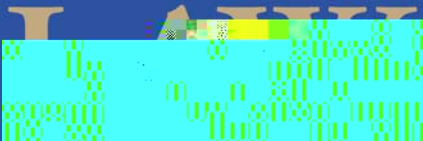


THE GRAVITY THRESHOLD OF THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE
International Criminal Court
Legal Analysis and Education Project
March 2008



ACKNOWLEDGMENTS

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EXECUTIVE SUMMARY

From its inception, the world's first permanent International Criminal Court (ICC) was envisioned as a body that would preside over only those cases of most serious concern to the international community as a whole. Thus, the Court's subject matter jurisdiction is limited to the international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. Moreover, Article 17(1)(d) of the Rome Statute provides that a case is inadmissible where it is "not of sufficient gravity to justify further action by the Court." This so-called "gravity threshold" has played

become over-burdened. The drafters therefore added a provision to the Statute intended to provide the Court with discretion to decline the exercise of jurisdiction on grounds

made clear that the OTP will generally focus on those individuals who bear the greatest responsibility for crimes within the jurisdiction of the Court.

Gravity has guided the Prosecutor's selection of situations and cases warranting the attention of the ICC not only because of the need to satisfy admissibility requirements, but also as a matter of policy. Thus, for example, gravity was the dominant consideration guiding the selection of his first case in Northern Uganda, where the OTP has investigated crimes allegedly committed by both the Lord's Resistance

Article 17(1)(d) at some length in a February 2006 decision. Notably, no other decision of the ICC has addressed the gravity threshold, although it has presumably been applied since February 2006, particularly given that PTC I expressly held that the threshold must be met not only in every situation but also in every case arising from the investigation of a situation.

In its February 2006 decision, PTC I held that, to satisfy the gravity threshold: (i) the relevant conduct must be either systematic or large-scale, and (ii) due consideration must be given to the “social alarm” such conduct may have caused in the international community. Furthermore, the Chamber held that the perpetrator of the relevant

Pre-Trial Chamber I's February 2006 decision is helpful in that it provides guidance as to how "gravity" – a term not defined in the Rome Statute – will be interpreted by the ICC, a Court with limited resources that must focus on those crimes that most warrant international prosecution. However, PTC I's decision *requiring* such systemacity or scale as a condition of Article 17(1)(d) in every case appears to be overly restrictive. This is especially true where, for instance, the number of victims would be relatively small in comparison to other situations, bu

international concern, without limiting that jurisdiction to any particular class of persons. Moreover, the standard imposed by PTC I is very strict, requiring that the perpetrator be both a “senior leader” and among those “most responsible.” Indeed, as a practical matter, one can imagine situations where the objectives of the Rome Statute would be served through the prosecution of an individual who might not be described as among the “most senior leaders suspected of being most responsible.” As human rights groups and other commentators have pointed out, there may be circumstances under which pursuing those officials further down in the chain of command could have a significant impact for victims on the ground.

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

Distinguish between the Gravity Threshold and the Exercise of Prosecutorial Discretion.

As discussed above, the Prosecutor seems to apply the concept of gravity at two distinct stages in determining whether to initiate an investigation or pursue a particular

threshold – the *relative gravity* of crimes may be one factor among many that enters into the Prosecutor’s ultimate decision to initiate an

I. INTRODUCTION

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

³ Rome Statute of the International Criminal Court, *adopted* on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force*, 1 July 2002, Art. 1, U.N. Doc. A/CONF.183/9 (1998).

⁴ *Id.* Preamble.

⁵ *Id.* Art. 1.

⁶ *Id.* Art. 5.

⁷ *Id.* Art. 17(1)(d).

⁸ Specifically, Article 53(1) provides as follows: "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: ...

(b) The case is or would be admissible under [A]rticle 17; and

As explained in detail below, the gravity threshold has played a critical role in guiding the Prosecutor's selection of investigations to initiate and crimes to prosecute, not only because of the need to satisfy admissibility requirements, but also

purpose of the so-called gravity threshold as understood by the drafters of the Rome Statute, analyzes the application of gravity considerations in practice over the first five years of the Court's operations, and offers recommendations aimed at clarifying both the objectives of the threshold and the factors relevant to its satisfaction.

that, although the Court was “intended to exercise jurisdiction only over the most serious crimes of concern to the international community,”¹⁵ it could become overburdened by “less serious cases.”¹⁶

One suggested remedy to this concern was to narrow the subject matter jurisdiction of the court, namely by limiting the Draft Statute to include only “those crimes as to whose magnitude and gravity there would be a consensus in the United Nations.”¹⁷ Another suggestion, put forward by the ILC member from the United States of America, Mr. Robert Rosenstock, was that the Court ought to be given discretion to decline to exercise its jurisdiction in certain cases on grounds of insufficient gravity.¹⁸ Mr. Rosenstock’s recommendation was noted in the 1994 ILC yearbook thus:

The court should be given some discretion in certain circumstances to decline to accept a particular case on specific grounds – for instance, that it *did not consider the case of sufficient gravity to merit a trial at international level* or that the existing national tribunals could handle the

matter expeditiously. Such discretion on the part of the court might mitigate the concerns raised with regard to the inclusion ... of crimes under national law, such as drug-related crimes and, for that matter, the “terrorism” conventions...¹⁹

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

In its commentary to Article 35, the ILC observed that the provision:

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

¹⁹ *Id.* (emphasis added).

²⁰ *See, e.g.*, 1994 ILC Yearbook, Vol. II, pt.2, *supra* n. 13, at 33, ¶ 22 (quoting the member from Iceland, Mr. Gudmundur Eiriksson, as saying that it would “be desirable to incorporate a provision in the draft giving the court discretion in deciding whether or not to take up a case even when that case clearly fell within its jurisdiction; it would then 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...”).

²¹ Draft Statute for an International Criminal Court, 1994, *reproduced in* Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10, at 382, 383, U.N. Doc. A/49/10, Art. 35 (1994).

circumstances outlined in the preamble, that is to say where it is really desirable to do so.²²

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

B. NEGOTIATIONS ON THE DRAFT STATUTE

Upon receiving the ILC Draft Statute, the General Assembly established the *ad hoc* Committee on the Establishment of an International Criminal Court, which met twice in 1995. During these

second preambular paragraph, for the following reasons: to promote broad acceptance of the court by States and thereby enhance its effectiveness; to enhance credibility and moral authority of the court; to avoid overloading the court with cases that could be dealt with adequately by national courts; and to limit the financial burden imposed on the international community.... With regard to selection of crimes, a number of delegations suggested that the jurisdiction of the court should be limited to three or four of the crimes under general international law... because of the magnitude, the occurrence and the inevitable international consequences of these crimes.²⁶

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

is not defined in the Rome Statute or in the later-adopted ICC Rules of Procedure and Evidence,³³ leaving open a number of important questions as to its objectives and requirements in practice.

³³ Sadat & Carden, *supra* n. 31, at 419; Murphy, *supra* n. 11, at 282 (“Although the concept of gravity is a central tenet of international criminal justice, the Statute provides little by way of explanation into what this means in practice.”). At least two States did call for clarification of the term “gravity” during drafting process. Venezuela, for example, in its comments to the Ad Hoc Committee dated 14 March 1995, stated that “vague, imprecise expressions must be avoided, since they may create difficulties when the time comes to put the provisions of the statute into practice.” *Ad hoc* Committee on the Establishment of an International Criminal Court, *Comments received pursuant to paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court*, U.N. Doc. A/AC.244/1 at 22, 20 March 1995. Later, at the Rome Conference, Chile noted the need to clearly explain the “vague reference” to sufficient gravity warranting further action by the Court. Summary record of 11th Meeting of Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.11, ¶ 29, 22 June 1998. It is unclear from the drafting history why these calls for greater clarification were not addressed in the final Statute.

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

against “physical integrity,” such as willful killing or rape;
the severity of the crimes;
the scale of the crimes;
the systematicity of the crimes;
the nature of the crimes;
the manner in which those crimes were committed; and
the impact of the crimes.³⁶

In addition, the Prosecutor has made clear that, given the “global character of the ICC, its statutory provisions and logistical constraints,” the OTP will generally “focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”³⁷ Thus, as stated in a 2003 policy paper

³⁶ See, e.g., Statement by Luis Moreno-Ocampo, Prosecutor of the ICC, *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs*, New York, at 6, 24 October 2005 (“We are currently in the process of refining our methodologies for assessing gravity. In particular, there are several factors that must be considered. The most obvious of these is the number of persons killed – as this tends to be the most reliably reported. However, we will not necessarily limit our investigations to situations where killing has been the predominant crime. We also look at number of victims of other crimes, especially crimes against physical integrity. The impact of the crimes is another important factor.”); Rod Rastan, Legal Officer with the ICC Office of the Prosecutor, *The Power of the Prosecutor in Initiating Investigations*, A paper prepared for the Symposium on the International Criminal Court, Beijing, China, at 7, 3-4 February 2007 (“In practice, in determining whether the situation is of sufficient gravity, the Office will consider issues of severity; scale; systematicity; impact; and particularly aggravating aspects.”); ICC Office of the Prosecutor, *Report on the Activities Performed during the First Three Years (June 2003-June 2006)*, at 6, 12 September 2006, available at http://www.iccnw.org/documents/3YearReport%20_06Sep14.pdf (“In the view of the Office, factors relevant in assessing gravity include: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes.”).

³⁷ ICC Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor*, at 7, September 2003, available at [http://www.icc-cpi.int/library/organs/otp/030905 Policy Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905%20Policy%20Paper.pdf). See also Moreno-Ocampo, *Informal Meeting of Legal Advisors*, *supra* n. 36, at 5, 6 (“Experience shows that the situations faced by the Court tend to involve

released by the OTP, the “concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission.”³⁸ Nevertheless, in announcing his policy, the Prosecutor was careful to acknowledge that “[i]n some cases, the focus of an investigation by the [OTP] may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.”³⁹

2. *Application*

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

a) Situations

Between July 2002, when the Rome Statute entered into force, and February 2006, the Office of the Prosecutor had received 1732 communications from individuals or groups in at least 103 different countries regarding alleged crimes within the jurisdiction of the Court,

large-scale commission of crimes, with an untold numbers of victims as well as many alleged perpetrators. As a global and permanent institution, the ICC will often be confronted with multiple situations of this nature...we have developed strategies that take into account the global nature of the ICC and allowing us to handle concurrently several situations, while respecting our limited resources. One of the most important elements of this strategy is to focus investigative and prosecutorial efforts and resources on those who bear the greatest responsibility for the most serious crimes...”).

³⁸ ICC-OTP, *Paper on some policy*, *supra* n. 37, at 7. *See also* Rastan, *supra* n. 36, at 7 (“The global character of the ICC, its statutory provisions and logistical constraints, in turn, support the policy decision of focusing, as a general rule, the Office’s investigative and prosecutorial efforts and resources on those who bear the greatest responsibility for those crimes.”).

³⁹ ICC-OTP, *Paper on some policy issues*, *supra* n. 37, at 3.

three referrals from states and one referral from the United Nations Security Council.⁴⁰ Irrespective of the source of information sent to the OTP, the Office has indicated that it conducts an initial evaluation of each communication received to determine whether there is a “reasonable basis” to proceed with an investigation.⁴¹

In terms of choosing which situations to investigate, the OTP has developed a three-tiered process for analyzing information regarding potential crimes within the jurisdiction of the Court.⁴² The first phase “is an initial review to identify those communications that manifestly do not provide any basis for further action.”⁴³ For example, the Prosecutor responded to information regarding alleged crimes against humanity committed in Venezuela by saying that, based upon communications received and a review of external sources, there was insufficient evidence establishing a “widespread or systematic attack against a civilian population,” as required under the Rome Statute’s definition of crimes against humanity.⁴⁴ Thus, it does not seem that the OTP ever even considered the gravity of the alleged crimes in Venezuela, as it determined at the first stage of inquiry that the Court lacked jurisdiction.⁴⁵

⁴⁰ ICC Office of the Prosecutor, *Update on Communications Received by the Office of the Prosecutor of the ICC*

The second phase of the Prosecutor's analysis looks to the "seriousness" of those crimes that presumably do fall within the jurisdiction of the Court in order to determine if the situations are of sufficient gravity to warrant the attention of the ICC.⁴⁶ The distinction between steps one and two of the Prosecutor's analysis are well-illustrated by his decision to forego an investigation into war crimes allegedly committed by British forces in Iraq. According to the OTP, an initial evaluation of the information submitted regarding crimes in Iraq established that there was a "reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman treatment."⁴⁷ Hence, the situation in Iraq satisfied the Prosecutor's first level of analysis. Nevertheless, the Prosecutor concluded that the situation in Iraq "did not appear to meet the required threshold of the Statute" at the second level of analysis.⁴⁸ He explained:

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

⁴⁶ ICC-OTP, *Referrals and Communications*, *supra* n. 41, at 3-4.

⁴⁷ Luis Moreno-Ocampo, *Letter concerning the situation in Iraq*, at 8, 9 February 2006.

⁴⁸ *Id.* at 8.

people. Other situations under analysis also feature hundreds or thousands of such crimes.⁴⁹

The Prosecutor also noted that, for war crimes, “a specific gravity threshold is set down in Article 8(1) [of the Rome Statute], which states that ‘the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.’”⁵⁰ While this “threshold is not an element of the crime,” the Prosecutor explained, it does “provide guidance that the Court is intended to focus on situations meeting these requirements.”⁵¹

Third, looking at those situations likely to be admissible before the Court – in other words, those situations that fall within the Court’s jurisdiction *and* meet the gravity threshold⁵² – the OTP will conduct

⁴⁹ *Id.* at 9. By contrast to his letter explaining the lack of sufficient gravity in Iraq, the Prosecutor has stressed the evident gravity present in each of the four situations currently under investigation by the OTP. *See, e.g.*, ICC Office of the Prosecutor, *Background: Situation in the Central African Republic*, The Hague, 22 May 2007 (“[A]ccording to all the information available to the OTP, the alleged crimes, notably killings and large-scale sexual crimes were of sufficient gravity to warrant an investigation.”); ICC-OTP, *First Three Years*, *supra* n. 36, at 6-7 (“After thorough analysis, the Office concluded that the situations in the Democratic Republic of the Congo (DRC) and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court. The situation in Darfur, the Sudan, referred to the Prosecutor by the Security Council, also clearly met the gravity standard.”).

⁵⁰ Moreno-Ocampo, *Letter concerning the situation in Iraq*, *supra* n. 47, at 8.

⁵¹ *Id.*

⁵² Of course, the Prosecutor must also consider whether a situation or case would be inadmissible under *any* of the other provisions of Article 17(1), including:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned,

“advanced analysis and planning” pursuant to Article 53 of the Statute,⁵³ which provides in part that the Prosecutor may decline to

committed.”⁵⁶ From this overall picture, “particularly grave events” are identified⁵⁷ and then liability is traced back to those “most responsible.”⁵⁸

According to the Prosecutor, gravity was the dominant consideration guiding the selection of his first case in Northern Uganda, where the OTP has been investigating crimes allegedly committed by both the Lord’s Resistance Army (LRA) and the national army, or Uganda Peoples Defence Forces (UPDF).⁵⁹ In October 2005, the OTP announced that it was charging five members of the LRA under the Rome Statute, yet bringing no charges against any member of the government-led forces.⁶⁰ The Prosecutor explained his decision as follows:

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

⁵⁶ Second Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593, at 2, 13 December 2005.

⁵⁷ *Id.*

⁵⁸ Moreno-Ocampo, *Informal Meeting of Legal Advisors*, *supra* n. 36, at 7.

⁵⁹ Although the Government of Uganda requested that the ICC limit its investigations in Northern Uganda to crimes allegedly committed by the LRA, *see* ICC-02/04, Situation in Uganda, Referral (29 January 2004) available at <http://www.icc-cpi.int/cases/UGD.html>, the ICC Prosecutor

UPDF. We therefore started with an investigation of the LRA.⁶¹

Gravity has also played an important role in guiding the OTP's investigation of the situation in the Democratic Republic of Congo (DRC). The Prosecutor first began looking at crimes allegedly committed in DRC in July 2003 and ultimately received a referral from the DRC government in March 2004.⁶² The Prosecutor began his investigation by making a gravity assessment of the entire country and identifying Ituri as the region where the gravest crimes had been committed; he then identified the most serious incidents and focused his investigation on the persons most responsible for those crimes.⁶³ In

Given the scale of the situation, we expect to be investigating in the DRC for a long duration. Therefore, we are working sequentially, starting with one or two cases, selected on the basis of gravity, while continuing to develop other cases. We have focused our investigation through analysis... first, we confirmed that the North Eastern region of DRC (including Ituri) was the area with the gravest crimes within our temporal jurisdiction; second, we identified the most serious incidents; and third, we traced responsibilities back to the persons most responsible. Further cases will be developed in the future, on the basis of Statute criteria.”⁶⁴

Finally, in the Darfur situation, the Security Council adopted Resolution 1593 which referred the situation in that region to the ICC.⁶⁵ After deciding that there was a reasonable basis to initiate an investigation, the Prosecutor outlined how the investigation would proceed in the following terms:

In the first phase of the investigation the Office collects information relating to the universe of crimes alleged to have taken place in Darfur, as well as the groups and individuals responsible for those crimes... In the second phase of the investigation the Prosecutor will select specific cases for prosecution... Accordingly, the Office has collated as comprehensive a picture as possible of the crimes allegedly committed in Darfur since 1 July 2002... From this over-all picture the Office has identified particularly grave events.⁶⁶

⁶⁴ *Id.* at 6-7.

⁶⁵ ICC Office of the Prosecutor, *Fact Sheet: The Situation in Darfur, the Sudan*, at 1, available at http://www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf.

⁶⁶ Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593, at 2-3, 13 December 2005.

B. PRE-TRIAL CHAMBER I

The first and only judicial interpretation of the gravity threshold under the Rome Statute has come from Pre-Trial Chamber I (PTC I), which discussed the requirements of Article 17(1)(d) in the context of evaluating the Prosecutor's application for an arrest warrant against Thomas Lubanga Dyilo. Mr. Lubanga, the first suspect identified in the DRC situation,⁶⁷ is charged with enlisting and conscripting children below the age of fifteen to participate actively in hostilities.⁶⁸ The charges were brought against Mr. Lubanga in his capacity as the leader of the *Union des patriotes congolais* (UPC), a rebel movement operating in the Ituri region of the DRC, and its armed wing, the *Forces patriotiques pour la liberation du Congo* (FPLC).⁶⁹

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

The Chamber... observes that this gravity threshold is in addition to the drafters' careful selection of the crimes included in articles 6 to 8 of the Statute,⁷⁰ a selection based on gravity and directed at confining the material jurisdiction of the Court to the "most serious crimes of international concern." *Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court.*⁷¹

⁶⁷ *Lubanga*, PTC I, 10 February 2006, *supra* n. 10.

⁶⁸ ICC Newsletter, *A word from the Prosecutor*, at 1, November 2006.

⁶⁹ *Lubanga*, PTC I, 10 February 2006, *supra* n. 10, ¶¶ 70-73.

⁷⁰ Referring to genocide, crimes against humanity, and war crimes. *See* Rome Statute, *supra* n. 1, Arts. 6-8.

⁷¹ *Lubanga*, PTC I, 10 February 2006, *supra* n. 10, ¶ 41 (emphasis added).

The Chamber also confirmed that “the gravity threshold provided for under article 17(1)(d) of the Statute must be applied at two different stages: (i) at the stage of initiation of the investigation of a situation, the relevant situation must meet such a gravity threshold and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold provided for in that provision.”⁷²

PTC I next addressed the requirements of the gravity threshold at the case stage, as this was the relevant inquiry for purposes of analyzing the Prosecutor’s request for an arrest warrant. As an initial matter, the Chamber performed a “contextual interpretation,” determining that

addition, the “social alarm” caused by the conduct must be given “due consideration.” The Chamber did not elaborate as to how these factors themselves are to be understood, nor did it mention any additional factors as relevant to the gravity determination.

PTC I then performed a “teleological interpretation” of the gravity requirement. Specifically, the Chamber viewed Article 17(1)(d) against the “backdrop” of the Rome Statute’s Preamble, stressing paragraph 5, which “emphasizes that the activities of the Court must seek to ‘put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’”⁷⁵ According to the Chamber, this teleological interpretation led to the conclusion that the “gravity threshold is a key tool provided by the drafters to maximize the Court’s deterrent effect.”⁷⁶ As a result, PTC I continued, “the Chamber must conclude that any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention,”⁷⁷ which in turn led it “to the conclusion that other factors, in addition to the gravity of the relevant conduct, must be considered when determining whether a given case meets [the gravity] threshold.”⁷⁸ Elaborating on this, PTC I held that, in its view, “the additional gravity threshold provided for in [A]rticle 17(1)(d) of the Statute is intended to ensure that the Court initiates cases only against the *most senior leaders suspected of being the most responsible for the crimes* within the jurisdiction of the Court allegedly committed in any given situation under investigation.”⁷⁹ It justified the criteria by

⁷⁵ *Id.* ¶ 47.

⁷⁶ *Id.* ¶ 48.

⁷⁷ *Id.* ¶ 48.

⁷⁸ *Id.* ¶ 49.

⁷⁹ *Id.* ¶ 50 (emphasis added). This additional factor is itself determined by reference to three sub-factors: (i) the rank of the persons, for instance, whether they are the most senior leaders; (ii) the role played by that person,

asserting that individuals who are “at the top” of the entities “allegedly responsible for the systematic or large scale commission of crimes within the jurisdiction of the Court... are the ones who can most effectively prevent or stop the commission of those crimes,” and “only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximized because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.”⁸⁰

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

- i. Is the conduct which is the

relevant person through acts or omissions when the State entities, organizations or armed groups to which he belongs commit systematic or large scale crimes within the jurisdiction of the Court, and (b) the role played by such State entities, organizations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?⁸¹

Notably, the Chamber recognized the fact that the Office of the Prosecutor had already indicated that it considers similar factors in analyzing the gravity of a given situation or case.⁸² However, PTC I also stated that the factors outlined in its decision were not discretionary considerations, but rather necessary conditions for meeting the gravity threshold under the Rome Statute.⁸³

Applying its newly-defined test to the case against Mr. Lubanga, Pre-Trial Chamber I first found that the conduct alleged by the Prosecutor against the suspect – including the enlistment, conscription, and use of “hundreds of children under the age of fifteen” in hostilities⁸⁴ – caused “social alarm” to the international community based on the extent of the relevant policy and practice.⁸⁵ The Court then found that Lubanga fulfilled the “senior leaders” requirement because there were reasonable grounds to believe that the Accused has been president of the UPC since its foundation in 2000, and the commander-in-chief of the UPC’s armed forces, the FPLC, throughout 2002 and 2003.⁸⁶

⁸¹ *Id.* ¶ 63.

⁸² *Id.* ¶ 61 (“[T]he Chamber observes that the Prosecution has already adopted some of the factors that the Chamber considers part of the core content of the gravity threshold provided for in [A]rticle 17(1)(d) of the Statute.”).

⁸³ *Id.* ¶ 62.

⁸⁴ *Id.* ¶¶ 65-66.

⁸⁵ *Id.* ¶ 66.

⁸⁶ *Id.* ¶ 67.

Furthermore, the Pre-Trial Chamber noted that Lubanga “exercised *de facto* authority which corresponded to his positions as the first and only president of the UPC and Commander-in-Chief of the FPLC, which included *inter alia* the authority to negotiate, sign and implement ceasefires or peace agreements and participate in negotiations relating to controlling access of [the United Nations Mission in the Democratic Republic of Congo] and other UN personnel” to parts of the territory of Ituri under UPC/FPLC control.⁸⁷

Finally, the Court held that there was reason to believe Lubanga was among those “most responsible” for the alleged crimes based on his “ultimate control over the UPC/FPLC’s alleged policy/practice of enlisting... and using to participate actively in hostilities children under the age of fifteen.”⁸⁸ Indeed, the Court concluded that Lubanga’s role in the relevant crimes “could not have been more relevant.”⁸⁹ Significantly, Pre-Trial Chamber I acknowledged that the UPC/FPLC was “only a regional group,” and that “during the relevant time there were in addition to the UPC/FPLC a number of other regional armed groups involved in the armed conflict in Ituri.”⁹⁰ Nevertheless, the Court held that Lubanga may be considered among the “senior leaders suspected of being most responsibinter72syTd[(suspecf495c 12 (the a un th

are known to the Court who bear similar or even greater responsibility for a particular crime than the suspect.

IV. A

impact the types of situations investigated and cases prosecuted before the ICC.

As explained above, Pre-Trial Chamber I determined that the gravity analysis involves requirements relating to both the nature of the conduct and the rank and role of the perpetrator.⁹⁴ While the decision is helpful in that it provides guidance as to how “gravity” – a term not defined in the Rome Statute – will be interpreted by the ICC, a court with limited resources that must focus on those crimes that most warrant international prosecution, we believe that the Pre-Trial Chamber has interpreted the prerequisites for satisfying Article 17(1)(d) too strictly. Specifically, we recommend that the standard set forth by the Chamber not be applied so rigidly as to exclude exceptional circumstances which might nevertheless satisfy the purpose of the gravity threshold.

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

In terms of determining what conduct satisfies Article 17(1)(d), PTC I held that “the conduct which is the subject of a case *must be* either systematic (pattern of incidents) or large-scale.”⁹⁵ In addition, the Chamber said that, “in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community.”⁹⁶ However, as noted earlier, the Chamber did not elaborate as to how these factors themselves are to be understood, nor did it mention any additional factors as relevant to the gravity determination.

⁹⁴ See *supra* n. 73 *et seq.* and accompanying text.

⁹⁵ *Lubanga*, PTC I, 10 February 2006, *supra* n. 10, ¶ 46 (emphasis added).

⁹⁶ *Id.*

In announcing the requirement that, to satisfy the Article 17(1)(d) threshold, conduct must be either “systematic” or “large-scale,” the PTC observed: “[i]f isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes” falling within the jurisdiction of the Court.⁹⁷ This statement may appear obvious enough at first, but in fact, it suggests that the term “gravity”

Congo. Is gravity just the number of killings, or is it other factors, with wider-scale implications?⁹⁹

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

It may be the case that PTC I’s reference to “social alarm” could account for some of these additional factors, but the term is not explained by the Chamber, making it difficult to understand what, outside of the conscription and use of child soldiers in armed conflict would constitute “social alarm.”¹⁰⁰ Furthermore, it is unclear why the Chamber has chosen to look to the social alarm caused by the alleged conduct in the “international community;” the impact on the community or nation where the crimes occurred seems a more meaningful standard, particularly in light of the Rome Statute’s broader goals of ending impunity and promoting deterrence.

The notion that “gravity” cannot always be determined by reference to scale or systematicity is supported by the practice of the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). While the statutes of these tribunals do not limit the admissibility of cases according to gravity, both the ICTY and the ICTR do apply the concept of “gravity” in the context of sentencing.¹⁰¹

⁹⁹ Moreno-Ocampo, *Integrating the Work of the ICC into Local Justice Initiatives*, *supra* n. 35, at 498.

¹⁰⁰ See *Lubanga*, PTC I, 10 February 2006, *supra* n. 10, ¶ 46.

¹⁰¹ See Statute of the International Tribunal for the Prosecution of Persons

Furthermore, the overall purpose of analyzing the gravity of crimes within the jurisdiction of the ICTY and ICTR at the sentencing phase is similar to the larger purposes of the Rome Statute's overall gravity threshold, namely: ending impunity and maximizing deterrence.¹⁰² Thus, although conducted under a different context by tribunals of a different nature, it is nevertheless instructive to examine the *ad hoc*

Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, Art. 24(2), U.N. Doc. S/RES/827 (1993) (“In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”); Statute of the International Criminal Tribunal for Rwanda, adopted November 8, 1994, Art. 23(2), U.N. Doc. S/RES/955 (same).

¹⁰² See, e.g., *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case No. 1: ICTR-96-10; 2: ICTR-96-17, ¶ 884 (ICTR Trial Chamber, 21 February 2003) (Judgement and Sentence) (“[T]he principle of gradation in sentencing... enables the Tribunals to distinguish between crimes which are of the most heinous nature, and those which, 8 1d utimana,a Tw l Chuwhi2 Tc 0f6]TJ0nces, utimana,

tribunals' approach to the concept of gravity. Importantly, the relevant jurisprudence of those tribunals shows that, although "scale" is a key factor to be used in evaluating the gravity of a perpetrator's crimes,¹⁰³ a number of additional "aggravating factors" are examined, including: the impact on the victims;¹⁰⁴

children or the handicapped).¹⁰⁷ Overall, however, the most dramatic feature revealed from a review of *ad hoc*'s sentencing jurisprudence is the amorphous nature of the factors denoting gravity. This approach recognizes that each situation presents its own unique features indicative of the gravity of the crimes, typically demonstrated by a combination of factors. As noted above, the OTP has pointed to a variety of factors as relevant to determining the gravity of crimes, which largely overlap with the types of things considered by the ICTY and the ICTR in their own approaches to gravity.¹⁰⁸

In sum, while it is likely that the majority of crimes considered for prosecution before the ICC will involve conduct committed on a systematic or large-scale basis, PTC I's decision requiring such systemacity or scale as a condition of Article 17(1)(d) in every case does not appear warranted. Rather, the gravity analysis should be sufficiently flexible so as to allow the Court to consider exceptional circumstances, beyond scale and systemacity, as contributing to the gravity of a given case. In particular, factors such as the impact on victims, the manner in which the crimes were carried out, and the

women in the bureau communal through his presence and acts).

¹⁰⁷ *Krstic*, ICTY Judgement, *supra* n. 102, ¶ 702 (“[T]he Trial Chamber agrees with the Prosecutor that the number of victims and their suffering are relevant factors in determining the sentence and that the mistreatment of women or children is especially significant in the present case.”); *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, ¶ 702 (ICTY Trial Chamber, 2 November 2001) (Judgement) (holding that “the sexual violence inflicted upon the women, and the discriminatory nature of the crimes... are relevant factors in assessing the gravity of the crimes.”).

¹⁰⁸ *See supra* n. 36 *et seq.* and accompanying text (noting that the OTP has stated that the gravity analysis involves such factors as the number of persons killed; the number of victims, particularly in the case of crimes against “physical integrity,” such as willful killing or rape; the severity of the crimes; the scale of the crimes; the systematicity of the crimes; the nature of the crimes; the manner in which crimes were committed; and the impact of the crimes).

vulnerability of the victim population may weigh in favor of finding that a particular case meets the gravity threshold, even if it does not involve crimes on the same scale or the same degree of systematicity as might typically be seen in cases coming before the ICC.

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

As explained above, the Prosecutor, as a matter of policy, has stated that the OTP will focus its investigative efforts on those bearing the greatest responsibility for alleged crimes within the jurisdiction of the Court.¹⁰⁹ The “obvious intuitive appeal”¹¹⁰

At the same time, the Prosecutor has recognized that in some cases, the focus of an investigation may go wider than high-ranking officers.¹¹² This approach was praised by Human Rights Watch, which has “welcome[d] the prosecutor’s policy of focusing on those who bear the greatest responsibility,” while also “urg[ing] the office to keep a degree of flexibility with respect to [its] implementation.”¹¹³

Yet in February 2006, Pre-Trial Chamber I seemed to remove the flexibility announced in the Prosecutor’s stated policy.¹¹⁴ Specifically, PTC I held in the context of the *Lubanga* case that, viewed against the backdrop of the Rome Statute’s preamble, Article 17(1)(d) must be seen as a “key tool provided by the drafters to maximize the Court’s deterrent effect,”¹¹⁵ and that therefore “any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention.”¹¹⁶ As mentioned earlier, the Chamber then concluded that, in order to maximize the Court’s deterrent effect, cases should be initiated only against the “most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court.”¹¹⁷

While focusing on the so-called “big fish” may be wise as a matter of policy, PTC I’s interpretation of the threshold as *requiring* that cases

¹¹² See *supra* n. 39 (citing ICC-OTP, *Paper on some policy issues*, *supra* n. 37, at 3).

¹¹³ ICC Prosecutor’s Public Hearing for NGOs in The Hague, *Intervention by Géraldine Mattioli, Human Rights Watch*, at 4-5, 26 September 2006. See also *infra* n. 126 *et seq.* and accompanying text (explaining why, under certain circumstances, the ICC may want to prosecute individuals who are not senior leaders suspected of being the most responsible for the commission of crimes within the jurisdiction of the Court).

¹¹⁴ See *supra* n. 79 *et seq.* and accompanying text.

¹¹⁵ *Lubanga*, PTC I, 10 February 2006, *supra* n. 10, ¶ 50.

¹¹⁶ *Id.* ¶¶ 47-48.

¹¹⁷ *Id.* ¶ 50. See also *supra* n. 79 *et seq.* and accompanying text.

be brought only against the “most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court”¹¹⁸

standard imposed by PTC I is very strict, requiring that the perpetrator be *both* a “senior leader” and among those “most responsible” for the alleged crime(s).¹²² Applying this standard literally would presumably prevent the ICC from prosecuting someone like “Comrade Duch,” a former member of the Khmer Rouge who has been indicted by the ECCC for crimes against humanity and war crimes allegedly committed at the Tuol Sleng prison, where thousands of people were imprisoned, tortured and killed between 1975 and 1979.¹²³ Although Duch was not among the top leadership of the Khmer Rouge, the fact that the murder and torture of civilians was committed on such a widespread basis under his authority at the prison renders him subject to the personal jurisdiction of the ECCC, which includes individuals who were *either* among the “senior leaders” *or* those “most responsible” for the crimes within the jurisdiction of the Court.¹²⁴

Furthermore, as a practical matter, one can imagine situations where the objectives of the Rome Statute – including ending impunity, promoting deterrence, and giving voice to the victims of the world’s most heinous crimes¹²⁵ – would be served through the prosecution of

persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”).

¹²² See *supra* n. 79 and accompanying text.

¹²³ See, e.g., Extraordinary Chambers in the Court of Cambodia, *Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav, Alias “DUCH,”* Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (Pre-Trial Chamber, 3 December 2007).

¹²⁴ ECCC Establishment Law, *supra* n. 121, Art. 1.

10.

an individual who might not be described as among the “most senior leaders suspected of being most responsible.” For example, Human Rights Watch has pointed out that, “[i]n some contexts, pursuing those officials further down in the ch

At least one commentator has also challenged the idea that a policy of deterrence is best served by focusing strictly on senior leaders, calling instead for the prosecution of a “cross-section of perpetrators.”¹²⁸ This commentator explains:

Prosecuting a cross-section of perpetrators may be desirable in terms not only of retribution but also of deterrence. In support of the strategy of prosecuting only the top leaders, the argument often is made that it is most important to prosecute the leaders because “without the leaders, these crimes would not occur.” It is equally true, however, that without the followers these crimes would not occur. Indeed, there are probably more than a handful of would-be leaders of crimes of mass violence whose dangerous aspirations are never realized for lack of followers. Applying deterrents at top, middle and lower

However, it is not altogether obvious from the language of PTC I's February 2006 decision that this is the approach that will be taken by the ICC going forward. For example, although PTC I stated that it will look to three sub-factors to determ

highlight the relative gravity of situations and cases as a means of determining which will be investigated and prosecuted.

Two related observations flow from this dual-use of gravity. The first is that it has not always been clear when the Prosecutor is talking about gravity as a requirement under the Rome Statute versus gravity as one of presumably many factors leading to the OTP's decision to prosecute certain crimes over other crimes. For instance, the Prosecutor has repeatedly explained his decision to pursue an investigation of crimes committed by the Lord's Resistance Army in Uganda, prior to looking at the alleged crimes of government forces, based on the determination that the crimes committed by the LRA "were much more numerous and of much higher gravity than alleged crimes committed by" the national army.¹³⁷ Notably, the Prosecutor did not say in this context – as he did with the overall situation in Iraq,

the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, 97 Am. J. Int'l Law 510, 518 (July 2003). See also Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 J. Int'l Crim. Just. 124, 124-25 (March 2005) ("According to the Oxford Companion to Law, 'discretion' is 'the faculty of deciding or determining in accordance with circumstances and what seems just, right, equitable, and reasonable in those circumstances'. Discretion allows for flexibility and enables the decision maker to choose between two or more permissible courses of action and to adapt his decision to existing circumstances. All professional actors in the administration of justice need discretion to resolve the many issues that arise in the course of their work, as they cannot be resolved by hard and fast rules.").

¹³⁷ ICC-OTP, *Statement by the Chief Prosecutor on the Uganda Arrest Warrants*, *supra* n. 59, at 3. See also Statement by Luis Moreno-Ocampo, *Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties, 28 November- 3 December 2005*, The Hague, at 2, 28 November 2005 ("In Uganda, we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the Lord's Resistance

ultimate decision to initiate an investigation or prosecute a case. The need for such clarity is illustrated by recent commentary raising concerns over the OTP's divergent approach to the selection of its first cases in the context of the Uganda situation and the DRC situation, respectively.¹³⁹ Specifically, referring to a statement by the OTP in which it explained that Thomas Lubanga Dyilo was charged as the first suspect in the DRC situation because he was facing "imminent release" from prison in the DRC¹⁴⁰ – meaning that if the ICC delayed its case against Lubanga he may have evaded arrest – one commentator observed:

One might wonder, therefore, whether the selection of the Lubanga case was based on gravity or by his "possible imminent release." This shows contradiction and a clear deviation from the policy initially adopted by the OTP in relation to the gravity selection process.¹⁴¹

The commentator concluded that the OTP's application of the gravity criterion "raises some concerns," noting that in the case of Lubanga, the OTP "focused on crimes that are less serious than others committed within the context of grave events."¹⁴²

¹³⁹ Mohamed M. El Zeidy, *The Gravity Threshold under the Statute of the International Criminal Court*, 19 *Crim. L. Forum* 1, 41, March 2008.

¹⁴⁰ ICC-OTP, *First Three Years*, *supra* n. 36, at 8 ("In the situation in the DRC, the Office initially investigated a wide range of crimes allegedly committed, seeking to represent the broad range of criminality. The Office subsequently decided in its first case to focus on the crime of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities. *The decision to focus on this crime was triggered by the possible imminent release of Thomas Lubanga Dyilo, who had been under arrest in the DRC for approximately one year before he was transferred to the Court.*") (emphasis added).

¹⁴¹ El Zeidy, *supra* n. 139, 41, March 2008.

¹⁴² *Id.* at 56-57.

It is worth noting, however, that the OTP may legitimately be persuaded by different factors in different contexts when selecting situations and cases, as the Rome Statute – like the statutes of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, as well as the practice of many national jurisdictions¹⁴³ – allows the Prosecutor ultimate discretion to choose where to initiate

highlighted by the experiences of the *ad hoc*

independence of the Prosecutor, and is therefore “a crucial element in determining the long-term legitimacy of the ICC.”¹⁴⁸

Thus, while the relative gravity of a particular crime may lead the OTP to prosecute one case over another in one context, it may legitimately be persuaded by other factors – *i.e.*, practical considerations such as the likelihood of apprehending a suspect or the availability of evidence, or strategic considerations such as a desire to shed light on the “complete landscape” of events that occurred within a particular situation – in another context.¹⁴⁹ At the same time, however, the commentator cited above with regard to the OTP’s different approach in the Uganda and DRC situations is correct in observing that the Lubanga case is “contradictory” to a number of statements made by the OTP regarding the importance of gravity in the selection of cases.¹⁵⁰ We therefore suggest that it would enhance the legitimacy of the ICC if the OTP were to communicate as clearly as possible which factors were in fact relevant to its decisions in each context so that the public may more accurately evaluate those decisions.

¹⁴⁸ Brubacher, *supra* n. 54, at 84. *See also* Danner, *supra* n. 136, at 515 (“The Prosecutor’s ability to make individualized considerations based on law and justice, rather than the self-interest or .06indiviTf0 thatem Bruransefo m theCourt fro mndiilit

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The Gravity Threshold of the International Criminal Court

Article 17(1)(d) of the Rome Statute provides that the International Criminal Court (ICC) shall determine that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court. This so-called “gravity threshold” has played a critical role in guiding the ICC Prosecutor’s selection of investigations to initiate and crimes to prosecute, not only because of the need to satisfy admissibility requirements, but also as a matter of policy. In addition, Pre-Trial Chamber I has offered its own interpretation of the gravity threshold, affirming that Article 17(1)(d) is a requirement that must be met above and beyond the jurisdictional mandates of the Rome Statute, and setting forth the Chamber’s analysis of how the threshold is met. Yet, because the meaning and appropriate role of “gravity” is not defined in the Rome Statute or any of the other governing documents of the ICC, the meaning and the appropriate role of “gravity” in the ICC remains a matter of ongoing debate.

This aim of this report is therefore to review the underlying purpose of the threshold as understood by the drafters of the Rome Statute, analyze the application of gravity considerations in practice during the initial years of the Court’s operations, and offer recommendations aimed at



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