267. See *supra* Part II.A.1.

268. See *supra* notes 107, 111 and accompanying text.

range of important goals. In particular, enabling the Court to cast a broad net supports the critical deterrence objective. This approach also leaves room for other potentially significant goals, however. For example, the Court might have an opportunity to prevent mass atrocities by trying those responsible for the war-time assassination of a single important political or religious leader. The task of prioritizing the Court's objectives is not an element of the gravity threshold determination, but rather an important component of the discretionary consideration of gravity in selection decisions as discussed below.

C. *Relative Gravity as a Criterion in the Selection of Situations and Cases*

The Prosecutor claims that in making selection decisions he considers all of the gravity factors "jointly," without assigning a particular weight to any of them, and that he acts independently, impartially, objectively, and without discriminating.²⁶⁹ This approach conforms to the conventional wisdom that prosecutorial legitimacy requires objective, impartial selection decisions.²⁷⁰ In fact, however, such objectivity is impossible for the ICC Prosecutor because, unlike domestic prosecutors, his mandate is not simply to prosecute all violations of the law above a *de minimis* threshold, but rather to select among a wide array of potential situations and cases those that *most merit* the Court's attention. This task requires not only determining what the ICC's goals should be, but also prioritizing among those goals. The challenge is particularly acute in these early years of the Court's existence because there is as yet little agreement about the institution's goals or the appropriate priorities among them.²⁷¹

Thus, unlike gravity threshold decisions, which can be made by a relatively straightforward application of the factors described above, discretionary relative gravity decisions generally require a more complex analysis. Certainly, a small number of decisions may be amenable to a simple factor-based analysis because they reside at either end of the gravity spectrum. A case can be ruled out easily when it involves a low-level perpetrator of

269. *Draft: Criteria for Selection*, *supra* note 35, at 1-4.

270. *See* Danner, *supra* note 190, at 537.

271. *See generally* Mirjan Damaska, *What Is the Point of International Criminal Justice?*, 83 CHL-KENT L. REV. 329, 330, 339 (2008) ("Current views on the objectives of international criminal courts are in disarray.").

an isolated, insignificant crime and the selection of a high-level perpetrator for genocide is equally uncontroversial from a gravity perspective. For such cases there is likely to be little disagreement about the alignment between gravity and the ICC's goals—the Court was created to deal only with serious crimes and the prevention and punishment of the worst crimes by the most senior perpetrators is certainly among the Court's top priorities.

However, the question of relative gravity is rarely susceptible to such objective decision-making.²⁷² The Prosecutor does not simply select cases at the very top of the gravity spectrum and reject those at the very bottom; he makes most of his decisions in the middle. The majority of cases that present themselves as viable prosecutorial options (e.g., evidence and defendants are obtainable) will score high on some of the gravity factors and lower on others. In those cases, the Prosecutor must decide which factors and goals he considers most important. In so doing he will often be prioritizing the legitimacy perspectives of some audiences over others.

For example, in declining to investigate the British soldiers in Iraq, the Prosecutor explicitly prioritized the number of victims²⁷³ over other factors such as the fact that the crimes were (arguably) committed as part of an aggressive war.²⁷⁴ This decision appears to privilege the legitimacy perspective of powerful Western States. The decision also suggests the Prosecutor does not view deterring wars of aggression as an important goal for the ICC, although this may change when a definition of aggression is added to the Statute.

In contrast, in deciding to focus the Court's resources on attacks affecting a relatively small number of peacekeepers in Sudan, the Prosecutor subordinated the number of victims to the impact of the crimes.²⁷⁵ Again, he appears to privilege the perspective of Western States that engage in most peacekeeping missions over that of local populations who may well question why the rape or murder of hundreds in their village is less press-

272. See Greenawalt, *supra* note 203, at 654-55.

273. See generally Moreno-Ocampo, *Letter Concerning Situation in Iraq*, *supra* note 152.

274. See, e.g., Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, *supra* note 59, at 10.

275. See Moreno-Ocampo, Speech at the London School of Economics, *supra* note 165, at 5.

ing for the Court than the killing of a small number of peacekeepers. In making this selection, the Prosecutor asserts that the Court has an important role in supporting and encouraging peacekeeping worldwide that can take precedence over the goal of punishing larger-scale crimes against locals in a particular situation.

In charging Thomas Lubanga with recruiting child soldiers the Prosecutor appears to have prioritized the impact of the crime—the use of child soldiers is a widespread and under-addressed problem—over the nature of the crime—murder and rape are presumably more serious. In fact, the recruitment of child soldiers has not always been a crime under international law, and remains legal in some domestic systems. This decision signals that the Prosecutor views the Court as playing a role in norm proliferation. The Court's purpose is not simply to punish those most responsible for the worst crimes, but to transmit a message regarding crimes that have not always received adequate moral and legal condemnation.

Finally, the Prosecutor has announced a policy of selecting cases in a situation that reflect the “main types of victimization.”²⁷⁶ This diversity of victimization is not a gravity factor at all, but rather reflects a willingness to subordinate gravity altogether in service of the goal of addressing the needs of as many victims as possible, and perhaps, creating a reasonably complete historical record.²⁷⁷

The Prosecutor's decisions to prioritize ICC goals in these ways do not reflect a consensus in the international community about such prioritization. As such, the decisions are fundamentally subjective. The Prosecutor must decide whether *in his view* a case involving a large number of victims is more important than one involving a very high-level perpetrator with a particularly heinous intent, or one involving a traditionally underprosecuted crime, or one involving few direct victims but a substantial environmental impact.

By requiring the Prosecutor to prioritize among potential goals, the Rome Statute places much of the responsibility for determining the Court's impact and legitimacy on the Prosecutor.

276. *Report on Prosecutorial Strategy*, *supra* note 157, at 5-6.

277. Interestingly, the Prosecutor has disavowed the latter goal. See, e.g., *Draft: Criteria for Selection*, *supra* note 35, at 11.

Kevin Heller illustrates the magnitude of this task by proposing a fairly dramatic reconceptualization of the ICC's role. Heller suggests that the Prosecutor should stop focusing on mass atrocities in favor of situations involving systematic, government-perpetrated, and "socially alarming" crimes such as torture and disappearance.²⁷⁸ According to Heller, such situations are inherently graver than those involving mass atrocities.²⁷⁹ This vision of the Court's role differs quite dramatically, however, from the current paradigm, which places significant weight on the numbers of victims in a given situation. Even assuming Heller's approach has normative merit, its adoption by the Prosecutor would likely cause a legitimacy crisis at the Court since most audiences—global, state and even local populations—assume the Court will follow in the footsteps of prior international criminal courts, each of which addressed mass atrocities.²⁸⁰

One way to take some of this legitimacy burden from the Prosecutor is to enhance the judicial review of prosecutorial selection decisions. Heller argues that the judges should be allowed to review any prosecutorial decision not to pursue a situation based on gravity.²⁸¹ As Heller acknowledges, however, a literal reading of the Statute does not permit such review.²⁸² Judicial review is permitted when the Prosecutor declines to proceed based on the gravity threshold, but not based on his discretionary consideration of relative gravity. Furthermore, the Court does not have access to all information relevant to making selection decisions, and providing the judges such access might be incompatible with defendants' rights.

Another solution might be for the Assembly of States Parties to take a more active role in the selection of situations and/or cases, for example through a standing committee that could provide guidance to the Prosecutor or make certain decisions in consultation with his office. One author has even suggested a system of deference to political organizations such as the Secur-

278. See Heller, *supra* note 64, at 24-27.

279. See *id.* at 31.

280. While some audiences, particularly in the Global South, would welcome an approach that targets "systematic" crimes committed by Western governments, a significant shift in expectations would be required to make such an approach legitimate for many audiences.

281. Heller, *supra* note 64, at 31-34.

282. See *id.* at 31.

ity Council for certain prosecutorial decisions.²⁸³

Such possible mechanisms for reducing the Prosecutor's legitimacy burden deserve further consideration. In the meantime, the Prosecutor should be transparent about the policy choices reflected in his selection decisions. Rather than simply pointing to the gravity threshold, the Prosecutor should articulate why he is choosing to prioritize certain goals and gravity factors over others. For some situations and cases it will be sufficient to say they are the gravest by any measure. This applies most obviously to the decision to prosecute Sudan's president for genocide. Many situations and cases require greater explanation, however.

In particular, the Prosecutor must be clear about his goal prioritizations when he moves beyond the dominant rationales of retribution and deterrence.²⁸⁴ These rationales generally support prosecuting crimes involving high numbers of victims and top-level perpetrators. Decisions to pursue such cases are least likely to provoke charges of illegitimacy. At the same time, important questions have been raised about the ability of international courts to deter crimes,²⁸⁵ and retribution is arguably an insufficiently utilitarian justification for international jurisdiction. As such, other goals have been advanced including giving a voice to victims, creating an historical record, helping to end conflicts, and contributing to peace and reconciliation. Additionally, scholars increasingly promote a broader symbolic or educative role for international trials and punishment.²⁸⁶

Pursuing some of these less traditional goals may require prioritizing factors other than the number of victims and the role of the accused. For example, the ICTY pursued an expressive goal by focusing on crimes of sexual violence because such crimes have traditionally been under-prosecuted.²⁸⁷ This objective required prosecuting at least some direct perpetrators rather than leaders.²⁸⁸ Although the retributive goal of punishing

283. See Greenawalt, *supra* note 203, at 664.

284. See SLYE & VAN SCHAAK, *supra* note 2, at 296-97 (discussing rationales for punishment in international criminal law).

285. See, e.g., DRUMBL, *supra* note 9, at 169; Damaska, *supra* note 271, at 344-45.

286. See, e.g., Damaska, *supra* note 271; Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 75-77 (2007).

287. Smith, *supra* note 136, at 343-44.

288. *Id.* at 344 (quoting Louise Arbour).

those most responsible may not always have been met, the activity of the ICTY in this regard resulted in a substantial strengthening of the prohibition against sexual violence as a tool of war.

Similarly, the goal of fostering peace and reconciliation may require prosecuting members of all sides of a conflict regardless of their relative levels of responsibility.²⁸⁹ As discussed above, affected populations may consider a Court that prosecutes only one side illegitimate. In fact, such prosecutions could actually inflame tensions between groups rather than promoting reconciliation. Also, the goal of creating an historical record, to the extent it is an appropriate goal for an international criminal court,²⁹⁰ will likely require prosecuting not only all sides of the conflict, but also a range of representative crimes even if some of those crimes are less serious than others.

When the Prosecutor makes selection decisions in pursuit of such goals, it will be essential to the Court's sociological legitimacy that he publicize the grounds for the decisions. As explained above, different audiences will often have different views on which situations and cases most deserve the Court's attention. The Prosecutor will not be able to satisfy all audiences with each decision. However, by communicating that he considered the various points of view and explaining the grounds for his decisions he will at least gain whatever legitimacy advantages transparency can provide. Such transparency will also enable relevant audiences to make informed judgments of the Prosecutor's decisions, rather than relying on outcomes alone.

V. CONCLUSION

As the ICC seeks to establish itself as an important international institution, one of its most pressing tasks is to develop coherent gravity doctrines and policies. In creating the Court, states placed gravity at the heart of the enterprise: the Court's jurisdiction is limited to the most serious crimes and cases of insufficient gravity are to be rejected. The Statute's commitment to gravity reflects a broader narrative of international criminal

289. See, e.g., SCHIFF, *supra* note 211, at 64 ("To promote reconciliation between the perpetrators and victims of the genocide in Rwanda, the tribunal may need to consider prosecuting Tutsi suspects for crimes against Hutus, in addition to the ongoing prosecution of Hutus.").

290. Damaska suggests this goal is generally inappropriate for international criminal courts. See Damaska, *supra* note 271, at 340-42.

law that envisions such law as appropriate for the worst crimes and perpetrators. It was the horror of crimes in particular conflicts that motivated the creation of the *ad hoc* and internationalized criminal courts. Now, for the first time, the gravity narrative must be translated into an operational framework for a standing court.

To operationalize gravity in its work, the ICC must develop a clearer understanding of the roles gravity plays in the regime. In particular, a distinction must be drawn between the gravity threshold for admissibility and the Prosecutor's use of relative gravity as a selection criterion. The gravity threshold serves as a backstop to ensure the Court's moral legitimacy in the event the Statute's jurisdictional provisions prove inadequate. As such, the threshold should be used to exclude only cases of *de minimis* conduct that technically meets the jurisdictional requirements but is nonetheless insignificant. A broader interpretation of the threshold would undermine the Court's jurisdictional regime and limit its impact.

Gravity's more important role in the regime is to inform the Prosecutor's discretionary selections of situations and cases to pursue. Such selections will generally require the Prosecutor to prioritize certain ICC goals, and thus gravity factors, over others. This is no small task considering the international community has yet to adopt a unified vision of the ICC's goals or the appropriate priorities among them. Because the selection of situations and cases strongly affects the Court's sociological legitimacy, it might be preferable to relieve the Prosecutor of some of this burden by, for example, allowing the States Parties or the judges additional input in the process. Barring such systemic changes, however, it is crucial for the Prosecutor to be as transparent as possible regarding his reasons for selecting particular situations and cases. As long as relevant audiences can reasonably differ about the ICC's priorities, general references to gravity will be insufficient.