

The application of the gravity threshold by the International Criminal Court in the selection of situations and cases – how to differentiate between the gravity of situations and the gravity of cases?

Abstract

The International Criminal Court faces much criticism with respect to its selection of situations and cases. Especially selection decisions based on the gravity criterion have become the subject of controversy. The disagreements can be broken down to a difference in presumptions of a) how gravity is to be assessed generally and b) if and how situation and case gravity differ. The thesis at hand hence aims to answer the following question: *How does and should the Court apply the gravity threshold, in particular with regards to differentiating between situation and case gravity?* The question is addressed by depicting the Court's approach to gravity in the selection of situations and cases and contrasting it with points raised by critics. With the help of legal interpretative methods, a conclusion is drawn determining the validity of the criticism. The results are applied to a selection of situations and cases that have been under particular scrutiny in terms of how their gravity was evaluated by the Court. The thesis finds that, generally, the Court's understanding and application of the gravity criterion is consistent with its founding treaty. However, it could avoid some criticism by exercising more rigour in differentiating between situation and case gravity.

List of Abbreviations

AMIS	African Union Mission in Sudan
AQIM	Al Qaeda in the Islamic Maghreb
CAR	Central African Republic
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
HRW	Human Rights Watch
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defense Forces
ILC	International Law Commission
JEM	Justice and Equality Movement
LRA	Lord's Resistance Army
OHCHR	Office of the High Commissioner for Human Rights
OTP	Office of the Prosecutor of the International Criminal Court
PTC	Pre-Trial Chamber
RS	Rome Statute
RPE	Rules of Procedure and Evidence
SGBC	Sexual and Gender-Based Crimes
UN	United Nations
UNSC	United Nations Security Council
UPC	Union of Congolese Patriots
UPDF	Uganda People's Defence Force
VCLT	Vienna Convention on the Law of Treaties
WCRO	War Crimes Research Office

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2 Introduction

“One of the most important strategic questions for the Court as a whole is [...] how it selects its situations and subsequently its cases, and if those decisions are objective.”¹

Ten years ago not even the most outspoken advocates of the International Criminal Court (ICC or Court) believed that by 2016 the Rome Statute, its founding treaty, would have been ratified by more than 120 states.² The support of so many nations promised a leap forward in the evolution of international criminal justice and its efforts to end impunity worldwide. The recent withdrawal announcements of Burundi, South Africa and The Gambia from the International Criminal Court in October 2016 are hence seen as a major setback for the institution and its aspirations to bring justice to victims of international crimes. With Namibia and Kenya considering following suit and the African Union, while not officially recommending a mass withdrawal, having expressed strong objections against the operations of the Court, the ICC faces one of the biggest challenges in its young history - leaving one commentator with the question: “Les jours de la Cour sont-ils comptés?”³ The reasoning behind the opposition of many African states towards the Court is illustrated by the explanation of The Gambia’s information minister for the announced withdrawal of his country: “[T]he ICC, despite being called International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans.”⁴

His statement refers to the fact that out of the ten situations under investigation by the ICC, nine are on the African continent.⁵ Allegations of political bias are not new, neither for the ICC nor for international criminal justice itself. From its earliest days in Nuremberg and Tokyo, efforts to bring those responsible for international crimes to justice have been challenged with regard

¹ Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. p. 118.

² Schabas, William A. (2013) *Kein Frieden ohne Gerechtigkeit? Die Rolle der internationalen Strafjustiz*. Hamburg: Hamburger Edition HIS. pp.96-97.

³ Translation: “Are the days of the Court numbered?” Valdés Andino, Florencia (2016) “Burundi, Afrique du Sud, Gambie... La Court pénale internationale navigue en eaux troubles,” TV5MONDE, <http://information.tv5monde.com/info/burundi-afrique-du-sud-gambie-la-cour-penale-internationale-navigue-en-eaux-troubles-136390> (accessed 01 November 2016).

⁴ The Independent (2016) “Gambia joins South Africa and Burundi in exodus from International Criminal Court,” The Independent, <http://www.independent.co.uk/news/world/africa/gambia-international-criminal-court-hague-yahya-jammeh-south-africa-burundi-a7380516.html> (accessed 1 November 2016).

⁵ International Criminal Court (2016c) “Situations under investigation,” <https://www.icc-cpi.int/pages/situations.aspx> (accessed 15 October 2016).

to their legality, independence and impartiality. While the trial against German and Japanese war criminals after the Second World War is largely seen as a success not only for addressing war crimes judicially but also for creating a legacy for future international criminal justice projects, there were also allegations claiming the Nuremberg and Tokyo tribunals exercised victor's justice, i.e. that the selection of accused was unfair.⁶

In the 1990s, with the resurgence of international criminal justice efforts, also some of the critical voices re-emerged. The creation of the ad-hoc tribunals was, in contrast to the International Military Tribunals of Nuremberg and Tokyo, not facilitated by the victors of the respective conflict, but by the international community represented through the United Nations Security Council (UNSC). It has, however, been brought forward that the only logic behind the creation of tribunals for certain situations was consensus amongst the UNSC members on the basis of their strategic national interests. Further, it has been criticised that the selections of cases by the tribunals within the situation they had jurisdiction over was unfair; mainly, as the allegations went, because one group was specifically targeted/not targeted or only "small fish" ended up in court.⁷ Criticism regarding the situation selection was hence addressed to the Security Council, while the tribunals themselves had to answer for criticism on case selection.

With regard to the International Criminal Court, the drafters of its founding treaty tried to address the issue of alleged politicisation of international courts by giving more discretion to the ICC Office of the Prosecutor (OTP or Office). In contrast to the ad-hoc tribunals, the OTP was given more authority over the selection of situations ("which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of Congo since 1 July 2002")⁸ while maintaining power over the selection of cases ("which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more

⁶ Schabas, William A. (2013) *Kein Frieden ohne Gerechtigkeit? Die Rolle der internationalen Strafjustiz*. Hamburg: Hamburger Edition HIS. pp. 12-13.; Guariglia, Fabricio (2009) "The selection of cases by the Office of the Prosecutor of the International Criminal Court," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 210.

⁷ Ohlin, Jens D. Ibid. "Peace, Security, and Prosecutorial Discretion." pp. 185-186.; Schabas, William A. (2013) *Kein Frieden ohne Gerechtigkeit? Die Rolle der internationalen Strafjustiz*. Hamburg: Hamburger Edition HIS. pp. 17-23.; Guariglia, Fabricio (2009) "The selection of cases by the Office of the Prosecutor of the International Criminal Court," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 210.

⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-101-tEN-Corr „Decision on the application for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6“ (24 February 2006).para. 65.

identified suspects”⁹). Under Article 15, the Prosecutor has the authority to open investigations on its own initiative, *proprio motu*, pending authorization by the Pre-Trial Chamber.¹⁰ This mechanism is, next to a state party or Security Council referral, one of the three trigger mechanisms for starting investigations into a situation.¹¹

The investigations following each of these three trigger mechanisms are, however, subject to two limitations: jurisdiction and admissibility. If it is established that the ICC has jurisdiction,¹² the selection of situations and cases proceeds with assessing their admissibility. The admissibility test consists of three elements: *ne bis in idem*, complementarity and gravity.¹³

While the way *ne bis in idem*¹⁴ and complementarity¹⁵ are to be understood is apparent and/or explained, the term “gravity” is neither defined in the Rome Statute nor in the Rules of Procedure and Evidence (REP), making it an ambiguous concept. This is partly due to the controversy surrounding the role of the Prosecutor during the Rome Statute negotiations. The diverging opinions of delegations on how much autonomy and discretion the Office should be awarded with led to a compromise solution: The OTP was given *proprio motu* powers, with the admissibility criteria as limitations. However, the lowest common denominator in this case means a large scale of ambiguity and leeway for the Court to interpret.¹⁶

The gravity concept did not receive much attention by the Court and legal scholars until 2005, when the Prosecutor at the time, Luis Moreno-Ocampo, used the gravity threshold to justify that the OTP investigated crimes committed by the Lord Resistance Army (LRA) in Northern Uganda, but not crimes committed by government forces as, according to the Prosecutor, the former were of greater gravity.¹⁷ A few months later, he used the gravity concept again to reject

⁹ Ibid.

¹⁰ Article 15 of the Rome Statute

¹¹ Articles 13, 14 and 15 of the Rome Statute

¹² Articles 11 and 12 of the Rome Statute

¹³ Articles 17 and 53 of the Rome Statute

¹⁴ Principle of law holding that a person shall not be tried for the same conduct twice. See Articles 17(1)(a) and (b) and 20 of the Rome Statute

¹⁵ The principle of complementarity limits the Court to exercise its jurisdiction to cases not already being investigated or prosecuted by a State „unless the State is unwilling or unable to genuinely carry out the investigation or prosecution. Article 17(1)(a) of the Rome Statute.

¹⁶ Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. p. 249.; DeGuzman, Margaret M. (2015) "What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation," American Society of International Law, <https://www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber> (accessed 12 June 2016).

¹⁷ Schabas, William A. (2009) "Prosecutorial discretion and gravity," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. pp. 230-231.;

investigations into crimes allegedly committed by British troops in Iraq. Both decisions proved to be controversial. Criticism arose claiming the application of the gravity threshold to situations and cases was inconsistent.¹⁸ In the words of Schabas: “[T]he gravity language strikes the observer as little more than obfuscation, a laboured attempt to make the determinations look more judicial than they really are [...]”¹⁹

Since then, gravity has continuously been the subject of debate in relation to its application in the situation and case selection process and has led to discussions on the application of this concept at the Court, amongst and within its organs, and on the outside. As the withdrawal announcements of member states show, allegations claiming the ICC’s selection of situations and cases is biased threaten its credibility and legitimacy; its perception as a legal institution independent of external political influence.²⁰ For a Court that depends on the participation and cooperation of member states, a lack of approval by these undermines its actual and potential operations and impact.²¹

Legal scholars have hence called for more transparency and rigour in the application of gravity in order to minimise grounds for allegations of political bias.²² As the next chapter will show,

Kersten, Mark (2016) "Yeah, Right... ICC Officials Say There's No Evidence Against Ugandan Military," Justice in Conflict, <https://justiceinconflict.org/2016/05/05/yeah-right-icc-officials-say-theres-no-evidence-against-ugandan-military/> (accessed 11 October 2016).

¹⁸ Bassiouni, M. Cherif; Hansen, Douglass (2016) "The Inevitable Practice of the Office of the Prosecutor," in R. H. Steinberg, ed. *Contemporary issues facing the International Criminal Court*. Leiden/Boston: Brill Nijhoff.; Tiemessen, Alana (2014) "The International Criminal Court and the politics of prosecutions," 18 *The International Journal of Human Rights* 444-461. (4-5). p. 445.

¹⁹ Tiemessen, Alana (2014) "The International Criminal Court and the politics of prosecutions," 18 *The International Journal of Human Rights* 444-461. (4-5). p. 445.; See also DeGuzman, Margaret M. (2013a) "Gravity Rhethoric: The Good, the Bad, and the "Political"," 107 *American Society of International Law (Proceedings of the Annual Meeting)* 421-423. p. 423

²⁰ Peake, Jessica (2016) "The Institutional Framework of the Office of the Prosecutor, Legitimacy, and Overcoming Bias Allegations," in R. H. Steinberg, ed. *Contemporary Issues Facing the International Criminal Court*. Leiden/Boston: Brill Nijhoff.; Tiemessen, Alana (2014) "The International Criminal Court and the politics of prosecutions," 18 *The International Journal of Human Rights* 444-461. (4-5). p. 444.; Danner, Allison M. (2005) "Prosecutorial discretion and legitimacy," 97 *The American Journal of International Law* 510-552. p. 536.

²¹ Bassiouni, M. Cherif; Hansen, Douglass (2016) "The Inevitable Practice of the Office of the Prosecutor," in R. H. Steinberg, ed. *Contemporary issues facing the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 315.; Franceschet, Antonio (2016) "The International Criminal Court's Authority Crisis and Kant's Political Ethics," *International Criminal Law Review* 1-15. p. 5.

²² See Peake, Jessica (2016) "The Institutional Framework of the Office of the Prosecutor, Legitimacy, and Overcoming Bias Allegations," in R. H. Steinberg, ed. *Contemporary Issues Facing the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 364; Orentlicher, Diane (2013) "Remarks of Diane Orentlicher," 107 *American Society of International Law (Proceedings of the Annual Meeting)* 425-428.; Stegmiller, Ignaz (2013) "The International Criminal Court and Mali: Towards

a lot of the criticism thrown at the Court with regards to the selection of situations and cases according to gravity, is based on difference in presumptions of a) how gravity is to be assessed generally and b) if and how situation and case gravity differ. It is inevitable that an analysis based on different presumptions will lead to different conclusions. Evaluating the admissibility of situations is a novelty in international criminal law and unfortunately, the distinction between the admissibility criteria for situations and cases has not been discussed extensively in the academic community so far:²³ “Few attention, however, was devoted to the distinction between ‘situations’ and ‘cases’ and the question how gravity would affect the actual choices of the Prosecutor.”²⁴ And if it did, it was mostly related to another aspect of the admissibility test, complementarity.²⁵ Attempting to fill this gap in the discussion, the following research question is formulated:

How does and should the Court apply the gravity threshold, in particular with regards to differentiating between situation and case gravity?

The goal of this thesis is to show if the Court’s application of the gravity threshold is reasonable and based on the correct presumptions or if the criticism, or part of it, is valid. Chapter 3 will outline and systematise the criticism to facilitate its validation. Two situations and two cases have been chosen to contrast and exemplify the arguments made. After illustrating the methodology in the chapter 4, chapter 5 will then depict the selection process for situations and cases and chapter 6 will show how the OTP and the Chambers have applied the gravity threshold thus far. Chapter 7 then analyses the Court’s approach by contrasting it with the points raised by critics. Contrasting approaches will be evaluated applying the previously outlined methodology and applied to the example situations and cases in chapter 8. In chapter 9 a conclusion will be drawn and an outlook on future discussions given.

more Transparency in International Criminal Law Investigations?," 24 *Criminal Law Forum* 475-499. p. 499.

²³ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. p. 34.

²⁴ Stahn, Carsten (2009) "Judicial review of prosecutorial discretion: Five years on," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 267.

²⁵ See Rastan, Rod (2008) "What is a 'Case' for the Purpose of the Rome Statute," 19 *Criminal Law Forum* 435-448. (3), Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd.

3 Outline – Discussion of criticism on the Court’s application of the gravity threshold

As outlined in the introduction, criticism with respect to the application of the gravity threshold in the selection of situations and cases has been a constant companion of the Court’s operations. The critics’ arguments are mostly based on comparisons, aiming to prove that the application of the gravity threshold is inconsistent, and can be divided into three categories: a) comparing situations that were selected with situations that were not; b) comparing cases that were selected with cases that were not; c) comparing cases that were selected with situations that were not.

3.1 Situation v. Situation

Category a) was already touched upon in the introduction. The criticism revolves around the fact that all except one situation under investigation are situated on the African continent and that hence Africa has allegedly been unfairly targeted while equally grave situations in other parts of the world were ignored.²⁶ This line of criticism is arguably the most prominent and has hence also been countered exhaustively.

For example, one counter-argument has been brought forward in the context of the recent withdrawals seeing the criticism as a pretence to hide the more self-serving motives of gaining leverage at the Assembly of States Parties and of protecting the impunity of the respective states’ elites.²⁷ The New York Times hold in this regard: “The autocratic leaders of Gambia and Burundi fear not a resurgence of colonialism but being held accountable for their abuses. In South Africa, President Jacob Zuma is motivated by domestic and regional politics at a time when his integrity and leadership have rightly come under scrutiny.”²⁸

Human Rights Watch argues that the criticism on the Court’s concentration on Africa is difficult

²⁶ See Human Rights Watch (2016a) "Fifteenth Session of the International Criminal Court Assembly of States Parties," <https://www.hrw.org/news/2016/11/11/fifteenth-session-international-criminal-court-assembly-states-parties> (accessed 30 November 2016).

²⁷ Valdés Andino, Florencia (2016) "Burundi, Afrique du Sud, Gambie... La Court pénale internationale navigue en eaux troubles," TV5MONDE, <http://information.tv5monde.com/info/burundi-afrique-du-sud-gambie-la-cour-penale-internationale-navigue-en-eaux-troubles-136390> (accessed 01 November 2016).

²⁸ The New York Times (2016) "A Stronger Court for Crimes Against Humanity," <http://www.nytimes.com/2016/11/03/opinion/a-stronger-court-for-crimes-against-humanity.html?mabReward=A5&recp=0&moduleDetail=recommendations-0&action=click&contentCollection=Opinion®ion=Footer&module=WhatsNext&version=WhatsNext&contentID=WhatsNext&src=recg&pgtype=article> (accessed 5 November 2016).

to substantiate if one looks at the facts.²⁹ The jurisdiction of the Court is limited to the territory or the nationals of member states or situations referred to it by the Security Council - many situations therefore being out of its reach. Out of the nine situations in Africa, five were self-referrals (i.e. the respective state itself referred the situation on its territory to the ICC). Two, Libya and Sudan, were referred to the OTP by the Security Council. The OTP acted on its own initiative in only two situations: Kenya and Cote d'Ivoire. However, it is worth mentioning that in the case of Cote d'Ivoire, the government indirectly invited the ICC to conduct investigations.³⁰ Given that the OTP, except in one or arguably two instances, did not initiate investigations *proprio motu*, the reasoning put forward to support a bias towards Africa has been argued to be largely unfounded or directed at the wrong addressee.³¹

One point, however, that could give more substance to the position of bias in situation selection, is the claim that situations in other parts of the world were purposely neglected: "What has become most problematic for the Court's credibility and impartiality in this regard are the situations and cases that have not been selected, and the criteria and discourse used to justify such omissions and imbalanced prosecutions."³²

The problem, therefore, might be less that nine situations in Africa are under investigation, but that until 2016 there were no investigations in any other region of the world. A study by Smeulers, Weerdersteijn and Hola aspired to address this concern by conducting an empirical evaluation of the situations under investigation by the Court in comparison to other potential situations not investigated. The study shows, in contrast to what critics claimed, that generally the OTP's selection covered the gravest situations in the world.³³ While the study has its

²⁹ Human Rights Watch (2016a) "Fifteenth Session of the International Criminal Court Assembly of States Parties," <https://www.hrw.org/news/2016/11/11/fifteenth-session-international-criminal-court-assembly-states-parties> (accessed 30 November 2016).

³⁰ *Situation in the Republic of Cote d'Ivoire*, ICC-01/11-14 "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire" (3 October 2011a). paras. 11-12.; Tiemessen, Alana (2014) "The International Criminal Court and the politics of prosecutions," 18 *The International Journal of Human Rights* 444-461. (4-5). p. 453.

³¹ See discussion in Krever, Tor (2016) "Africa in the Dock: On ICC Bias," Critical Legal Thinking, <http://criticallegalthinking.com/2016/10/30/africa-in-the-dock-icc-bias/> (accessed 12 November 2016).

³² Tiemessen, Alana (2013) "Defying Gravity: Seeking Political Balance in ICC Prosecutions," Justice in Conflict, <https://justiceinconflict.org/2013/04/22/defying-gravity-seeking-political-balance-in-icc-prosecutions/> (accessed 4 September 2016).

³³ Smeulers, Alette; Weerdersteijn, Maartje; Hola, Barbora (2015) "The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance," 15 *International Criminal Law Review* 1-39.

methodological limitations, it raises more questions with regard to the validity of the arguments of bias in situation selection.³⁴

3.2 Case v. Case

It is, however, more difficult to dismiss criticism regarding category b), case selection. The ICC does not face the same jurisdictional limitations here and self-serving motives can hardly be claimed for critics such as NGOs, academics and the affected population. Much of the criticism resembles the allegations of victor's justice faced by the Nuremberg and Tokyo tribunals – the “winners” of a conflict escaping justice, while the “losers” are held accountable. With regard to all situations for which the OTP has identified cases (which excludes Central African Republic II and Georgia), discontent about the case selection has been expressed.³⁵ One commentator summarises the issue as follows: “The gravity threshold is presumed to be an impartial legal criterion. But upon further scrutiny it has provided a legal justification for

³⁴ See section 7.4.

³⁵ On case selection in Uganda: Schabas, William A. (2008) "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," 6 *Journal of International Criminal Justice* 731-761. pp. 752-753; Rodman, Kenneth A.; Booth, Petie (2013) "Manipulated Commitments: The International Criminal Court in Uganda," 35 *Human Rights Quarterly* 271-303. (2). p. 289. On case selection in DRC: Schabas, William A. (2008) "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," 6 *Journal of International Criminal Justice* 731-761. pp. 738, 741.; Clark, Phil (2008) "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," *Courting Conflict? Justice, Peace and the ICC in Africa*. p. 39. On case selection in Sudan: Nouwen, Sarah M. H.; Werner, Wouter G. (2011) "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," 21 *The European Journal of International Law* 941-965. (4).; Human Rights Watch (2011) "Unfinished Business - Closing Gaps in the Selection of ICC Cases," <https://www.hrw.org/report/2011/09/15/unfinished-business/closing-gaps-selection-icc-cases> (accessed 3 November 2016). On case selection in CAR: Arieff, Alexis; Margesson, Rhoda; Browne, Majorie A.; Weed, Matthew C., (2011) "International Criminal Court Cases in Africa. Status and Policy Issues," Congressional Research Service, <https://www.fas.org/sgp/crs/row/RL34665.pdf> (accessed 20 November 2016). On case selection in Kenya: Human Rights Watch (2011) "Unfinished Business - Closing Gaps in the Selection of ICC Cases," <https://www.hrw.org/report/2011/09/15/unfinished-business/closing-gaps-selection-icc-cases> (accessed 3 November 2016). On case selection in Libya: Kersten, Mark (2012) "The ICC to Investigate Libyan Rebel Crimes? We'll See.," *Justice in Conflict*, <https://justiceinconflict.org/2012/11/22/the-icc-to-investigate-libyan-rebel-crimes-well-see/> (accessed 5 November 2016).; United Nations Human Rights Council (2012) "Report of the International Commission of Inquiry on Libya," *A/HRC/19/68*. On case selection in Cote d'Ivoire: Human Rights Watch (2015a) "Making Justice Count - Lessons from the ICC's work in Cote d'Ivoire ", https://www.hrw.org/sites/default/files/report_pdf/cdi0815_4up.pdf (accessed 13 May 2016). p. 49; Human Rights Watch (2015b) ""To consolidate this Peace of Ours" - A Human Rights Agenda for Cote d'Ivoire," https://www.hrw.org/sites/default/files/report_pdf/cdi0815_4up.pdf (accessed 8 May 2016). p. 5. On case selection in Mali: Harber, Fatouma (2015) "Why the ICC has the wrong man on trial over invasion of Timbuktu," *The Guardian*, <https://www.theguardian.com/world/2015/sep/30/icc-mali-timbuktu-invasion-trial> (accessed 3 November 2016).

imbalanced prosecutorial strategies that often reflect a political balance of power at the domestic level.”³⁶

While it might be fair to say that the case selection process has its flaws based on objective criteria, the question arises again to which degree the OTP can be held responsible for this. The Court operates in a highly politicised context and lacks the enforcement powers of domestic judiciaries. The statement made by the former Prosecutor that he “will apply the law without political considerations and [...] should not adjust to political consideration”,³⁷ has been argued to be difficult to implement for a Court sitting at the intersection of law and politics.³⁸

However, this is but one side of the paradox. For a Court that lacks the executive powers available in domestic systems and hence relies on support of its member states, it is also inherently difficult to conduct its work without making concessions to political realities and avoid being taken advantage of by states for their own strategic interests.³⁹ “This highlights a major tension in international justice, between the need to conduct expeditious investigations and prosecutions and the need to pursue representative cases involving those most responsible for crimes.”⁴⁰

Some commentators argue that including political considerations in the selection of situations and cases is not necessarily illegitimate.⁴¹ Davis believes that the OTP, based on political arguments, could and should decline investigations into situations and cases by reference to the “interest of justice” criterion of article 53, for example in case of lack of state cooperation.⁴² It might seem a straightforward choice not to proceed with investigations if the likelihood of being able to carry out successful investigations in the respective country or against the respective suspect is minimal. However, going down this road can have dangerous consequences. It

³⁶ Tiemessen, Alana (2013) "Defying Gravity: Seeking Political Balance in ICC Prosecutions," *Justice in Conflict*, <https://justiceinconflict.org/2013/04/22/defying-gravity-seeking-political-balance-in-icc-prosecutions/> (accessed 4 September 2016). See also Davis, Cale (2015) "Political Considerations in Prosecutorial Discretion at the International Criminal Court," 15 *International Criminal Law Review* 170-189. p. 178

³⁷ Moreno-Ocampo, Luis (2008) "The Rome Statute of the International Criminal Court - Tenth Anniversary Commemoration," New York: United Nations. p.15.

³⁸ Franceschet, Antonio (2016) "The International Criminal Court's Authority Crisis and Kant's Political Ethics," *International Criminal Law Review* 1-15. p. 1.

³⁹ *Ibid.* p. 6.

⁴⁰ Clark, Phil (2008) "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," *Courting Conflict? Justice, Peace and the ICC in Africa*. p. 41

⁴¹ Davis, Cale (2015) "Political Considerations in Prosecutorial Discretion at the International Criminal Court," 15 *International Criminal Law Review* 170-189. p. 174.

⁴² *Ibid.* p. 172.

provides states opposing investigations with an easy way out and goes against the objective and purpose of the Rome Statute “that the most serious crimes of concern to the international community as a whole must not go unpunished” and to “put an end to impunity of the perpetrators of these crimes and thus contribute to the prevention of such crimes”.⁴³

An example for the value of investigations that do not lead to convictions is the Kenya situation according to Orentlicher. Even though none of the accused could be effectively prosecuted largely due to lack of state cooperation, “many Kenyans and Kenya experts are convinced that the ICC’s engagement played a vital role in preventing a recurrence of election-related violence during recent presidential elections.”⁴⁴ Notwithstanding this, is it recommendable for the OTP to completely abandon pragmatic considerations as ineffective investigations are also an obstacle to advancing the Court’s goals?

The selection of cases remains a balancing act between idealism and reality. As one commentator put it, the question is not “whether selective prosecution should occur, as it is essentially impossible that it does not, but when selective prosecution is unacceptable.”⁴⁵ It has been argued that the Court needs to communicate this more clearly.⁴⁶

3.3 Situation v. Case

The discussion shows the importance of evaluating whether and to what extent the criticism against the OTP has merit and as such should lead to the Court changing its approach to situation and case selection. It further shows the extent of writings and studies expressing and refuting criticism regarding the Court’s performance in situation and case selection. As to category c), criticism comparing a case with a situation, relatively little has been done to systemise and scrutinise the points made by critics.⁴⁷ One paper has recently been published touching on the subject, but it is limited in scope and reaches the conclusion that “whether there

⁴³ Preamble of the Rome Statute

⁴⁴ Orentlicher, Diane (2013) "Remarks of Diane Orentlicher," 107 *American Society of International Law (Proceedings of the Annual Meeting)* 425-428.

⁴⁵ Guariglia, Fabricio (2009) "The selection of cases by the Office of the Prosecutor of the International Criminal Court," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 211.

⁴⁶ Stegmiller, Ignaz (2013) "The International Criminal Court and Mali: Towards more Transparency in International Criminal Law Investigations?," 24 *Criminal Law Forum* 475-499. p. 499.

⁴⁷ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. p. 34.; Peake, Jessica (2016) "The Institutional Framework of the Office of the Prosecutor, Legitimacy, and Overcoming Bias Allegations," in R. H. Steinberg, ed. *Contemporary Issues Facing the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 363.

is some difference in criteria between the assessments of the gravity of a case and the gravity of a situation would not practically affect the Court's conclusion."⁴⁸ The discussion below will show whether that is actually the case. The author further acknowledges that more in-depths research on the subject is needed.⁴⁹

The critics' arguments are based on a comparison of the selection of a situation with the selection of a case; often without differentiating between the two or explaining if the same or different gravity standards should be applied. This has led to confusion as to whether there is a difference between situation and case gravity and if so, how this difference manifests itself. Two examples which perfectly illustrate the critics' line of argument are:

1. The comparison of the decision not to investigate the Iraq situation with the decision to initiate charges against Thomas Lubanga Dyilo (*hereinafter* Lubanga) within the situation in the Democratic Republic of the Congo (DRC) and against Bahar Idriss Abu Garda (*hereinafter* Abu Garda) within the Darfur situation; and
2. The comparison of the decision not to investigate the Comoros situation with the decision to initiate charges against Ahmad Al Faqi Al Mahdi (*hereinafter* Al Mahdi) within the Mali situation and, again, against Abu Garda.

In looking at whether and how to differentiate between situation and case gravity, also the gravity concept itself needs be examined as understanding of the latter is necessary to analyse the former. The discussion will focus on criticism regarding the application of the gravity threshold and will not include disputes on the facts (such as the number of victims in a situation/case).

3.3.1 *Iraq v. DRC/Lubanga and Darfur/Abu Garda*

In February 2006, the Prosecutor informed the public that the Office had received "over 240 communications concerning the situation in Iraq".⁵⁰ After evaluating the communications and further available information, the Office decided not to initiate *proprio motu* investigations because the situation (the conduct of British troops in Iraq in the period of deployment from 20

⁴⁸ Ochi, Megumi (2016) "Gravity Threshold before the International Criminal Court: An Overview of the Court's Practice," 16 *ICD Brief*. p. 16.

⁴⁹ Ibid.

⁵⁰ Office of the Prosecutor (2006) "OTP response to communications received concerning Iraq," International Criminal Court, https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed 3 November 2016). p. 1.

March 2003 – 28 July 2009) allegedly would not meet the gravity threshold.⁵¹ The material jurisdiction only extended to two war crimes according to the Prosecutor: “wilful killing (Article 8(2)(a)(i)) and torture or inhumane treatment (Article 8(2)(a)(ii)).”⁵² The Prosecutor estimates the number of victims of wilful killings to rank between four and twelve and the number of victims of torture and/or inhumane treatment to be below twenty.⁵³

In 2014, the OTP re-opened preliminary examinations into the Iraq situation on the basis of new information it had received via an article 15 communication. The preliminary examination is currently at the subject-matter jurisdiction stage and has hence not touched upon the issue of gravity yet.⁵⁴

In the statement by the Prosecutor declaring that the Office would not investigate the Iraq situation in 2006, he contrasts the Iraq situation with, amongst others, the DRC situation with respect to their gravity. The decision on Iraq was made the same month an arrest warrant against Lubanga was issued. Some have hence taken up the opportunity and compared the application of the gravity threshold in the Iraq situation with the case against Lubanga within the DRC situation.⁵⁵ Before outlining their arguments, the DRC situation and the case against Lubanga is briefly illustrated.

In June 2004, former ICC Prosecutor Luis Moreno-Ocampo announced his decision to initiate investigations into the first situation following a self-referral by the DRC three months earlier. The conflict in Eastern DRC had been raging since the 1990s and is estimated to have caused the highest death toll since the Second World War.⁵⁶ The jurisdiction of the ICC only extends to crimes committed since 1 July 2002, however, there appears to be no lack of crimes falling under its jurisdiction afterwards. Human Rights Watch (HRW) believes that more than 5,000 civilians died in Ituri, a district in Eastern DRC and main focus of the OTP’s investigation, and thousands more died in other regions between July 2002 and March 2003, as result of direct

⁵¹ Ibid. p. 9.

⁵² Ibid. p. 8.

⁵³ Ibid.

⁵⁴ Office of the Prosecutor (2016c) "Report on Preliminary Examination Activites 2016 - 14 November 2016," The Hague: International Criminal Court. paras 77, 107.

⁵⁵ See e.g. El Zeidy, Mohamed M. (2008) "The Gravity Threshold under the Statute of the International Criminal Court," 19 *Criminal Law Forum* 35-57. p. 40.; Schabas, William A. (2008) "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," 6 *Journal of International Criminal Justice* 731-761. p. 741.

⁵⁶ Human Rights Watch (2004) "ICC's First-Ever Probe Must Be Effective - Criminal Responsibility in Congo Conflict Reaches Across Borders," Brussels: Human RightsWatch.

violence. Further, HRW emphasises the widespread use of sexual violence as a weapon of war in the DRC.⁵⁷ Government troops as well as rebel groups were identified as perpetrators.⁵⁸

Some years into the investigation, many were disappointed with what was perceived as slow progress and politically motivated choices in the case selection.⁵⁹ Next to criticism regarding the choice of region and suspects, also the choice of charges, especially in the Lubanga case, was contested.⁶⁰ Lubanga was the first individual from the DRC situation for whom an arrest warrant was issued. He was charged with three counts of war crimes relating to the recruitment and use of child soldiers. His conviction was finalised in 2014.⁶¹ Lubanga was the founder and head of the Union of Congolese Patriots (UPC), a rebel group operating in the Ituri region since mid-2002.⁶² From its creation roughly coinciding with the start date of the ICC's jurisdiction until mid-2003, the UPC was responsible for the deaths of 2369 civilians through one-sided violence.⁶³ Against this background, the Office of the United Nations High Commissioner for Human Rights (OHCHR) stated that the scope of the charges "failed to provide justice to the

⁵⁷ Ibid. According to the Uppsala Data Conflict Programme 39 actors (rebel groups and government forces) have committed one-sided violence in the DRC since 2002. One-sided violence is defined as "(t)he use of armed force by the government of a state or by a formally organised group against civilians which results in at least 25 deaths in a year."⁵⁷ The fact that it was one-sided is relevant in this context as deaths resulting from this form of violence are more likely to constitute a Rome Statute crime than battle-related deaths. See Uppsala Conflict Data Programme (2016a) "DR Congo (Zaire) - One-sided violence," <http://ucdp.uu.se/#country/490> (accessed 3 November 2016).

⁵⁸ Amnesty International (2004) "2004 UN Commission on Human Rights: Mission: to promote and protect human rights," IOR 41/001/2004. p. 62.

⁵⁹ See Office of the United Nations High Commissioner for Human Rights (2010) "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003." para. 1023.; Mattioli, Géraldine; Van Woudenberg, Anneke (2008) "Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo," in N. Wadell; P. Clark, ed. *Courting Conflict? Justice, Peace and the ICC in Africa*. Royal African Society.; Human Rights Watch (2011) "Unfinished Business - Closing Gaps in the Selection of ICC Cases," <https://www.hrw.org/report/2011/09/15/unfinished-business/closing-gaps-selection-icc-cases> (accessed 3 November 2016). p. 11.; Clark, Phil (2008) "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," *Courting Conflict? Justice, Peace and the ICC in Africa*. p. 452.

⁶⁰ Human Rights Watch (2011) "Unfinished Business - Closing Gaps in the Selection of ICC Cases," <https://www.hrw.org/report/2011/09/15/unfinished-business/closing-gaps-selection-icc-cases> (accessed 3 November 2016). p. 21.

⁶¹ International Criminal Court (2016b) "Case Information Sheet - The Prosecutor v. Thomas Lubanga Dyilo," ICC-PIDS-CIS-DRC-01-015/16_Eng.; Schabas, William A. (2009) "Prosecutorial discretion and gravity," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 240.

⁶² Uppsala Conflict Data Programme (2016c) "UPC - Summary," <http://ucdp.uu.se/#actor/1076> (accessed 3 November 2016).

⁶³ Uppsala Conflict Data Programme (2016b) "UPC - Civilians," <http://ucdp.uu.se/#/onesided/1094> (accessed 3 November 2016).

hundreds or even thousands of civilians killed by the UPC and did not reflect the true scale of the criminal activities of the accused, [...].”⁶⁴ The points made have not only been taken up to address alleged flaws in the case selection within the DRC situation, but his arrest was especially criticised in relation to the Prosecutor’s decision not to investigate the Iraq situation.

Schabas argues that the Prosecutor’s decision not to investigate the Iraq situation was based on a flawed gravity assessment contrasting alleged crimes committed by British troops “with the ‘thousands of deaths in the DRC, yet then proceed in a case of recruiting child soldiers in which allegations of homicide were not even made. The Prosecutor was comparing apples with oranges.”⁶⁵ He believes that the Prosecutor’s gravity assessment of the Iraq situation was based on an imprecise comparison to another situation.⁶⁶ Schabas’ assessment has been referred to in numerous articles on gravity⁶⁷ and is supported by the WRCO which holds that the comparison of crimes within the Court’s jurisdiction in the Iraq situation with the total number of killings in other situations was flawed.⁶⁸ Similarly, El Zeidy has put forward that “[w]hen compared to the crimes of wilful killing or rape committed by the British soldiers in Iraq, one many question which crime is more serious: wilful killing or conscripting children? The latter was not even deemed as a violation before the adoption of the Additional Protocols to the Geneva Convention.”⁶⁹ This line of argument purports that the Prosecutor erred in comparing the entire DRC situation with the Iraq situation. Instead, the Lubanga case serves as a yardstick to measure the alleged crimes in Iraq against. This argument is based on the presumption that there should

⁶⁴ Office of the United Nations High Commissioner for Human Rights (2010) "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003." para. 1023.; See also Clark, Phil (2008) "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," *Courting Conflict? Justice, Peace and the ICC in Africa*.; Schabas, William A. (2008) "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," 6 *Journal of International Criminal Justice* 731-761. pp. 743-744

⁶⁵ Schabas, William A. (2008) "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," 6 *Journal of International Criminal Justice* 731-761. p. 741.

⁶⁶ Ibid. p. 748.

⁶⁷ See e.g. Stegmiller, Ignaz (2009) "The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda," 9 *International Criminal Law Review* 547-565. p. 551; Ambos, Kai (2010) *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court*. Heidelberg: Springer. p. 44.

⁶⁸ War Crimes Research Office (2009) "The Relevance of "A Situation" to the Admissibility and Selection of Cases Before the International Criminal Court," Washington D.C.: American University Washington College of Law. p. 5.

⁶⁹ El Zeidy, Mohamed M. (2008) "The Gravity Threshold under the Statute of the International Criminal Court," 19 *Criminal Law Forum* 35-57. p. 40.

not be a difference between the gravity assessment of a situation and the gravity assessment of a case.

When the Court later filed charges against Abu Garda in the Darfur situation, similar points were raised. DeGuzman criticises that the OTP applied different standards in its gravity evaluation of the Iraq situation and the Abu Garda case within the Darfur situation.⁷⁰

The Darfur situation was referred to the Court by the UNSC in March 2005. Human Rights Watch estimates that in the years 2003 and 2004, thousands had fallen victim of murder, rape and displacement through the conduct of Sudanese government forces, allied, and rebel militias in the Darfur region.⁷¹ The OTP concluded there was reasonable basis to believe that crimes such as murder, rape, and persecution amounting to genocide, crimes against humanity and/or war crimes had been committed. The Court issued six arrest warrants/summons to appear, amongst them against the President and other high-ranking officials for crimes involving hundreds of victims, but also against Abu Garda, a leader of the Justice and Equality Movement (JEM). He was accused of the war crimes of killing twelve and further attempting to kill eight African Union Mission in Sudan (AMIS) peacekeeping personnel as well as for attacking AMIS installations and pillaging AMIS material.⁷² While the charges against him were not confirmed for lack of evidence, the OTP and the respective Pre-Trial Chamber found the case met the gravity threshold. Critics took this finding up to underline their argument that the Iraq situation was unreasonably dismissed as the number of victims was comparable.⁷³ Later, the case against Abu Garda was also used as a reference point for criticism pertaining the Prosecutor's choice not to open investigations into the Comoros situation.

3.3.2 *Comoros v. Darfur/Abu Garda and Mali/Al Mahdi*

In 2013, the Union of Comoros referred the situation of registered vessels of Comoros, Greece, and Cambodia from 31 May 2010 – 5 June 2010 to the OTP. The vessels were part of humanitarian aid flotilla which was intercepted by Israeli Defense Forces (IDF) when

⁷⁰ DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. p. 1460.

⁷¹ Human Rights Watch (2005) "World Report - 2005," <https://www.hrw.org/legacy/wr2k5/wr2005.pdf> (accessed 3 December 2016). p. 26.

⁷² *Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red "Decision on the Confirmation of Charges" (8 February 2010). para. 21.

⁷³ Seils, Paul (2015) "Putting Complementarity in its Place," in C. Stahn, ed. *The Law and Practice of the International Criminal Court*. Oxford: Oxford University Press. p. 322.

attempting to break the naval blockade established by Israel to deliver aid to Gaza.⁷⁴ The interception left ten passengers dead and 50-55 injured. While the OTP concluded that these incidents amounted to war crimes, it did not consider them to be of sufficient gravity for the Court to proceed with a formal investigation.⁷⁵

This decision raised criticism: “To suggest that one attack for a few hours in Darfur is much more serious than this attack on the high seas which took place as part of a total blockade in an armed conflict that has occupied the world’s attention for decades is very hard to justify.”⁷⁶ The argument appears to be based on the presumption that situation equals case gravity and further suggests that facts which are outside the Court’s jurisdiction should be considered in the gravity evaluation.

As the comparison to the Abu Garda case was also made by the Pre-Trial-Chamber (PTC) disagreeing with the OTP’s gravity assessment, there was also criticism from the other side; from those supporting a differentiation between situational and case gravity:

“The number of victims in the Comoros situation is indeed comparable to the number of victims in the JEM attack on the UN peacekeepers in Darfur. But the Abu Garda and Abdallah Banda case was one of many cases within the Darfur situation; when we compare the number of victims in the Comoros situation to the Darfur situation *as a whole*, it is clear that the PTC has no basis whatsoever to insist that the “scale” factor counsels in favour of finding the Comoros situation grave enough to formally investigate. The comparison is then between 10 civilian deaths and hundreds of

⁷⁴ Office of the Prosecutor (2014b) "Situation on Registered Vessels of Comoros, Greece and Cambodia - Article 53(1) Report," The Hague: International Criminal Court. paras 2-12.; *See also* Buchan, Russell (2014) "Scoping Out the Crime: Palestine, the Mavi Marmara and the ICC," Justice in Conflict, <https://justiceinconflict.org/2014/12/08/scoping-out-the-crime-palestine-the-mavi-marmara-and-the-icc/> (accessed 29 September 2016).

⁷⁵ Office of the Prosecutor (2014b) "Situation on Registered Vessels of Comoros, Greece and Cambodia - Article 53(1) Report," The Hague: International Criminal Court. para. 75.

⁷⁶ Dixon, Rodney (2015) "ICC and the Gaza Freedom Flotilla: The Lawyers explain," in N. Jakobsson, ed.: Justice Hub, <https://justicehub.org/article/icc-and-gaza-freedom-flotilla-lawyers-explain> (accessed 12 September 2016).; *See also* Jacobs, Dov (2013) "The Comoros Referral to the ICC of the Israel Flotilla Raid: When a 'situation' is not really a 'situation'," Spreading the Jam, <https://dovjacobs.com/2013/05/15/the-comoros-referral-to-the-icc-of-the-israel-flotilla-raid-when-a-situation-is-not-really-a-situation/> (accessed 28 September 2016).

thousands. [...], the OTP obviously cannot assess the gravity of an entire situation in the same way that it assesses the gravity of a specific crime within a situation.”⁷⁷

Others compare the OTP’s assessment of gravity in the Comoros situation, also referred to as Flotilla case, with the case against Al Mahdi. Vogelvang and Clerc hold that “[...] it is not immediately understandable why this case would qualify for prosecution by the ICC, when the Flotilla case did not.”⁷⁸ Underlining this argument, they believe that it is questionable whether Al Mahdi was the most responsible for the charged crimes and whether the charges against him met the gravity threshold.⁷⁹

Following a self-referral by Mali, the OTP started investigations into the Mali situation in January 2013. The situation comprises Rome Statute crimes committed on the territory of Mali since January 2012. The main focus of the OTP are crimes committed in the context of the armed conflict in the northern regions of Mali; such as murder, mutilation, rape, and directing attacks against protected objects attributed to the armed groups such as Al Qaeda in the Islamic Maghreb (AQIM) and other militias.⁸⁰ The incidents under investigations included the “alleged execution of 70-153 detainees in Aguelhok”,⁸¹ “looting and rape (90 cases of rape or attempted rape)”,⁸² “the imposition of severe punishments and the destruction of historic religious buildings in Timbuktu and other areas in the North”,⁸³ and “torture and enforced disappearances.”⁸⁴

In 2015, an arrest warrant against Ahmad Al Faqi Al Mahdi was issued. He was charged with the war crime of directing attacks against nine mausoleums and one mosque in Timbuktu in the period 30 June 2012 – 11 July 2012. In the respective time period, he was head of the *Hesbah* which was installed by AQIM and Ansar Dine⁸⁵ to control the morality of the population in

⁷⁷ Heller, Kevin J. (2015) "The Pre-Trial Chamber's Dangerous Comoros Review Decision," *Opinio Juris*, <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/> (accessed 4 August 2016).

⁷⁸ Vogelvang, Eva; Clerc, Sylvain (2016) "The Al Mahdi case: Stretching the principles of the ICC to a breaking point?," *Justice Hub*, <https://justicehub.org/article/al-mahdi-case-stretching-principles-icc-breaking-point> (accessed 3 November 2016).

⁷⁹ *Ibid.*

⁸⁰ Office of the Prosecutor (2017) "Mali - Situation in the Republic of Mali ICC-01/12," *International Criminal Court*, <https://www.icc-cpi.int/mali> (accessed 18 November 2016).

⁸¹ Office of the Prosecutor (2013c) "Situation in Mali - Article 53(1) Report," *The Hague: International Criminal Court*. para. 50.

⁸² *Ibid.* para. 51.

⁸³ *Ibid.*

⁸⁴ *Ibid.* para. 52.

⁸⁵ Militant Islamist Group based in Northern Mali

Timbuktu.⁸⁶ A year later, he was found guilty of all counts in the subsequent trial and sentenced to nine years in prison.⁸⁷ The Chamber established that “Al Mahdi knew that he exercised joint control over the attack and was fully implicated in its execution.”⁸⁸

As indicated, the gravity assessment in the Al Mahdi case has been criticised in comparison to the Comoros situation. In this line, criticism with respect to the personal and material element of gravity has been expressed; i.e. that Al Mahdi was a “small fish” and that the charges target the lesser crime of destruction of property while the graver crimes such as rape were not prosecuted.⁸⁹ As of now, no other case is prosecuted in the Mali situation.

3.4 Summary – Discussion of criticism on the Court’s approach to gravity

That the issue as to the difference between situation and case gravity remains unresolved is further shown by Zakerhossein’s comments on the 2016 *OTP Policy Paper on the Selection and Prioritisation of Cases*. He argues that the paper “[...] implies that to make a prioritisation among available cases, the Prosecutor should select those cases that are gravest not only within a situation but also across other situations. However, this interpretation is clearly wrong. [...] To select a situation and in the situational gravity assessment, a comparison should be made among the available situations.”⁹⁰ This statement suggests that Zakerhossein, in contrast to some of the critics whose points have been outlined above, believes that there should be a difference between situation and case gravity. Both sides, however, are united in their estimation that the Court’s decision-making or policies regarding the selection of situations and cases based on gravity are flawed. The outline of their arguments has shown that disagreements mainly revolve around the following five issues:

⁸⁶ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-171 “Judgment and Sentence” (27 September 2016). paras 32-33.

⁸⁷ International Criminal Court (2016a) “Case Information Sheet - The Prosecutor v. Ahmad Al Faqi Al Mahdi,” ICC-PIDS-CIS-MAL-01-08/16_Eng. The Hague.

⁸⁸ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-171 “Judgment and Sentence” (27 September 2016). para. 40.

⁸⁹ The International Federation for Human Rights (2015) “Mali: The hearing of Al Mahdi before the ICC is a victory, but charges must be extended,” <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/mali-the-hearing-of-abou-tourab-before-the-icc-is-a-victory-but> (accessed 20 November 2016).; Harber, Fatouma (2015) “Why the ICC has the wrong man on trial over invasion of Timbuktu,” *The Guardian*, <https://www.theguardian.com/world/2015/sep/30/icc-mali-timbuktu-invasion-trial> (accessed 3 November 2016).

⁹⁰ Zakerhossein, Mohammad H. (2016) “Comments on the ICC OTP’s draft policy paper on the case selection and prioritisation,” *Justice Hub*, <https://justicehub.org/article/comments-icc-otps-draft-policy-paper-case-selection-and-prioritisation> (accessed 15 July 2016).

1. Establishment of sufficient gravity in accordance with articles 53(1) and 17: A legal requirement or open for prosecutorial discretion? In relation to that, can gravity be assessed in relative or only in absolute terms? How exact can the gravity assessment be?
2. How is the material element of gravity to be assessed? Do quantitative and qualitative factors such as “scale”, “nature”, “manner of commission”, and “impact” of the crime have to be present or can abundance of one or some factors outweigh non-existence of others?
3. With respect to the personal element of gravity: Should the position of the perpetrator be included in the assessment or only his/her level of responsibility? How is this factor to be assessed at the situation stage?
4. How is situational gravity to be evaluated? Should the gravity assessment pertain to the situation in general or to potential cases arising from it? How can these two be distinguished? Should situations and cases be assessed according to different standards? In relation to this inquiry, should cases be compared across situations or only situations with situations and cases within the same situation?
5. What are the boundaries for assessing a situation? Can facts that lie outside the Court’s jurisdiction be included in the gravity assessment?

These questions will guide this thesis in an effort to show whether or not the Court really compared “apples with oranges”. In Chapter 6, the criticism expressed by academics will be taken up in more detail and contrasted to the Court’s approach to determine who got it right. In Chapter 7 the findings will be applied to the example situations and cases. The term “Court” is used as not only the OTP, but also the Chambers have influence over the gravity assessment. The aim is to bring clarification to the application of the gravity threshold to situations and cases as it appears that a higher degree of specificity in the evaluation of gravity is needed.⁹¹ It should be emphasised that this discussion is more than a mere legal exercise. The limited resources of the Court mean that the OTP has to make choices as to which group of victims will receive justice and which will not. This is a difficult and controversial task. As Louise Arbour, former ICTR/ICTY Prosecutor, put it: “[T]he real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather

⁹¹ Peake, Jessica (2016) "The Institutional Framework of the Office of the Prosecutor, Legitimacy, and Overcoming Bias Allegations," in R. H. Steinberg, ed. *Contemporary Issues Facing the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 364.

than weed out weak or frivolous ones.’’⁹²

4 Methodology

The research question is qualitative in nature and consists of two dimensions: descriptive and normative.

Firstly, to identify the understanding of the concept of gravity by the OTP and the Chambers, the descriptive part, relevant OTP documents and ICC jurisprudence will be outlined. This review of legal documents will show, how the concept of gravity is to be applied according to the relevant organs of the Court.

The normative part will be examined in a hermeneutic manner by interpreting primary and, to a lesser degree, secondary sources in accordance with article 31 of the Vienna Convention on the Law of Treaties (VCLT) with the aim of identifying the meaning and scope of the term “gravity” and determining whether the Court’s concept and application of it is in line with this meaning.

The applicable law is determined in article 21 of the Rome Statute. Para. 1 states that the Court shall apply (a) firstly, “this Statute, Elements of Crimes and its Rules of Procedure and Evidence, (b) secondly, “applicable treaties and the principles and rules of international law” and (c) thirdly, “general principles of law derived by the Court from national laws of legal systems of the world”. Para. 2 adds that the Court “may apply principles and rules of law as interpreted in its previous decisions.”⁹³ The VCLT falls under article 21 (b) and can hence provide guidance on the interpretation of the Rome Statute.

The VCLT rules of interpretation are stipulated in articles 31 and 32. Article 31, para. 1, states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Para. 2 indicates that the context can be derived from the text of the treaty including its preamble and annexes as well as other agreements or instruments made between the parties in relation to the treaty. In addition, as described in para. 3, any other agreement, practice or relevant international law applicable to the interpretation of the treaty shall be taken into account.⁹⁴

⁹² Stahn, Carsten (2009) "Judicial review of prosecutorial discretion: Five years on," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 256.

⁹³ Article 21 of the Rome Statute

⁹⁴ Article 31 of the Vienna Convention on the Law of the Treaties

Article 32, establishing the supplementary means of interpretation, “the preparatory work of the treaty and the circumstances of its conclusion” may be referred to in order to clarify an interpretation following application of article 31 or “determine the meaning when the interpretation according to article 31 “(a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.”⁹⁵

The VCLT thereby in article 31 allows for textual (“in accordance with the ordinary meaning to be given to the terms”), systematic/contextual (“in their context”) and teleological (“in the light of its object and purpose”) as well as in article 32 for historical interpretation (“the preparatory work of the treaty and the circumstances of its conclusion”). Textual interpretation encompasses that the words used should be given their ordinary and natural meaning which must be unambiguous and must not lead to an absurd or unreasonable result. The systematic approach requires compatibility of the ordinary meaning of the terms with the treaty text and further agreements made regarding the treaty. Applying a teleological interpretation means determining the meaning of terms considering the object and purpose of the given treaty. This approach offers a larger extent of flexibility as the understanding of the object and purpose can evolve with political and societal developments. The historical approach is a supplementary means to confirm interpretation made in accordance with article 31 or, if no satisfying results can be reached by applying the three other forms, to ascertain the meaning.⁹⁶

The approach outlined in articles 31 and 32 VCLT will be applied in order to determine the meaning of the term “gravity” within the framework of the Rome Statute and the Rules of Procedure and Evidence. Since the concept of gravity is not defined in these documents and does not have an ordinary meaning in a legal context, a textual interpretation will produce very limited results. Therefore, recourse will often be taken to the systematic and teleological approach using historical interpretation complementarily.

While the basis for systematic and historical interpretation is relatively straightforward (looking at the context and the *travaux préparatoires* respectively), the teleological approach requires slightly more groundwork. Before evaluating whether the meaning of a term is in line with the object and purpose of the Rome Statute, it is indispensable to first determine what the object and purpose of the Rome Statute is. Looking at the Preamble and article 1 of the Statute proves particularly enlightening in this regard. Article 1 lists two main purposes relevant for a teleological interpretation: The Court a) “shall be a permanent institution”, b) “shall have the

⁹⁵ Article 32 of the Vienna Convention on the Law of the Treaties

⁹⁶ Kaczorowska, Alina (2010) *Public International Law*. London/New York: Routledge. pp.122-126

power to exercise its jurisdiction over persons for the most serious crimes of international concern”, and c) “shall be complementary to national criminal jurisdictions.”⁹⁷ The Preamble adds the following objectives: d) “the most serious crimes of concern to the international community as a whole must not go unpunished, e) [...] their effective prosecution must be ensured at the national level and by enhancing international cooperation f) “to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.” Further, the Preamble highlights that the background of the Court’s establishment is the history of humankind suffering from “unimaginable atrocities” and that “such grave crimes threaten the peace, security and well-being of the world”.⁹⁸

As some of the indicated goals overlap and/or include several purposes at once, it is sensible for an effective teleological interpretation to summarise them. The following five main objectives can be identified:

1. Prosecuting the most serious crimes of concern to the international community as a whole (see (b) and (d))
2. Putting an end to impunity (see (f))
3. Respecting and advancing complementary prosecution ((c) and (e))
4. Establishing a permanent and effective Court (see (a) and (e))
5. Preventing the said crimes from occurring and thereby contributing to a more peaceful world (see (f) and historical background)

While breaking down the object and purpose as found in the Preamble and article 1 provides more oversight and clarity, the identified goals are not completely separable, but interdependent and sometimes possibly contradictory.

Further, in accordance with article 21(b), also relevant jurisprudence by ad hoc tribunals will be included in the analysis.⁹⁹ The results will determine how the concept of gravity should be understood, in particular with regards to differentiating between situation and case gravity.

The descriptive and normative part will be accompanied by a comparative case study to exemplify the findings and to show how the Court’s policies and jurisprudence is applied. While the strategies of the OTP are naturally of general applicability and the Court’s jurisprudence covers numerous situations and cases, the application of the gravity threshold in practice will

⁹⁷ Article 1 of the Rome Statute

⁹⁸ Preamble of the Rome Statute

⁹⁹ See Article 21 of the Rome Statute

be analysed within the framework of a comparative case study. The case study will not be discussed in a separate section but will be conducted next to the theoretical part.

According to Bromley, a case study is a “systematic inquiry into an event or set of related events which aims to describe and explain the phenomenon of interest.”¹⁰⁰ The set of related events in this instance is a set of related situations and cases. As illustrated in the introduction, they are related by the controversy as to the distinction between situation and case gravity. Hence, these “events” were selected for the comparative case study as they are expected to offer the greatest explanatory insights into the applicability of situation and case gravity.

The application of gravity in the Iraq situation will be contrasted with the application in the Lubanga and the Abu Garda case and the Comoros situation with the Al Mahdi and the Abu Garda case by a review of relevant legal documents and literature. The choice of situations and cases covers almost the entire time period of Court operations increasing the validity of the results by capturing possible changes in the OTP’s and the Chambers’ approach. Iraq and Lubanga stood at the beginning of the Court’s operations in 2005, the decision on the confirmation of charges against Abu Garda was made in 2010, the first decision on the Comoros situation was made in 2014 and the confirmation of charges against Al Mahdi took place in 2016. It is worth noting that the significance of the results could be increased if all situations and cases covered by the Court could be evaluated with regard to their gravity. However, taking this approach would exceed the limits of this thesis.

5 The legal framework for the selection of situations and cases

In a first step, the process of starting an investigation into a situation and in prosecuting a case in accordance to the Rome Statute will be outlined. As the practice by the OTP of assessing admissibility at two stages (situation AND case stage) is not without controversy and relevant for the ensuing discussion on gravity, the issue will be covered in detail.

5.1 From a referral/communication to a case – steps in the selection process

As sketched out in the introduction, the three trigger mechanisms for the OTP to start an investigation are: referral by the UNSC (article 13(b)), referral by a state party (article 14), or the Prosecutor acting *proprio motu* following a communication by natural or legal persons

¹⁰⁰ Bromley, Dennis B. (1990) "Academic contributions to psychological counselling: A philosophy of science for the study of individual cases," 3 *Counselling Psychology Quarterly* 299-307. (3). p. 302.

(article 15). According to the wording in these articles, the subject of a referral or *proprio motu* investigation is a “situation”.

Following the procedure laid out in article 53(1) to determine if there is reasonable basis to pursue an investigation, the OTP starts with the preliminary examination phase by assessing whether the Court has temporal, material and territorial and/or personal jurisdiction over the respective situation in accordance with articles 5, 11, 12 and 53(1)(a) of the Statute. Opinions on whether the Prosecutor has to adhere to the exact scope of the situation referred to her/him by a state party and, to a more limited extent by the UNSC, differ. Some authors say that the OTP could, for example, extend the scope of a situation to cover an additional area or time period as long as it falls within the Court’s jurisdiction.¹⁰¹ The Office did so in the Uganda situation in which the referral by the Ugandan government solely regarded crimes committed by the LRA and the OTP amended the referral to “the situation in northern Uganda”.¹⁰² While the practice of the Court hence suggests that altering the scope of a situation following a referral is possible, some authors disagree with this practice. They contend that “absent invoking his or her *proprio motu* powers, there is no evidence that the ICC Prosecutor may choose cases that fall *beyond* the terms of a State Party or Security Council referral.”¹⁰³ This controversy will arise again later in the discussion.

Having established that the Court has jurisdiction over the situation in question, the OTP continues the preliminary examination by analysing whether the situation is admissible under articles 17 and 53.

According to article 17(1), a case is inadmissible when it a) and b) violates the principle of complementarity¹⁰⁴, c) the *ne bis in idem*¹⁰⁵ principle and/or d) “is not of sufficient gravity to justify further actions by the Court”.¹⁰⁶ Article 53(1) stipulates that the Prosecutor shall initiate

¹⁰¹ Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. pp. 108, 113.

¹⁰² Kersten, Mark (2016) "Yeah, Right... ICC Officials Say There's No Evidence Against Ugandan Military," Justice in Conflict, <https://justiceinconflict.org/2016/05/05/yeah-right-icc-officials-say-theres-no-evidence-against-ugandan-military/> (accessed 11 October 2016).

¹⁰³ War Crimes Research Office (2009) "The Relevance of "A Situation" to the Admissibility and Selection of Cases Before the International Criminal Court," Washington D.C.: American University Washington College of Law.

¹⁰⁴ The principle of complementarity limits the Court to exercise its jurisdiction to cases not already being investigated or prosecuted by a State „unless the State is unwilling or unable to genuinely carry out the investigation or prosecution. Article 17(1)(a) of the Rome Statute.

¹⁰⁵ Principle of law holding that a person shall not be tried for the same conduct twice. See Articles 17(1)(a) and (b) and 20 of the Rome Statute

¹⁰⁶ Article 17 of the Rome Statute

an investigation “unless he or she determines that there is no reasonable basis to proceed under the Statute” considering, amongst others, whether the case is or would be admissible under article 17 and whether it would not serve the “interest of justice”.¹⁰⁷ As “interest of justice” is

¹⁰⁷ Article 53 of the Rome Statute, full text:

Article 53: Initiation of an investigation

1. 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:
 - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 - (b) The case is or would be admissible under article 17; and
 - (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
 - (d) If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.
2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
 - (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
 - (b) The case is inadmissible under article 17; or
 - (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.”
3.
 - (a) At the request of the State making a referral under article 14 or the Security Council under article 12, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
 - (b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
4. The Prosecutor may, at any time, reconsider his decision whether to initiate an investigation or prosecution based on new facts or information.

not a positive criterion to be met, the necessary conditions for admissibility are *ne bis in idem*, complementarity and gravity.¹⁰⁸ The Statute does not determine the order in which those are to be examined,¹⁰⁹ however, as all three need to be met for an investigation or a prosecution to proceed, the least ambiguous aspect in the respective situation/case will likely be addressed first. As with the possibility of extending the jurisdictional scope of a situation, the practice of assessing its admissibility is subject to controversy as will be shown in part 5.3.

If the situation is determined to be admissible, the OTP either starts a formal investigation in accordance with article 54 or, in case it acted *proprio motu*, asks for authorisation of the investigation by the Pre-Trial Chamber and then starts a formal investigation.¹¹⁰ The Prosecutor then conducts an investigation with the goal of prosecuting one or several cases within the respective situation by “selecting geographic regions, selecting incidents, selecting groups, selecting persons most responsible for most serious crimes, selecting a case (decision to request a prosecution), and selecting charges.”¹¹¹ After having again assessed the admissibility criteria of articles 17 and 53 with regard to the specific case, and having established that “reasonable grounds” exist to proceed in accordance with article 58, the OTP then applies for a warrant of arrest or summons to appear.¹¹²

These steps of selecting a case from a situation do not necessarily follow a linear pattern which means that, while relatively clear in theory, the distinction between a situation and a case can become more complicated in practice.¹¹³ It is therefore prudent to delineate the two terms as clearly as possible.

¹⁰⁸ Schabas, William A. (2009) "Prosecutorial discretion and gravity," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 229.

¹⁰⁹ Office of the Prosecutor (2013a) "Policy Paper on Preliminary Examinations," The Hague: International Criminal Court. para. 42.; Guariglia, Fabricio (2009) "The selection of cases by the Office of the Prosecutor of the International Criminal Court," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p.214.

¹¹⁰ Article 54 of the Rome Statute

¹¹¹ Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. p. 118.

¹¹² Ibid. pp. 236-237.; Article 58 of the Rome Statute

¹¹³ Badagard, Lovisa; Klamberg, Mark (2016) "The Gatekeeper of the ICC - Prosecutorial strategies for selecting situations and cases at the International Criminal Court," <https://ssrn.com/abstract=2784470> (accessed 5 October 2016). p. 13

5.2 Defining the terms “situation” and “case”

“The elaboration of such definitions (of the terms “situation” and “case”) are central to the operation of the Statute, for upon their determination depend a series of procedural provisions relating, inter alia, to the assumption of jurisdiction, admissibility, [...]”.¹¹⁴

The Prosecutor’s announcement regarding initiating an investigation into the situation in the DRC in 2004 provided a first idea on the differentiation between the terms “situation” and “case” and how they are understood and applied by the OTP. The distinction between situations and cases has also been acknowledged by all Chambers of the Court¹¹⁵ and has become “a matter of procedural importance in the daily practice of the Court.”¹¹⁶

So how are the terms “situation” and “case” defined? Both terms appear in the Rome Statute in articles pertaining to the initiation of investigations and prosecutions. Differentiation between these two terms, however, is not as straightforward as it might seem at a first glance. As neither term is defined in the Rome Statute or the Rules of Procedure and Evidence, Pre-Trial Chamber I, in order to differentiate between victims of a situation and victims of a case, saw it necessary to delineate these terms as follows:

“**Situations**, which are generally defined in terms of temporal territorial and in some cases personal parameters, [...], entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. **Cases**, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear [emphasis added].”¹¹⁷

These definitions have largely remained unchallenged and hence represent the widely accepted understanding of what is meant by “situation” and “case” in the context of the Rome Statute.¹¹⁸ A situation, therefore, sets the basic jurisdictional boundaries of time, place, and potentially of

¹¹⁴ Rastan, Rod (2008) "What is a 'Case' for the Purpose of the Rome Statute," 19 *Criminal Law Forum* 435-448. (3). p. 436.

¹¹⁵ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. p. 22.

¹¹⁶ Ibid. p. 26.

¹¹⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-101-tEN-Corr "Decision on the application for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (24 February 2006). para. 65.

¹¹⁸ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. p. 25.

a set of individuals, from which cases can be derived.¹¹⁹ A case is identified within the boundaries of a situation and consists of a personal and a material element: the perpetrator(s) and his/her/their criminal conduct.¹²⁰ Cases hence comprise “specific incidents within a given ‘situation’ during which one or more crimes within the jurisdiction of the Court may have been committed, and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.”¹²¹ As an example for the distinction between situations and cases serves the subject of PTC I’s discussion in defining “situations” and “cases”. The respective situation covers the territory of the Democratic Republic of Congo since 1 July 2002 and the respective case consists of incidents of criminal conduct by Thomas Lubanga Dyilo within these territorial and temporal parameters.

It has further been established that “[...] a case arising from the investigation of a situation will fall within the jurisdiction of the Court only if the specific crimes of the case do not exceed the territorial, temporal and possibly personal parameters defining the situation under investigation and fall within the jurisdiction of the Court”.¹²² Hence, the OTP cannot overstep the limits set out at the situation stage in identifying cases.

However, in order to know which situational “limits” not to overstep, they need to be demarcated. While the scope of a case is clearly framed by the person(s) and the conduct and resembles practice of domestic judiciaries and international tribunals, the scope of a situation is more difficult to delineate. Despite efforts to define the meaning of “situation”, there is no distinct line in place establishing its exact scope – can the temporal, territorial and personal parameters defining a situation be too broad or too narrow? Could, for example, a situation comprise the period of one day in which a single incident falling within the jurisdiction of the Court was committed in one city (e.g. hypothetically the attack on the World Trade Centre on 11 September 2001) and another situation cover a period of decades in a large region (e.g. hypothetically the Soviet Union from 1922-1991)?

¹¹⁹ Office of the Prosecutor (2016a) "Policy Paper on Case Selection and Prioritisation," The Hague: International Criminal Court. para. 4.

¹²⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr "Decision concerning Pre-Trial Chamber's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo" (24 February 2006). para. 37.

¹²¹ Office of the Prosecutor (2016a) "Policy Paper on Case Selection and Prioritisation," The Hague: International Criminal Court. para. 4.

¹²² *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2 "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (10 February 2006). para. 21.

This question arose recently in the context of the Comoros situation. The territorial (four vessels) and temporal (between one and several days) parameters were so limited that barely any difference between the scope of the situation and potential case(s) could be made out leading to a discussion on whether the situation might be too narrow; hence not qualifying as a situation at all. While some commentators argued in favour of this estimation,¹²³ the Court and others held that the Comoros situation indeed amounted to a situation.¹²⁴ The wording in articles 13 and 14 of the Rome Statute appears to support their conclusion.

Article 13(a) and (b) states that “[t]he Court may exercise its jurisdiction with respect to [...] [a] situation in which one or more of such crimes appears to have been committed [...]”.¹²⁵ This is repeated in article 14. The wording of these articles indicates that a situation could consist of only one case – meaning that a situation and a case could, in some instances and in terms of scope, be one and the same.¹²⁶ One commentator states in this regard that “the terms may overlap because an accurate disjuncture is nearly impossible.”¹²⁷ However, it could be argued that the drafting history contradicts this conclusion. The term “situation” was introduced during the Rome Statute negotiations to prevent states and the UNSC from making politicised referrals, e.g. referring a specific incident for which only one group in a conflict can be held accountable.¹²⁸ If a situation could have the scope of a single case, the intention behind distinguishing between a situation and a case might become void.

This argument does not withstand scrutiny, however. First of all, there is another safeguard to politicised referrals: The Prosecutor has the last word and can decide to reject a referral if it considers it politicised on the basis of the “interest of justice” criterion. Further, in accordance

¹²³ Jacobs, Dov (2013) "The Comoros Referral to the ICC of the Israel Flotilla Raid: When a 'situation' is not really a 'situation'," Spreading the Jam, <https://dovjacobs.com/2013/05/15/the-comoros-referral-to-the-icc-of-the-israel-flotilla-raid-when-a-situation-is-not-really-a-situation/> (accessed 28 September 2016).

¹²⁴ Akande, Dapo (2013) "Court between A Rock and a Hard Place: Comoros Refers Israel's Raid on Gaza Flotilla to the ICC," EJIL: Talk!, <http://www.ejiltalk.org/court-between-a-rock-and-a-hard-place-comoros-refers-israels-raid-on-gaza-flotilla-to-the-icc/> (accessed 29 September 2016), Heller, Kevin J. (2013) "Could the ICC Investigate Israel's Attack on the Mavi Marmara?," *Opinio Juris*, <http://opiniojuris.org/2013/05/14/could-the-icc-investigate-the-mavi-marmara-incident/> (accessed 29 September 2016).

¹²⁵ Article 13 of the Rome Statute

¹²⁶ War Crimes Research Office (2009) "The Relevance of "A Situation" to the Admissibility and Selection of Cases Before the International Criminal Court," Washington D.C.: American University Washington College of Law. pp. 21-22.

¹²⁷ Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. p. 121.

¹²⁸ *Ibid.* p. 107.

with the interpretation rules of the VCLT, the drafting history is only to be applied complementarily, if no consistent conclusion can be drawn from other interpretative methods. With the wording being unambiguous and the systematic and teleological approach not contradicting the wording, this historical interpretation is to be rejected. Additionally, analysing the drafting history does not produce a conclusive result as “nothing from the drafting history clearly indicates that the negotiating states intended to *require* that a situation involve more than one case.”¹²⁹

On the narrow side of the spectrum, a situation could hence comprise of one case. But what about the other end of the spectrum? Various Chambers have considered the potential broadness of a situation by analysing which nexus needs to be in place connecting a situation to individual cases. Firstly, it has been established that the scope of a situation cannot remain indefinite.¹³⁰ The Chambers’ further findings can be broken down to the following criteria: a) there should be “continuity, at least in a broad sense, between the principal actors/groups involved”, and b) there should be “a link between the contextual elements of the crimes – i.e. whether the crimes have occurred in the context of the same attacks for crimes against humanity, the same armed conflict for war crimes, or in the context of a manifest pattern of similar conduct directed against the target group of genocide.”¹³¹ These findings suggest that the potential situational infiniteness based on temporal and territorial parameters is confined by factual and legal considerations.

In its definition of the term “situation”, Pre-Trial Chamber I also refers to personal parameters which could be considered in addition to territorial and temporal limitations. The personal parameter of a situation becomes especially relevant in case the Court lacks territorial jurisdiction and exercises jurisdiction based on the nationality of the perpetrators, as for example in the Iraq situation.¹³² However, if the ICC has territorial jurisdiction, an additional

¹²⁹ War Crimes Research Office (2009) "The Relevance of "A Situation" to the Admissibility and Selection of Cases Before the International Criminal Court," Washington D.C.: American University Washington College of Law. p. 17.

¹³⁰ Rastan, Rod (2012) "The Jurisdictional Scope of Situations before the International Criminal Court," 23 *Criminal Law Forum* 1-34. p. 9.

¹³¹ Ibid. p. 33.

¹³² Iraq not being a state party, the Court does not have jurisdiction over crimes committed on its territory *per se*, but it can exercise jurisdiction over crimes committed by British troops on Iraqi territory based on their nationality in accordance with Art. 12(2)(b). See Badagard, Lovisa; Klamberg, Mark (2016) "The Gatekeeper of the ICC - Prosecutorial strategies for selecting situations and cases at the International Criminal Court," <https://ssrn.com/abstract=2784470> (accessed 5 October 2016). p. 13.

limitation to a certain group of people is neither necessary nor desirable.¹³³ It would needlessly narrow down the investigation by exempting groups of potential perpetrators from the Court's reach. Furthermore, neither the drafting history of the Rome Statute, nor the conduct of other international tribunals suggest situational limitations on the basis of personal parameters and PTC I emphasises the limited use of personal parameters by stating they should be considered "in some cases".¹³⁴

It can be concluded that the potential indefinite broadness of a situation based on territorial and temporal boundaries is limited by legal, factual, and, potentially, personal constraints.¹³⁵ On the other end of the spectrum, the scope of a situation can be as narrow as the scope of a case. A situation could hence comprise of a single, isolated incident as well as of countless incidents which took place in a large region over a long period of time.

5.3 The application of articles 17 and 53 to situations and cases

"The question arises as to whether the dichotomy between 'situations' and 'cases' also has an impact on the object of the admissibility assessment: can there be an admissibility analysis of situations?; and as a result of it can there be 'admissible' and 'inadmissible' situations.?"¹³⁶

As depicted above, the OTP assesses the admissibility at the situation and at the case stage. This procedure might appear evident as the subjects of referrals and *proprio motu* investigations are "situations" and articles 15(5) and (6) and 18(1) underline that preliminary examinations should pertain situations.¹³⁷ However, articles 17 and 53 dealing with admissibility, refer to "cases" and not to "situations". Hence the question arises if and in which way the admissibility of situations is to be assessed.

To recapitulate, the admissibility criteria are *ne bis in idem*, complementarity and gravity.¹³⁸ But at which stage or which stages of the proceedings are they to be assessed? According to

¹³³ Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. p. 110.

¹³⁴ War Crimes Research Office (2009) "The Relevance of "A Situation" to the Admissibility and Selection of Cases Before the International Criminal Court," Washington D.C.: American University Washington College of Law. p. 21.

¹³⁵ Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. p. 110.

¹³⁶ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. p. 26.

¹³⁷ Ibid. pp. 20-21.

¹³⁸ Schabas, William A. (2009) "Prosecutorial discretion and gravity," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 229.

Schabas, the issue is “unclear”.¹³⁹ As the term “case” is used in both articles, Kreß and Gover as well as others have argued that, in line with a literal interpretation, they only apply once a case has been generated from a situation, not prior to that.¹⁴⁰ Disagreeing with this opinion (“Interpretative criteria aim at defining the precise content of a provision, not at depriving the relevant provision of any meaning”),¹⁴¹ Olásolo refers to Rule 48 of the RPE which stipulates that “the Prosecutor shall consider the factors set out in article 53(1) “when determining whether to proceed with a *proprio motu* investigation.”¹⁴²

He believes that Rule 48 was meant to clarify that the criteria laid out in article 53(1) “must be applied to decide whether to open an investigation, regardless of whether the Court acts on the receipt of a referral by a State Party or the UN Security Council, or on a communication by any other natural or legal person.”¹⁴³ Accordingly, “the Prosecution must carry out an admissibility assessment before deciding whether to initiate [...] an investigation into the relevant situation.”¹⁴⁴ Olásolo, however, does not elaborate on how Rule 48 which solely refers to *proprio motu* investigations is applicable to a state party or UNSC referral.

Article 18 provides further insights into this matter. The article on “preliminary rulings regarding admissibility” indeed seems to imply that the admissibility criteria are to be applied to situations. Article 18(1) stipulates:

“When a *situation* has been referred to the Court pursuant to article 13(a) and the *Prosecutor has determined that there would be a reasonable basis to commence an investigation*, or the Prosecutor initiates an investigation pursuant to articles 13(c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned [emphasis added].”¹⁴⁵

¹³⁹ Ibid. p. 229.; Nichols, Lionel (2010) "Will the ICC's Pre-Trial Chamber give Ocampo the Benefit of the Doubt in Kenya?," EJIL: Talk!, <http://www.ejiltalk.org/will-the-iccs-pre-trial-chamber-give-ocampo-the-benefit-of-the-doubt-in-kenya/> (accessed 20 September 2016).

¹⁴⁰ According to Grover, an interpretation which is not consistent with the text cannot be accepted, even if plausible. See Grover, Leena (2014) *Interpreting Crimes in the Rome Statute of the International Criminal Court*. Cambridge: Cambridge University Press. p. 399.; Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. pp. 21,

¹⁴¹ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. p. 27.

¹⁴² Rule 48 of the Rules of Procedure and Evidence

¹⁴³ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. p. 28.

¹⁴⁴ Ibid. p. 21.

¹⁴⁵ Article 18 of the Rome Statute

The wording in this article, again, only partially provides clarity. Although neither article 17 nor article 53 are mentioned, one might infer from the wording “determined that there would be a reasonable basis to commence investigations” which reflects the text of article 53(1), that article 18 indeed requires the Prosecutor to assess the admissibility of situations. The issue remains, however, that the determination of “reasonable basis” is only referred to in relation to state party referrals, not with regard to the other two trigger mechanisms. As *proprio motu* investigations are covered by Rule 48, the question of Security Council referrals remains unresolved.

Another clue to solving this mystery might be found in reading article 53(1) in combination with article 53(2). As depicted, article 53(1) states that before initiating an investigation, the Prosecutor shall consider whether the case is or *would be* admissible. Article 53(2) stipulates that if, upon investigation, the Prosecutor finds the case inadmissible he/she shall inform the Pre-Trial Chamber and the referring party. In both instances the term “case” is used, but the wording “would be” only appears in para. 1, highlighting the possible preliminary nature of an admissibility assessment in accordance with article 53(1). Furthermore, para. 2 indicates that the terms “situation” and “case” might have been used interchangeably in this article as it would be illogical for the OTP to inform the referring party of a case not investigated, since only situations can be the subject of referrals.

The confusion can at least partly be explained by looking at the *travaux préparatoires*. In the drafting process, the term “situation” was introduced following concerns that referrals of specific cases against a certain individual or regarding a particular incident might lead to politicisation of the Court.¹⁴⁶ The term “situation” was hence adopted to clarify the intended wider scope of a UNSC or state party referral.¹⁴⁷ However, agreement on the term was reached late in the drafting process. Some authors hence claim that there was not enough time to harmonise articles 17 and 53, which had been finalised already, to include the notion of “situation”.¹⁴⁸ Following this approach, the use of “situations” and “cases” in the Statute would have remained inconsistent unintentionally.¹⁴⁹ Others believe, at least with respect to the

¹⁴⁶ Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. p. 107.

¹⁴⁷ Rastan, Rod (2008) "What is a 'Case' for the Purpose of the Rome Statute," 19 *Criminal Law Forum* 435-448. (3). p. 435.

¹⁴⁸ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. p. 28.; Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot.

¹⁴⁹ The parts in the Rome Statute on admissibility had already been finalised before the term „situation“ was introduced and there was not sufficient time to make changes accordingly during the

articles on admissibility, that the term “case” was retained advertently for the Court to apply it as fit.¹⁵⁰

Whatever the case, proponents of these scenarios agree that, at the very least, the drafters did not oppose an admissibility assessment at the situation stage. Others disagree and claim that there were discussions on assessing the admissibility of situations, but that the majority of delegations rejected this proposal “because the Prosecutor might not know if the admissibility requirements are met until he or she conducts an investigation.”¹⁵¹ They say that neither the relevant provisions, nor the drafting history supports the OTP’s practice of assessing admissibility at the situation stage.¹⁵²

While the *travaux préparatoires* appears not to provide a definitive answer on the question at hand, the last point made is worth looking at further. While some delegations appear to have seen difficulties with the Prosecutor’s ability to assess admissibility in the preliminary examination phase,¹⁵³ others see it instead necessary to assess the admissibility prior to opening an investigation and consider the wording of article 53 to be an unfortunate “internal contradiction in the Statute.”¹⁵⁴

A teleological approach supports this line of thought as assessing the admissibility at the situation stages can ensure more effective proceedings (Preamble: “effective prosecution must be ensured”, see goal 4.).¹⁵⁵ For analysing complementarity at the situation stage, Olásolo makes a valid point in this regard: “In order to effectively preserve the ICC’s complementary nature, the admissibility assessment cannot be postponed until a cases arises [...]” as this might

Rome Conference. See Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. p.99.

¹⁵⁰ *Situation in the Republic of Kenya*, ICC-01/09-19 "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Republic of Kenya" (31 March 2010). para. 47.

¹⁵¹ War Crimes Research Office (2009) "The Relevance of "A Situation" to the Admissibility and Selection of Cases Before the International Criminal Court," Washington D.C.: American University Washington College of Law. p. 29.

¹⁵² Ibid. pp. 4, 31.

¹⁵³ As the Prosecutor is not authorised to conduct investigations at the preliminary examination phase, it can be inherently difficult to foresee at this stage what evidence can be collected, against whom and for which crime. See Rastan, Rod (2008) "What is a 'Case' for the Purpose of the Rome Statute," 19 *Criminal Law Forum* 435-448. (3). p. 442.

¹⁵⁴ Stahn, Carsten (2009) "Judicial review of prosecutorial discretion: Five years on," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 249.

¹⁵⁵ Preamble of the Rome Statute

result in parallel investigations undermining the efficacy of the proceedings.¹⁵⁶ This argument also has merit with regards to gravity. The resources and time invested into investigating cases might be preserved if insufficient gravity is already found at the situation stage.

The Court's practice mostly confirms that article 53 is to be applied to situations as well. With announcing investigations into the DRC, the first situation, the Prosecutor referred to this article to justify initiating an investigation into a situation and has put this practice into writing in the OTP Regulations.¹⁵⁷ Although acknowledging that articles 17 and 53 speak of the admissibility of a "case", the OTP appears to consider it necessary to evaluate admissibility before opening an investigation AND before deciding to prosecute a case.¹⁵⁸ In the words of Guariglia: "Gravity is an overarching consideration and a critical admissibility factor which must be analysed before any decision to investigate or to prosecute is made."¹⁵⁹

The Chambers have largely followed the same approach. In 2006, Pre-Trial Chamber I states that "according to a contextual interpretation, [...] the gravity threshold provided for in article 17(1)(d) of the Statute must be applied at two different stages: (i) at the stage of initiation of an investigation of a situation, the relevant situation must meet such gravity threshold and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold."¹⁶⁰ This was confirmed by Pre-Trial Chamber II in 2009. The Chamber, when contrasting the different stages in the proceedings in light of admissibility, holds that article 53 also pertains situations.¹⁶¹ In 2010, the same Pre-Trial Chamber stipulates again that the articles 53(1) and 17(1) were to be applied to situations as "the Statute is drafted in a manner which tends to solve questions related to admissibility at different stages of the proceedings up until trial. These stages begin with a "situation" and end with a concrete "case", [...]"¹⁶² According to a

¹⁵⁶ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. para. 29.

¹⁵⁷ Ibid. p. 22.

¹⁵⁸ See footnote 17 in Guariglia, Fabricio (2009) "The selection of cases by the Office of the Prosecutor of the International Criminal Court," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 213

¹⁵⁹ Ibid.

¹⁶⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr "Decision concerning Pre-Trial Chamber's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo" (24 February 2006). para. 44.

¹⁶¹ *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05-377 "Decision on the admissibility of the case under article 19(1) of the Statute" (10 March 2009). para. 14.

¹⁶² *Situation in the Republic of Kenya*, ICC-01/09-19 "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Republic of Kenya" (31 March 2010). para. 41.

contextual interpretation, especially with regard to the provisions on the three trigger mechanisms (articles 13, 14, 15), the Chamber holds that assessing the admissibility of situations, not just cases, in the context of article 53 was intended.¹⁶³ The Chamber explains the contradictory wording by consulting the *travaux préparatoires* of the Statute. The Chamber argues that “the drafters advertently retained the terminology of a “case” in all relevant provisions addressing admissibility, including article 17 of the Statute, thereby leaving it for the Court to harmonize the meaning according to the different stages of the proceedings.”¹⁶⁴ The Chamber holds that this approach is supported by the wording in article 15 which first refers to “case” (article 15(4)) and later to “situation” (article 15(5)) highlighting the applicability to different stages in the proceedings.

However, this coherence in jurisprudence has recently been disrupted by the Appeals Chamber in the context of the Comoros situation.

Ensuing the OTP’s appeal of the PTC’s request to reconsider the decision not to investigate the Comoros situation, the Appeals Chamber issued a “Decision on the admissibility of the Prosecutor’s appeal against the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’”. The Appeals Chamber finds there was no basis in the Statute for it to review the decision made by Pre-Trial Chamber I under articles 53 and 82(1)(a)¹⁶⁵ and makes some noteworthy observations on the differentiation between the admissibility of situations and cases in the reasoning.

Article 82(1)(a) states that parties may appeal decisions with respect to jurisdiction or admissibility. It mentions neither the term “situation” nor “case”.¹⁶⁶ Based on this article, the Prosecutor argues that the impugned decision was appealable since it constituted a “‘ruling’ on admissibility.”¹⁶⁷ The OTP relies on jurisprudence on cases arising from the Kenya and DRC situation which had allowed for appeal. Submissions by the Union of Comoros and the victims argue the contrary. They hold that article 82(1)(a) only allows for appeal with respect to the

¹⁶³ Ibid. paras. 44-45.

¹⁶⁴ Ibid. para. 47.

¹⁶⁵ *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-51 “Decision on the admissibility of the Prosecutor’s appeal against the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation” (6 November 2015a). paras. 60, 66.

¹⁶⁶ Article 82 of the Rome Statute

¹⁶⁷ *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-47 “Prosecution’s Further Submissions concerning Admissibility” (14 August 2015). para. 27

admissibility of a case which had not been the subject of the Pre-Trial Chamber's decision.¹⁶⁸ Further, they argue that the OTP's reference to prior jurisprudence was misguided as it concerned the admissibility of a case at the arrest warrant stage, not a situation.¹⁶⁹

Determining whether or not the impugned decision was a decision on admissibility according to article 82(1)(a), the Chamber states the following: "While the Impugned Decision might conceivably have an effect on the admissibility of potential cases arising out of the situation, [...], the Impugned Decision is not by its nature a decision determining admissibility."¹⁷⁰ Further, it holds that the contested decision "did not pertain directly to a question of the admissibility of a case" but simply concerned the Prosecutor's decision not to initiate investigations into the Comoros situation.¹⁷¹ The Chamber argues that if the option of review at this stage of the proceedings had been intended by the drafters, the Pre-Trial Chamber would have been awarded with judicial control, not just the power to request reconsideration, over the decision of the Prosecutor of whether to initiate an investigation into a situation.¹⁷²

However, Judge Fernández de Gurmendi and Judge van den Wyngaert, disagree with the findings of the majority and attached a dissenting opinion. They consider the appeal to be admissible.¹⁷³ Noting that prior jurisprudence was related to the admissibility of specific cases, they argue that the appeal of a review on admissibility of potential cases within a situation was

¹⁶⁸ *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-39 "Application by the Government of the Comoros to dismiss in limine the Prosecution 'Notice of Appeal of 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' (ICC-01/13-34)'" (3 August 2015). para. 13.

¹⁶⁹ *Ibid.* para. 14.; *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-49 "Response of the Government of the Comoros to the 'Prosecution's Further Submissions concerning Admissibility'" (19 August 2015b). para. 14.; *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-48 "Victim's observations on the admissibility of the Prosecution 'Notice of Appeal of 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' (ICC-01/13-34)'" (19 August 2015a). paras 37, 42.

¹⁷⁰ *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-51 "Decision on the admissibility of the Prosecutor's appeal against the 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation'" (6 November 2015a). para. 50.

¹⁷¹ *Ibid.* para. 51.

¹⁷² *Ibid.* paras 57-58.

¹⁷³ *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-51-Anx "Joint Dissenting Opinion of Judge Silvia Fernández de Gurmendi and Judge Christine van den Wyngaert to the Decision on the admissibility of the Prosecutor's appeal against the 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation'" (6 November 2015b). para. 1.

a novel question which was to be addressed as such.¹⁷⁴ The two judges believe that article 17 and therewith article 53(1)(b) also apply to the determination of admissibility of preliminary rulings in accordance with article 18 of the Statute.¹⁷⁵ To support their argument they quote a previous Appeals Chamber decision: “It should also be noted that article 17 applies not only to the determination of the admissibility of a concrete case (article 19 of the Statute), but also to preliminary admissibility rulings (article 18 of the Statute). [...]. The factors listed in article 17 are also relevant for the Prosecutor’s decision to initiate an investigation under article 53 (1) or to seek authorisation for a *proprio motu* investigation under article 15.”¹⁷⁶ Judge Fernández de Gurmendi and Judge van den Wyngaert hence conclude that the appeal was admissible.

Outlining the differing opinions of the Appeals Chamber’s judges proves that confusion and disagreement with regard to assessing the admissibility of situations exists not only in the academic world, but also amongst practitioners at the Court. The majority of jurisprudence, however, is in favour of assessing admissibility at both stages of the proceedings.

The previous discussion has shown that there are undeniably arguments for both approaches. However, supporting the reasoning that situations cannot be the subject of admissibility assessments is only the wording in article 53(1) in combination with article 17 (“The case is or would be admissible under article 17”). A systematic (considering articles 18, 19, 53(2) and Rule 48), historical (no consistent distinction between the two terms in the Statute) and teleological interpretation (efficiency of proceedings) outweigh the arguments of those opposing the applicability of article 17 and 53(1) to situations.

The practice of the Court overwhelmingly supports the notion that articles 17 and 53(1) apply to situations. The approach of assessing admissibility of situations AND cases has been endorsed by the OTP and most Chambers. It can hence be concluded that an admissibility assessment pursuant to articles 17 and 53(1) is to be made at two stages of the proceedings: the situation and the case stage.

The question remains whether and how the gravity assessment at the two stages do and should differ. Two possible options come to mind:

¹⁷⁴ Ibid. para. 24.

¹⁷⁵ Ibid. para. 32.

¹⁷⁶ Ibid. para. 32.

1. The same standards apply to the gravity assessment of a situation and the gravity assessment of a case, i.e. if a single case in the situation meets the gravity threshold, the situation is admissible.
2. Different standards apply to the gravity assessment of a situation and the gravity assessment of a case, i.e. the gravity of a situation is assessed in its entirety and according to a higher standard than individual cases.

These options are reflected in the academic discussion with some authors claiming that there is such a thing as situational gravity and others arguing that situational gravity equals case gravity. For example, Heller believes that “the OTP obviously cannot assess the gravity of an entire situation in the same way that it assesses the gravity of a specific crime within a situation”,¹⁷⁷ while the War Crimes Research Office (WCRO) claims that “as long as one or more individual cases within the situation would meet the gravity threshold, the ICC should not forgo prosecuting the relevant cases solely on the ground that the situation does not involve a wider range of cases that could be prosecuted by the Court.”¹⁷⁸ This debate raises interesting questions, such as how the previously discussed varying broadness of situations should influence the gravity assessment if situation are assessed in their own right.

The following chapter will examine how the OTP and the Chambers have approached this issue and the concept of gravity in general.

6 The Court’s approach to gravity

6.1 Strategies and Policies of the OTP on gravity

“Crimes within our jurisdiction are by definition grave crimes of international concern. But gravity in our Statute is not only a characteristic of the crime, but also an admissibility factor,

¹⁷⁷ Heller, Kevin J. (2015) "The Pre-Trial Chamber's Dangerous Comoros Review Decision," *Opinio Juris*, <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/> (accessed 4 August 2016).; See also Zakerhossein, Mohammad H. (2016) "Comments on the ICC OTP's draft policy paper on the case selection and prioritisation," *Justice Hub*, <https://justicehub.org/article/comments-icc-otps-draft-policy-paper-case-selection-and-prioritisation> (accessed 15 July 2016).

¹⁷⁸ War Crimes Research Office (2009) "The Relevance of "A Situation" to the Admissibility and Selection of Cases Before the International Criminal Court," Washington D.C.: American University Washington College of Law. p. 5.

which seems to reflect the wish of our founders that the ICC should focus on the gravest situations in the world.’”¹⁷⁹ *Luis Moreno-Ocampo*

The previous analysis has shown that the OTP evaluates gravity at two different stages: the situation and the case stage. This section aims to illustrate how the OTP understands gravity and whether it differentiates between situational and case gravity.

6.1.1 *Evolution of the OTP's approach*

While the gravity criterion has become one of the most crucial and controversial aspects of the Rome Statute, the OTP, like others, did not pay much attention to the concept in the beginning of the Court's operations. In its first policy paper published in 2003, the OTP mentions a selection strategy focused on the most serious crimes committed by leaders bearing most responsibility for those crimes, but does not proceed to explain the role of gravity as an admissibility criterion and/or factor in the selection process.¹⁸⁰ Similarly, while determining that the first three situations referred to the Office were admissible, the Prosecutor does not demonstrate how exactly this assessment had been reached. With respect to the gravity threshold, the Prosecutor simply put forward that “the DRC and Northern Uganda [...] were the gravest admissible situations under the Statute's jurisdiction”,¹⁸¹. As to the DRC situation, one of the situations under scrutiny in this thesis, he further holds that the decision was motivated by the reported “thousands of deaths by mass murder and summary executions in the DRC since 2002” and the alleged “pattern of rape, torture, forced displacement and the illegal use of child soldiers.”¹⁸²

The Prosecutor does not provide any information on his considerations with regards to the condition of gravity. The issue of gravity with regards to the situation in the DRC has also never been disputed as such – it appeared evident that this investigation covered a region which saw large-scale atrocities over an extended period of time.

¹⁷⁹ Schabas, William A. (2009) "Prosecutorial discretion and gravity," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 232.

¹⁸⁰ Smeulers, Alette; Weerdesteijn, Maartje; Hola, Barbora (2015) "The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance," 15 *International Criminal Law Review* 1-39. p. 6.

¹⁸¹ Stegmiller, Ignaz (2009) "The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda," 9 *International Criminal Law Review*. 547-565. p.557.

¹⁸² Office of the Prosecutor (2004) "The Office of the Prosecutor of the International Criminal Court opens its first investigation," The Hague: International Criminal Court.

As to the Darfur situation, the Prosecutor holds “the Darfur situation clearly met the gravity standard” and that “the Office will continue to adhere to the rigorous standard of gravity established in the Statute.”¹⁸³ The OTP also does not elaborate on gravity later in the context of the Abu Garda case. These general statements provided very little insight on how the gravity threshold is to be understood and applied.

The gravity criterion first entered centre stage when the OTP applied for arrest warrants for five members of the LRA in 2005. Explaining the decision, the Prosecutor states: “The criteria for selection of the first case was gravity. [...]. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF [Uganda People’s Defence Force]. We therefore started with an investigation of the LRA.”¹⁸⁴

This approach is reflected in the first OTP strategy document published in 2006. The document introduces five strategic objectives. In relation to the objective of focused investigations and prosecutions, the OTP argues that the focus on the most serious crimes committed by persons bearing most responsibility required a sequencing of cases in accordance with their gravity. The strategic objectives remained largely unchanged in the consecutive strategy document of 2010.¹⁸⁵

The document reveals little about which factors are to be considered to assess gravity beyond the rather general aspects of seriousness of the crime and high degree of responsibility of the perpetrator. The statement made by the Prosecutor on selecting LRA crimes offers more insights. Moreno-Ocampo specifies that for assessing gravity “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. We also look at number of victims of other crimes, especially crimes against physical integrity. The impact of the crimes is another important factor.”¹⁸⁶

¹⁸³ Stegmiller, Ignaz (2009) "The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda," 9 *International Criminal Law Review* 547-565. p.557.

¹⁸⁴ Schabas, William A. (2009) "Prosecutorial discretion and gravity," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 231.

¹⁸⁵ Peake, Jessica (2016) "The Institutional Framework of the Office of the Prosecutor, Legitimacy, and Overcoming Bias Allegations," in R. H. Steinberg, ed. *Contemporary Issues Facing the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 355.; Badagard, Lovisa; Klamberg, Mark (2016) "The Gatekeeper of the ICC - Prosecutorial strategies for selecting situations and cases at the International Criminal Court," <https://ssrn.com/abstract=2784470> (accessed 5 October 2016). pp. 32-33.

¹⁸⁶ Schabas, William A. (2009) "Prosecutorial discretion and gravity," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. pp. 231-232.

It is noteworthy that the Prosecutor's application of the gravity threshold in this instance served to justify his prioritisation of LRA crimes. He does not claim that a case against UPDF members would be of insufficient gravity and thereby inadmissible, but rather that the case against the LRA is *relatively* graver and therefore awarded priority.

A similar line of argumentation was adopted when the Prosecutor decided not to initiate investigations into alleged crimes having been committed by British troops in Iraq in the course of the 2003 invasion:

“(t)he number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.”¹⁸⁷

The argumentation again suggests that gravity is understood as a *relative*, not an *absolute* criterion.¹⁸⁸ Further, the Prosecutor compares the situations in their entirety not mentioning any actual or potential cases and their gravity. Interestingly, the OTP also refers to a gravity threshold laid down in article 8(1) which was to be looked at in addition to the gravity threshold of article 53(1). Article 8(1) conferring subject-matter jurisdiction over war crimes to the Court, holds 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.”¹⁸⁹ The factors following “in particular” are not strict requirements but, in the Prosecutor's understanding, meant to guide the Court to focus on situations fulfilling these criteria.

¹⁸⁷ Office of the Prosecutor (2006) "OTP response to communications received concerning Iraq," International Criminal Court, https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed 3 November 2016). p. 9.

¹⁸⁸ DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. p. 1432.

¹⁸⁹ Article 8 of the Rome Statute

According to the Prosecutor, the Iraq situation did not meet these additional war crime gravity threshold considerations either.¹⁹⁰

In the 2006 *Draft Policy Paper on Selection Criteria*, the OTP for the first time systematically addresses the material factors relevant to the gravity assessment: “the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes.”¹⁹¹

These factors were confirmed in the first report on preliminary examinations the OTP published in 2011.¹⁹² These reports have since been published annually and show that the Office’s consideration of the gravity criterion has become more sophisticated in the course of the past six years. While the first reports only recapitulate the fact that gravity is an admissibility criterion and the four material factors to be considered in its assessment, later reports apply the gravity threshold evaluating gravity in relation to the facts of the respective situation.¹⁹³

For the Mali and the Comoros situation, the OTP even published an article 53 report. In the report on the Mali situation, the gravity of each incident is addressed separately. Considering the four material factors “scale”, “nature”, “manner” and “impact”, the Office finds the Aguelhok incident (execution of 70-153 detainees), the imposed punishments (including execution, stoning, amputation; scale unknown), and the destruction of 13 protected objects (such as UNESCO World Heritage sites) to be of sufficient gravity individually. As to the incidents of pillaging and rape, the OTP concludes that more information on whether the acts “have been committed on a large scale or as part of a plan or a policy is required” to make a final assessment.¹⁹⁴

¹⁹⁰ Schabas, William A. (2009) "Prosecutorial discretion and gravity," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 233.

¹⁹¹ Ibid. p. 234.

¹⁹² Office of the Prosecutor (2011) "Report on Preliminary Examination activities - 13 December 2011," The Hague: International Criminal Court. para. 7.

¹⁹³ See *ibid.*, Office of the Prosecutor (2012) "Report on Preliminary Examination Activities - November 2012," The Hague: International Criminal Court.; Office of the Prosecutor (2013b) "Policy Paper on Preliminary Examinations - November 2013," The Hague: International Criminal Court, Office of the Prosecutor (2014a) "Report on Preliminary Examination Activities 2014 - 2 December 2014," The Hague: International Criminal Court, Office of the Prosecutor (2015) "Report on Preliminary Examination Activities (2015) - 12 November 2015," The Hague: International Criminal Court, Office of the Prosecutor (2016c) "Report on Preliminary Examination Activities 2016 - 14 November 2016," The Hague: International Criminal Court.

¹⁹⁴ Office of the Prosecutor (2013c) "Situation in Mali - Article 53(1) Report," The Hague: International Criminal Court. paras 165, 170.

While analysing each incident separately, the OTP more or less repeats the facts of each incident in the gravity assessment without explaining how much weight is to be given to each factor.¹⁹⁵ This report suggests that the OTP addresses the gravity of a situation by analysing the gravity of potential cases within the situation. Remarkably, neither the OTP nor the Pre-Trial Chamber entertained the issue of gravity upon issuing the arrest warrant and confirming the charges against Al Mahdi.¹⁹⁶ The Trial Chamber only considered gravity in the sentencing, not as an admissibility criterion.¹⁹⁷

The higher priority given to explaining the application of the gravity threshold is also seen in the 2014 article 53(1) report on the Comoros situation. In this report, first of all, the OTP states that while it had jurisdiction over the alleged crimes, the jurisdiction was limited to events occurring on three vessels registered on states parties on 31 May 2010. Hence, the Prosecutor could only consider the scope of the situation as confined by these parameters and not any incidents that occurred after the passengers were taken off the ships.¹⁹⁸ The Office that there was reasonable basis to believe that the following war crimes had been committed: ten instances of wilful killing, some instances of outrages upon personal dignity, some instances of wilfully causing serious injury to body or health, and, arguably, intentionally directing an attack against two civilian objects. With the exception of the last count, the crimes concerned only one vessel, the Mavi Marmara, according to the OTP.¹⁹⁹

As to the scale of the crimes, the OTP concludes that it did not extend 10 dead and 50-55 injured passengers. This meant “the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office.”²⁰⁰ With regard to the nature of the crimes, the Prosecutor states that two counts of crimes amounted to grave breaches of the Geneva Conventions.²⁰¹ The manner of commission of the crimes was

¹⁹⁵ Stegmiller, Ignaz (2013) "The International Criminal Court and Mali: Towards more Transparency in International Criminal Law Investigations?," 24 *Criminal Law Forum* 475-499. p. 497.

¹⁹⁶ See *Le Procureur c. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-1-Red "Mandat d'arret a l'encontre d'Ahmad Al Faqi Al Mahdi"(28 September 2015).; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-84-Red "Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi"(24 March 2016), *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-84-Anx "Separate Opinion of Judge Péter Kovács"(9 May 2016).

¹⁹⁷ See *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-171 "Judgment and Sentence"(27 September 2016).

¹⁹⁸ Office of the Prosecutor (2014b) "Situation on Registered Vessels of Comoros, Greece and Cambodia - Article 53(1) Report," The Hague: International Criminal Court. para. 25.

¹⁹⁹ Ibid. paras 69-78.

²⁰⁰ Ibid. para. 138.

²⁰¹ Ibid. para. 139.

partly characterised as excessive, but did not appear to have been “systematic or resulted from a deliberate plan or policy” according to the Prosecutor.²⁰² The OTP further estimates that the impact did not extend beyond the immediate victims, i.e. the population in Gaza was not significantly affected by the alleged crimes.²⁰³ It does not, however, mention the level of responsibility of individuals that would likely be targeted in the investigation.

The Prosecutor concludes that the “limited nature of the referred situation affects the gravity of the potential case(s) that could arise from it.”²⁰⁴ While, generally, a single event sufficed to meet the required gravity threshold, the limited scale in addition to the limited presence of qualitative factors make the situation inadmissible according to the Prosecutor.²⁰⁵ The OTP compares the situation to the Abu Garda case which also involved a relatively low number of victims, but, according to the OTP, the nature and impact of the crime had reached another level.²⁰⁶ The OTP herewith confirms that the gravity of one case would suffice to make the entire situation admissible.

The advancement in the analysis of the gravity threshold in the preliminary examination activities and article 53(1) reports was accompanied by publications of policy documents elaborating how this admissibility criterion is to be appraised in more detail. These policy papers, being the most extensive and most recent publications of the OTP on the assessment of the gravity threshold and thereby providing the clearest idea of the Prosecutor’s current understanding of gravity, will be looked at in more detail in the next section.

Prior to that, the OTP had already outlined its approach to the “interest of justice” criterion of article 53(1)(c).²⁰⁷ In this 2007 policy paper the Office informs that it would only make use of the concept in exceptional circumstances. As to the reference in the interest of justice paragraph to take into account the gravity of the crime, the OTP estimates that the repetition of the gravity factor underlined its importance.²⁰⁸ Also in the 2014 *Policy Paper on Sexual and Gender-Based Crimes*, the OTP makes a connection to the gravity criterion. Finding Sexual and Gender-Based

²⁰² Ibid. para. 140.

²⁰³ Ibid. para. 141.

²⁰⁴ Ibid. para. 143.

²⁰⁵ Ibid. para. 144.

²⁰⁶ Ibid. para. 145.

²⁰⁷ Article 53(1)(c) of the Rome Statute: “Taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”

²⁰⁸ Badagard, Lovisa; Klamberg, Mark (2016) "The Gatekeeper of the ICC - Prosecutorial strategies for selecting situations and cases at the International Criminal Court," <https://ssrn.com/abstract=2784470> (accessed 5 October 2016). p. 36.

Crimes (SGBC) to be among the gravest of Rome Statute crimes, the OTP determines that these crimes could, in some instances, warrant prosecution of low-level perpetrators.²⁰⁹

The greater flexibility concerning the rank of the perpetrators to be prosecuted is also found in recent strategy papers. Under the new Prosecutor, Fatou Bensouda, the prosecutorial strategy was revised in a strategy document the Office issued in 2012: “At the policy level, the principle of focused investigations and prosecutions was replaced with ‘in-depth, open-ended investigations, while maintaining focus to avoid over-expanding the investigations at the expense of efficiency.’”²¹⁰ The OTP also introduces an upwards-building strategy. While not renouncing the focus on those individuals bearing the greatest responsibility, if more feasible, the Office would prosecute lower-ranking perpetrators first with the goal of building a case against the most responsible person(s) at a later stage. Low-level perpetrators were only to be prosecuted though, if their conduct was particularly grave and/or notorious.²¹¹ This strategy was largely retained in the most recent strategic plan covering the period of 2016-2018.²¹²

While these strategy documents provide a general idea on how the OTP selects and prioritises its cases and how gravity consideration play a part in it, they do not get into the depths of the gravity concept. The policy papers outlined below will provide a clearer picture of the Office’s approach to gravity.

6.1.2 2013 Policy Paper on Preliminary Examinations

This policy paper explains how the OTP conducts its preliminary examinations, i.e. how it determines whether there is reasonable basis to proceed with an investigation under article 53(1) taking into account the admissibility criteria.²¹³

Prior to going into the details of preliminary examination procedures, the Office reiterates the overarching principles guiding its conduct: independence, impartiality and objectivity. With respect to the topic of this thesis, especially the finding that impartiality does not involve “geographical implications, or geographical balance between situations” and that these

²⁰⁹ Ibid. p. 38.

²¹⁰ Ibid. pp. 33-34.

²¹¹ Ibid. p. 34.

²¹² Ibid. p. 35.

²¹³ See Office of the Prosecutor (2013a) "Policy Paper on Preliminary Examinations," The Hague: International Criminal Court. paras 1, 3, 5.

considerations should hence not play a role in “determining whether to open an investigation into a situation under the Statute” is relevant.²¹⁴

Referring to the use of the term “case” as the basis for the assessment under article 53(1), the OTP holds that in the preliminary examination “there is not yet a ‘case’, as understood to comprise an identified set of incidents, suspects and conduct. Therefore, the consideration of admissibility (complementarity and gravity) will take into account potential cases that could be identified in the course of the preliminary examination based on the information available, and that would likely arise from an investigation into the situation.”²¹⁵ The identification of potential cases was not binding for ensuing prosecutorial activities according to the OTP.²¹⁶ Against the backdrop of its strategy, the OTP would also focus on perpetrators “bearing the greatest responsibility for the most serious crimes” in the admissibility evaluation.²¹⁷

In the section on the gravity criterion, the Office specifies that it “assesses the gravity of *each* potential case that would likely arise from an investigation of the situation [emphasis added].”²¹⁸ In the next paragraph it rejects a too rigid gravity threshold as “the role of persons or groups may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formulistic grounds.”²¹⁹ Notwithstanding this statement, it continues to outline that the gravity evaluation should be based on quantitative and qualitative factors; namely the scale, nature, manner of commission and impact of the crimes.²²⁰ How these conditions are understood is depicted in the following four paragraphs. As these were transferred almost one-on-one to the 2016 *Policy Paper on Case Selection and Prioritisation*, they will be addressed jointly below.

6.1.3 2016 Policy Paper on Case Selection and Prioritisation

“Another reason for the importance of the policy is its timing. Criticism levelled against the ICC – both institutionally, and at the Prosecutor specifically – regarding the choice of cases have reached a crescendo.”²²¹

²¹⁴ Ibid. para. 29.

²¹⁵ Ibid. para. 43.

²¹⁶ Ibid. paras 44, 84.

²¹⁷ Ibid. para. 45.

²¹⁸ Ibid. para. 59.

²¹⁹ Ibid. para. 60.

²²⁰ Ibid. para 61.

²²¹ Maunganidze, Ottilia A.; Du Plessis, Max (2016) "The new ICC policy paper on case selection and prioritisation is a step in the right direction, but does it really address current concerns?," Institute

The similarity in the composition of gravity factors in the *Policy Paper on Preliminary Examinations* and the *Policy Paper on Case Selection and Prioritisation* shows that the process of assessing gravity is not entirely different in the situation and the case phase. It appears that at the situation stage, the entirety of potential cases will be taken into account to evaluate gravity, while at the case stage, the gravest in the pool will be selected. Further, the Office stipulates that the aim of its case selection was to reach a most accurate representation of the extent of the criminal events that occurred in the respective situation.²²²

In line with moving from focused to open-ended investigations, a confidential case selection and prioritisation document would be developed weighing the gravity of cases within and across situations against each other and the Office's resources.²²³ The Office argues this approach to be in accordance with article 54(1)(b) demanding the Prosecutor to ensure effective investigations. The case prioritisation will follow the same procedure (e.g. assessment of sufficient gravity) as the case selection, but additionally the following factors will be taken into account in hierarchical order: 1) "whether a person, or members of the same group, have already been subject to investigation or prosecution either by the Office or by a State for another serious crime"; 2) the impact of investigations on victims, 3) the expected level of deterrence, 4) „the impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis“, and 5) circumstances influencing the operability of investigations such as availability of evidence, the security situation and international cooperation.²²⁴

How potential cases will be identified at the situation stage without conducting focused investigations, is not elaborated upon.

for Security Studies <https://www.issafrika.org/iss-today/icc-prosecutors-policy-on-case-selection-timely-but-is-it-enough> (accessed 11 October 2016).

²²² Office of the Prosecutor (2016a) "Policy Paper on Case Selection and Prioritisation," The Hague: International Criminal Court. para. 8.

²²³ Ibid. para. 9.

²²⁴ Ibid. paras 50-51.

As noted, the gravity assessment follows the same criteria in both phases, taking into account the scale, nature, manner of commission and impact of the crimes.”²²⁵ These four criteria are defined in the *Policy Paper on Case Selection* (see below).²²⁶

“Scale” is the only quantitative element. It consists of the number of victims and the temporal and geographical spread of the crimes. The “nature” factor looks at the kind of crime committed. While not specifically stating which material elements are considered graver than others, the mention of killings, SGBC, persecution, extermination and crimes against children, indicate that these are considered to be at the top of the gravity list. Assessing the “manner of commission” criterion, the means employed in the execution of the crime are considered. Factors such as a high degree of organisation, abuse of power and brutality play a role here. The “impact of crimes” is evaluated in light of the effects the criminal conduct had on victims and communities.

²²⁵ Office of the Prosecutor (2009) "Regulations of the Office of the Prosecutor," ICC-BD/05-01-09. The Hague: International Criminal Court. Regulation 29 (2).; Office of the Prosecutor (2013a) "Policy Paper on Preliminary Examinations," The Hague: International Criminal Court. para. 61.; Office of the Prosecutor (2016b) "Policy Paper on Case Selection and Prioritisation." para. 32.

²²⁶ Office of the Prosecutor (2016b) Office of the Prosecutor (2016b) "Policy Paper on Case Selection and Prioritisation." paras 38-41.:

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

The nature of the crimes refers to the specific factual elements of each offence such as killings, rapes, other sexual and gender-based crimes, crimes committed against or affecting children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.

The manner of commission of the crimes may be assessed in light of, *inter alia*, the means employed to execute the crime, the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and other sexual or gender-based violence or crimes committed by means of, or resulting in, the destruction of the environment or of protected objects.

The impact of crimes may be assessed in light of, *inter alia*, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land [emphasis added].”

At the case stage, the OTP additionally makes detailed analysis of the degree of responsibility of the alleged perpetrators: “Gravity is the predominant case selection criteria adopted by the Office and is embedded also into considerations of both the degree of responsibility of alleged perpetrators and charging.”²²⁷ It reiterates a focus on most responsible persons, but also commits to an upward-building approach if, initially, those at the top of the responsibility chain are outside the Office’s reach.²²⁸ The evaluation of the extent of responsibility will be based on “the nature of the unlawful behaviour; the degree of their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity.”²²⁹ Further, the selection of charges should ideally mirror the principal types of victimisation and represent communities most affected.²³⁰

6.1.4 Conclusion – The OTP’s approach to gravity

The Office’s understanding of gravity has undergone significant changes. The definition and application of the concept became more elaborate and sophisticated with time.

At a first glance, the approach followed by the OTP does not reveal significant differences in the assessment of situational and case gravity. At both stages four factors – scale, nature, manner of commission and impact – are looked at in addition to the degree of responsibility of the persons of interest. These elements are examined against a set of potential cases at the situation stage and amongst those at the case stage. It has been acknowledged that the latter naturally allows for a more “exacting standard of gravity”²³¹ as the investigations become more specific.²³²

While the OTP in its early days looked at situations in their entirety, it appears that now the Office evaluates the gravity of a situation in light of potential cases arising from it. The OTP’s policies have faced criticism with regards to assessing the four factors “scale”, “nature”,

²²⁷ Office of the Prosecutor (2016a) "Policy Paper on Case Selection and Prioritisation," The Hague: International Criminal Court. para. 6.

²²⁸ Ibid. para. 42.

²²⁹ Ibid. para. 43.

²³⁰ Ibid. para. 45.

²³¹ Bosco, David (2016) "How the ICC Selects Its Cases," LAWFARE, <https://www.lawfareblog.com/how-icc-selects-its-cases> (accessed 20 October 2016).

²³² Badagard, Lovisa; Klamberg, Mark (2016) "The Gatekeeper of the ICC - Prosecutorial strategies for selecting situations and cases at the International Criminal Court," <https://ssrn.com/abstract=2784470> (accessed 5 October 2016). p. 28.

“manner of commission” and “impact” too vaguely and non-transparently²³³ and that the Prosecutor should do a better job of differentiating between insufficient gravity as a legal admissibility criterion and gravity as a policy criterion guiding the Prosecutor in exercising his/her discretion.²³⁴

6.2 The jurisprudence on gravity

The following section will depict the jurisprudence on gravity. Some, but not all situations and cases chosen for the case study have been discussed by the Chambers.

6.2.1 *Situation in the Democratic Republic of Congo – Decision on arrest warrants*

The first jurisprudence on the concept of gravity was issued by Pre-Trial Chamber I in its “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58” of 10 February 2006. In January 2006, the Prosecutor had requested the PTC to issue arrest warrants in the context of the DRC situation for two rebel leaders, Thomas Lubanga Dyilo and Bosco Ntaganda (*hereinafter* Ntaganda). While PTC I decided to issue the requested warrant of arrest for Lubanga, it declined to do so for Ntaganda declaring the case against him to be inadmissible on the basis of insufficient gravity.

This conclusion was preceded by the development of a gravity threshold test. First of all, the judges argue that the gravity criterion was to be viewed as an addition threshold to the crimes listed in the Statute and therefore “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.”²³⁵ Following the interpretation criteria laid down in the VCLT²³⁶ and taking into account the Rules of Procedure and Evidence of the ICTY and ICTR as well as relevant UNSC resolutions,²³⁷ the judges unanimously argue that the following criteria were to be met to fulfil the necessary standard of sufficient gravity in line with article 17(1)(d): (i) the respective

²³³ Peake, Jessica (2016) “The Institutional Framework of the Office of the Prosecutor, Legitimacy, and Overcoming Bias Allegations,” in R. H. Steinberg, ed. *Contemporary Issues Facing the International Criminal Court*. Leiden/Boston: Brill Nijhoff.

²³⁴ Stegmiller, Ignaz (2009) “The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda,” 9 *International Criminal Law Review* 547-565.; SaCouto, Susana; Cleary, Katherine (2007) “The Gravity Threshold of the International Criminal Court,” 23 *American University International Law Review* 808-862. (5). pp. 813-814.

²³⁵ *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2 “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58” (10 February 2006). para. 41.

²³⁶ *Ibid.* para. 43

²³⁷ *Ibid.* para. 56-60.

conduct must be systematic and or large-scale also considering the “social alarm caused to the international community”; (ii) the suspect must be one of the most senior leaders of the respective situation; and (iii) the suspect must be amongst the most responsible taking into account the role he/she played and the role played by the organisation/group the relevant person belonged to.²³⁸ The Chamber further holds that these criteria were to be understood as constituting a legal threshold to be met, not factors to be considered as a matter of prosecutorial discretion.²³⁹

Applying the outlined test, the Chamber found that, in contrast to Lubanga, Ntaganda was not amongst the most senior leaders in this situation. The required gravity threshold was hence not met and the case against him inadmissible.²⁴⁰

The Prosecution appealed this decision and the Appeals Chamber in its judgement of 13 July 2006 revoked the decision of PTC I and declared the case against Ntaganda admissible. It argued that, firstly, the PTC wrongfully exercised discretion to review admissibility in the context of an arrest warrant and that, secondly, the PTC erred in law in its interpretation of “gravity”. The Appeals Chamber highlights that even though the decision to reject the judgment of PTC I was already made based on the first issue, it still saw it necessary to address the concept of gravity as “the interpretation of article 17(1)(d) of the Statute by the Pre-Trial Chamber, if upheld, could have an impact on the Court as a whole [...]”.²⁴¹ The Appeals Chamber believes that PTC I’s interpretation of gravity “contained errors, which, if not addressed here, could lead to future cases being declared inadmissible on grounds that are incorrect.”²⁴²

Going through the three-pronged test PTC I developed, the Appeals Chamber opines that with regards to a) the criterion that conduct must be systematic or large-scale and cause social alarm, the interpretation was not in line with the definitions of Rome Statute crimes and would “[...] effectively blur the distinction between the jurisdictional requirements for war crimes and crimes against humanity [...]”.²⁴³ Furthermore, the Appeals Chamber states that it was unclear

²³⁸ Ibid. para. 64.

²³⁹ See Stahn, Carsten (2009) "Judicial review of prosecutorial discretion: Five years on," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 275.

²⁴⁰ Ibid. para. 78-89.

²⁴¹ *Situation in the Democratic Republic of the Congo*, 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"" (13 July 2006). para. 54.

²⁴² Ibid.

²⁴³ Ibid. para. 69-70.

where the “social alarm” criterion came from as it did not appear in the Rome Statute and agrees with the Prosecutor in that it unnecessarily added a subjective rather than an objective dimension to the determination of gravity.²⁴⁴ As to the second and third criterion, the suspect belonging to the category of most senior leaders being most responsible, the Appeals Chamber takes issue with the PTC’s teleological argument that a focus on the most senior leaders would have the highest deterrent effect. It argues that “[t]he predictable exclusion of many perpetrators on the grounds proposed by the Pre Trial Chamber could severely hamper the preventive, or deterrent, role of the Court [...]”.²⁴⁵ It further holds that there is no reference in the Rome Statute to “‘most serious perpetrators’”²⁴⁶ and that according to article 27(1) “the Statute ‘shall apply equally to all persons without any distinction based on official capacity.’”²⁴⁷ It hence concludes that this criterion was overly restrictive and formalistic unnecessarily limiting the Court’s reach.²⁴⁸ Further, the Appeals Chamber argues that the PTC’s methodology with reference to ICTY and ICTR procedural law and UNSC resolution 1534 was flawed. The latter, putting forward a focus on most senior leaders, was adopted to facilitate the completion of the two tribunals and was hence made in a different context. Also, the practice of the two tribunals showed that persons of various seniority had been prosecuted – not only the most senior leaders.²⁴⁹

While the arguments rejecting the “most senior leaders” criterion are very convincing, it would have been helpful if the Appeals Chamber had also addressed the other criterion related to the personal element (“most responsible”). As PTC I declared the case against Ntaganda inadmissible on the basis of (ii) the suspect not being amongst the most senior leaders, the Appeals Chambers’ focus is understandable. However, it would have been beneficial to clarify whether and how, if this criterion was not to be applied, the (iii) “most responsible” criterion could be considered in the gravity assessment.

Judge Pikis did not disagree with the majority that article 5 does not require the Court to review admissibility when assessing the justiciability of a case²⁵⁰ and that the PTC’s interpretation of

²⁴⁴ Ibid. para. 70-72.

²⁴⁵ Ibid. para. 75.

²⁴⁶ Ibid. para. 79.

²⁴⁷ Ibid. para 78. ²⁴⁸

Ibid. para. 73-78. ²⁴⁹

Ibid. para. 80.

²⁵⁰ *Situation in the Democratic Republic of the Congo*, ICC-01/04-169 "Separate and partly dissenting opinion of Judge Georgios M. Pikis - "Judgement on the Prosecutor's appeal against the decision of Pre Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'" (13 July 2006). para. 32.

gravity was incorrect²⁵¹, but saw it necessary to offer a more elaborate interpretation of the concept of gravity. In his separate opinion, Judge Pikis begins by stating that “neither by its terms nor contextually is the gravity requirement set down in article 17 (1) of the Statute associated with or linked to the provisions of any other section of the Statute.”²⁵² It is hence to be analysed autonomously.²⁵³ He opines that for a case to be of insufficient gravity in accordance with article 17(1) it “[...] would have to be such as to qualify as a matter unworthy of consideration by the Court.”²⁵⁴ Cases are unworthy of the Court’s consideration, if “[...] acts constituting the crime are wholly peripheral to the objects of the law in criminalising the conduct. Both, the inception and the consequence of the crime must be negligible.”²⁵⁵

Judge Pikis hence took an approach opposing the narrow understanding of PTC I in assessing the gravity threshold. His interpretation would lead to a broad concept of gravity excluding only cases consisting of isolated incidents and negligible conduct. An example for this could be one instance of pillaging of a house by a soldier in the context of an armed conflict which would be punishable under article 8(b)(xvi) but would not fall within the scope of the object and purpose of the Rome Statute in that would not be amongst “the most serious crimes of international concern.”²⁵⁶ This approach would also imply that the gravity threshold of article 17(1) only plays a role with regard to war crimes. The qualifying elements for genocide (“acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”) and crimes against humanity (“acts when committed as part of a widespread and systematic attack directed against any civilian population”) already raise the bar of gravity higher than Judge Pikis’ threshold.

6.2.2 *The Prosecutor v. Bahar Idriss Abu Garda – Decision on confirmation of charges*

The second case in which the question of gravity arose was within the Darfur situation against Bahar Idriss Abu Garda. On 8 February 2010, PTC I decided whether to confirm charges against the Vice President of the Justice and Equality Movement (JEM) for the war crimes of killing twelve and further attempting to kill eight African Union Mission in Sudan (AMIS) ~~peacekeeping personnel as well as for attacking AMIS installations and pillaging AMIS~~

²⁵¹ Ibid. paras. 33-37.

²⁵² Ibid. para. 29.

²⁵³ Ibid.

²⁵⁴ Ibid. para. 39.

²⁵⁵ Ibid. para. 40.

²⁵⁶ Article 1 of the Rome Statute.

material.²⁵⁷ The Chamber establishes that it had discretion in accordance with article 19 to assess the admissibility of a case at the confirmation of charges stage.²⁵⁸ Referring to observations made by Schabas, the Chamber puts forward that, in addition to quantitative also qualitative factors should play a role in the evaluation of gravity and follows the Prosecutor's approach in taking into account the nature, manner and impact of the crime in addition to the scale.²⁵⁹

The judges make reference to rule 145(1)(c) of the Rules of Procedure and Evidence for factors to be considered in the assessment of gravity. This rule stipulates that for the determination of sentences, “the extent of damage caused, in particular, the harm cause to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime” are to be looked at.²⁶⁰ These criteria reflect the previously mentioned OTP's approach of, in the order of rule 145(1)(c), “scale”, “impact”, “nature” and “manner of commission”.

Applying this concept, the Chamber focuses on the dimension of impact, arguing that the result of the alleged crimes, namely the reduction of AMIS operations, severely impacted the local population and hence had effects beyond the immediate impact on the victims and their families.²⁶¹ Although it does not further analyse the dimensions of nature and manner, PTC I concludes that the gravity threshold was met and that the case was admissible.²⁶²

This was the first time a Chamber emphasised the qualitative element of gravity and referred to the four factors “scale”, “nature”, “manner of commission” and “impact” as part of the gravity assessment. The Chamber makes interesting observations on the impact factor taking into account the effect the attack on peacekeepers had on the overall security situation and the affected population, not just on those directly affected. However, the analysis remains somewhat superficial. The Chamber does not address the other three material factors, nor the level of responsibility of the alleged perpetrator. One might infer from this approach that the Chamber considered the presence of one factor to be sufficient to fulfil the gravity threshold. It would, however, have been valuable for future discussions if the Chamber specified if this was ~~indeed the case and/or if the~~ presence of one factor (e.g. impact) could outweigh the non-

²⁵⁷ *Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red "Decision on the Confirmation of Charges"(8 February 2010). para. 21.

²⁵⁸ Ibid. para. 27.

²⁵⁹ Ibid. para. 31.

²⁶⁰ Ibid. para. 32.

²⁶¹ Ibid. para. 33.

²⁶² Ibid. para. 34. PTC I nonetheless declined to confirm the charges against Abu Garda as it found the evidence provided by the Prosecutor insufficient; see *ibid.* paras. 231-236.

existence of another (e.g. scale). Further, it does not make reference to the controversy that had arisen in relation to the Lubanga and Ntaganda arrest warrants on how narrow the legal bar of gravity should be.

6.2.3 *Situation in the Republic of Kenya – Decision on authorisation of investigations*

The first judicial assessment on situational gravity was made the same year by Pre Trial Chamber II in the “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya.” As this was the first *proprio motu* investigation and authorisation by the PTC is only required for this trigger mechanism, the admissibility of a situation had not been addressed before by a Chamber.²⁶³

Having assessed that admissibility is to be evaluated at the situation stage, the Chamber concludes that “[...] it is called upon to construe the term “case” in the context in which it is applied.”²⁶⁴ The Chamber continues with arguing that a situation’s admissibility could not be analysed in the abstract, but had to be evaluated against the backdrop of actual and potential cases arising from said situation.²⁶⁵ It lists the following criteria for consideration: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).²⁶⁶ This outline of potential cases, however, was not binding for future examinations of admissibility and did not prevent the Prosecutor from making changes with regards to case selection at later stages according to the Chamber.²⁶⁷

The judges of Pre-Trial Chamber II then address the concept of gravity stating that “the insufficiency of gravity is actually an additional safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases.”²⁶⁸ Regarding (i) the personal element, the Chamber specifies that the groups of persons to be investigated should include those “who may bear the greatest responsibility for the alleged crimes committed.”²⁶⁹ For (ii) the material

²⁶³ See article 15 of the Rome Statute

²⁶⁴ *Situation in the Republic of Kenya*, ICC-01/09-19 "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Republic of Kenya"(31 March 2010). para. 48.

²⁶⁵ *Ibid.* para. 49.

²⁶⁶ *Ibid.* para. 50.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.* para. 56.

²⁶⁹ *Ibid.* para. 60.

element, the gravity of crimes within the context of incidents expected to be subject of the investigation should be evaluated with regards to the *modus operandi*.²⁷⁰ Following PTC I's approach in the Abu Garda decision, the Chamber argues that quantitative and qualitative factors were to be considered referring to rules dealing with determination of sentences, i.e. 145(1)(c) and 2(b)(iv) of the Rules of Procedure and Evidence. Based on these rules, the Chamber develops a similar but more sophisticated test than PTC I did previously.

The Chamber articulates that the gravity evaluation regarding the second element should be based on "(i) the scale of the alleged crimes (including assessment of geographical and temporal intensity; (ii) the nature of the unlawful behaviour of the crimes allegedly committed; (the employed means for the execution of the crimes (i.e., the manner of their commission) and (iv) the impact of the crimes and the harm caused to victims and their families."²⁷¹

Applying the gravity test to the Kenya situation, the Chamber finds that the Prosecutor failed to analyse the gravity of (potential) cases and instead only looked at the gravity of the overall situation.²⁷² However, PTC II went on to review this general submission on gravity stating that (i) the scale appears to be met based on the number of victims and by the incidents being widespread,²⁷³ the nature and manner based on the degree of brutality,²⁷⁴ and the impact by the devastating consequences for the victims, such as psychological and physical trauma and stigmatisation.²⁷⁵ The Chamber proceeds to make its own assessment of gravity of (potential) cases establishing that the provided evidence shows the involvement of high-ranking individuals in the alleged crimes²⁷⁶ (first element fulfilled) and the scale of the alleged crimes, the number of "burned houses, deaths, and displaced people" as well as the brutality with which they were carried out, "for example burning victims alive, attacking places sheltering IDPs, beheadings, and using pangas and machetes to hack people to death"²⁷⁷ (second element fulfilled). The Chamber hence concludes that the article 17(1)(d) gravity threshold was met in the Kenya situation.²⁷⁸

²⁷⁰ Ibid. para. 61.

²⁷¹ Ibid. para. 62.

²⁷² Ibid. para. 189.

²⁷³ Ibid. paras. 190-191.

²⁷⁴ Ibid. paras. 192-193.

²⁷⁵ Ibid. paras. 194-196.

²⁷⁶ Ibid. para. 198.

²⁷⁷ Ibid. para. 199.

²⁷⁸ Ibid. para. 200.

In spite of the Chamber's claims that it would distinguish between evaluating the gravity of the situation as a whole and evaluating the gravity of potential cases, it did not follow through on this promise. In its application of the gravity test to potential cases it addresses the personal element, but fails to examine the second element any differently than in the general situation assessment. While the Chamber mentions specific incidents, it does neither elaborate on whether they would constitute one or several potential cases, nor establish a link between the incidents and specific persons it found to be most high-ranking. Therewith, "the Chamber did not provide concrete guidance on how the 'potential cases' approach should be applied. It simply enumerated some general factors, such as "high-ranking positions", "scale", "brutality" and "impact on victims", and applied them to the facts of the situation."²⁷⁹ Further, it is noteworthy, that PTC II referred to the seniority of the perpetrators as the significant criterion, not to their level of responsibility. It hence reiterated the highly criticised PTC I's approach to the personal element in the Lubanga/Ntaganda judgement. However, it agreed with the separate opinion of Judge Pikis that the gravity should not to be interpreted too narrowly and only exclude peripheral cases.

6.2.4 *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali – Decision on confirmation of charges*

In the same composition, PTC II ruled again on gravity two years later, this time at the case stage. The "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) of the Rome Statute" in the case against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (*hereinafter* Ali) followed a claim by the Defence of Ali that the case against him was not admissible as it failed the gravity test.²⁸⁰ The Defence bases its claim on the first gravity test developed by PTC I in the Lubanga and Ntaganda decision arguing that the alleged crimes were neither systematic nor widespread and that Ali was neither one of the most senior leaders nor amongst the most responsible.²⁸¹

The Chamber dismisses these arguments making reference to the Appeals Chamber's finding that PTC I's understanding of gravity was flawed.²⁸² The Chamber reiterates the gravity test it established in the decision on the authorisation of the investigation into the Kenya situation and

²⁷⁹ Olásolo, Héctor (2012) *Essays on International Criminal Justice*. Oxford: Hart Publishing Ltd. p. 57.

²⁸⁰ *Situation in the Republic of Kenya* ICC-01/09/-02/11-382-Red. "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"(23 January 2012). para. 40.

²⁸¹ *Ibid.* para. 41.

²⁸² *Ibid.* para. 44. The Chamber nonetheless decided not to confirm the charges against Ali as it found the provided evidence to be insufficient. *See ibid.* para.430.

finds that the gravity threshold was satisfied in this case in light of Ali's position as Commissioner of Police, the significant scale of the alleged crimes, their serious nature and the brutal manner with which they were committed. While mentioning the impact on victims as a factor, the Chamber did not apply this criterion.²⁸³

With this decision the four factor test of material gravity was reinforced and the first approach to gravity developed by PTC I again rejected.

6.2.5 *Situation in the Republic of Cote d'Ivoire – Decision on authorisation of investigation*

The issue of gravity arose again in the second instance the Prosecutor exercised his *proprio motu* powers. Pre-Trial Chamber III authorising the investigation into the Cote d'Ivoire situation, also evaluates the gravity criterion in its decision. The judges follow the assessment by PTC I in the Abu Garda case which were reiterated in the decision on the Kenya situation, that evaluating the gravity serves as an additional threshold on top of the jurisdictional subject-matter limitations of the Court.²⁸⁴ However, in contrast to PTC II's approach in the Kenya situation, the Chamber develops a two-tier test stating that the gravity assessment should be made "in a general sense, as regards the entire situation, but also against the backdrop of potential case(s) within the context of a situation."²⁸⁵

Hence, while the PTC II argued in favour of an analysis solely based on potential case(s), PTC III proposes that "[...] the assessment should be general in nature and compatible with the pre-investigative stage of a situation."²⁸⁶ For the analysis of potential cases, the Chamber relies on the following criteria: (i) persons with greatest responsibility and (ii) gravity of the crimes determined by their scale, nature, manner and impact.

Unfortunately, the Chamber does not apply its concept in detail. It solely states that, according to information provided by the Prosecutor, it appears the investigations would focus on the most responsible individuals and would cover crimes "such as murder, rape and enforced disappearance" that were "committed on a large scale, as part of a plan or in furtherance of a policy, or in the context of, or in association with, an armed conflict."²⁸⁷ Also, the Chamber

²⁸³ Ibid. paras. 49-50.

²⁸⁴ *Situation in the Republic of Cote d'Ivoire*, ICC-01/11-14 "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire"(3 October 2011a). para. 201.

²⁸⁵ Ibid. para. 202.

²⁸⁶ Ibid. para. 203.

²⁸⁷ Ibid. para. 205.

does not elaborate on how a situation should be evaluated as to its gravity in a general sense v. as to its gravity depending on potential cases. Further, the assessment looks more like an evaluation of subject-matter jurisdiction – making sure the necessary elements of the crimes are fulfilled – than a gravity evaluation of the criteria laid out before.

In her separate opinion, Judge Fernández de Gurmendi only mentions gravity in the context of the assessment of victim representations, saying that they, amongst others, “[...] served to confirm the gravity of the situation.”²⁸⁸ Given that, in her eyes, the supervisory role of the Chamber in *proprio motu* investigations should be more limited than exercised by the majority, this is hardly surprising.²⁸⁹ However, she notes that “information presented by the Prosecutor at this early stage is meant to be illustrative and, as such, is necessarily non-exhaustive. The provisional nature of such information, moreover, means that it is in no way predictive of future cases that may arise upon the collection of evidence during the investigation itself, which may in fact focus on other crimes.”²⁹⁰

One author hence concludes that the disagreement between the dissenting judge and the majority “appears to focus, in part, on the question: in relation to what does the Chamber authorize an investigation?”²⁹¹ The lack of consensus does not provide more clarity on the question of how the gravity of situations is to be assessed.

6.2.6 *Situation on the registered vessels of The Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia – Review of the OTP’s decision not to investigate*

The Comoros situation led to the most elaborate discussion on gravity thus far, as the criterion was the decisive factor in the decision of whether or not to investigate. Following a state-referral by the Union of the Comoros, the Prosecutor conducted a preliminary examination, concluded that the situation did not meet the required gravity threshold and declined to open investigations into this situation. The Union of Comoros under article 53(3)(a) asked the Court to review the OTP’s decision. The state party challenged the Prosecutor’s understanding and application of the gravity concept, specifically “(i) the failure to take into account facts which did not occur

²⁸⁸ *Situation in the Republic of Cote d'Ivoire*, ICC-02/11-15 "Judge Fernández de Gurmendi's separate and partially dissenting opinion to the the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire" (3 October 2011b). para. 50.

²⁸⁹ *Ibid.* para. 16.

²⁹⁰ Rastan, Rod (2012) "The Jurisdictional Scope of Situations before the International Criminal Court," 23 *Criminal Law Forum* 1-34. p. 24.

²⁹¹ *Ibid.* pp. 26-27.

on three vessels over which the Court has territorial jurisdiction (paras. 62-81); and (ii) the errors in addressing the factors relevant to the determination of gravity under article 17(1)(d) of the Statute.”²⁹²

The first noteworthy finding the Chamber makes is that articles 53(a) and (b) constitute legal requirements and that only article 53(c), the “interest of justice” criterion, awards the Prosecutor with discretion.²⁹³ As to the first contentious issue, the limitations of territorial jurisdiction in the gravity assessment, the Chamber states that the OTP made an erroneous judgement. Acknowledging that the territorial jurisdiction is limited to the three respective vessels, the Chamber holds that, contrary to what the Prosecutor stated, “[...] the Court has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competences as well as their gravity.”²⁹⁴ However, the Chamber argues that the Prosecutor did not follow through with applying the principle she established and considered facts which were outside the jurisdiction of the ICC and that this error hence did not influence the outcome of the OTP’s gravity evaluation.²⁹⁵

Turning to the second issue, the factors relevant for the gravity assessment, the Chamber comes back to the approach developed in the Kenya situation. It holds that the gravity assessment of the situation should be made in light of “potential cases” likely to become the subject of the investigation. These potential cases should (i) target individuals bearing the greatest responsibility and (ii) address crimes meeting the gravity threshold with regards to their scale, nature, manner of commission and impact on victims.²⁹⁶ Concerning (i), the Chamber contends the Prosecutor’s argument that “there was not a reasonable basis to believe that ‘senior IDF commanders and Israeli leaders’ were responsible as perpetrators or planners of the identified crimes does not answer the question at issue, [...]” as not the formal position, but the degree of responsibility for the alleged crimes is to be seen as the decisive factor for the assessment of this criterion.²⁹⁷ The Prosecutor’s determination of this criterion hence led to a flawed gravity assessment.

²⁹² *Situation on the registered vessels of The Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-34 "Decision on the request of the Union of Comoros to review the Prosecutor's decision not to initiate an investigation"(16 July 2013). para.11.

²⁹³ Ibid. para. 14.

²⁹⁴ Ibid. para. 17.

²⁹⁵ Ibid. paras. 18-19.

²⁹⁶ Ibid. para. 21.

²⁹⁷ Ibid. para. 23.

Turning to (ii), the gravity of crimes, the Chamber starts off by looking at the scale. The OTP had argued that the “number of victims ‘reached relatively limited proportions as compared, generally, to other cases’”.²⁹⁸ According to the Chamber, however, “ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment [...] in addition to exceeding the number of casualties in actual cases that were previously not only investigated but even prosecuted (*e.g.* the cases against Bahar Idriss Abu Garda and Abdallah Banda) are a compelling indicator of sufficient, and not insufficient gravity.”²⁹⁹ The Chamber hence takes the approach that cases across situations are comparable and gives significant weight to the factor “scale”.

As to the nature of the crimes, the Comoros and the OTP disagreed on whether the actions by the IDF amounted to torture or cruel and inhumane treatment.³⁰⁰ The Chamber notices that this estimation is not only relevant in determining the subject-matter jurisdiction, but also for the gravity assessment.³⁰¹ The Chamber finds there was reasonable basis to believe that the acts committed on the *Mavi Marmara* vessel amounted to torture or inhuman treatment and that this factor should have been taken into account when assessing the nature of the crimes.³⁰²

With respect to the manner of commission, the Prosecutor argued that serious crimes were only committed on one out of seven vessels of the flotilla and that there is no indication they were committed as part of a plan or policy.³⁰³ The Chamber disagrees with the Prosecutor based on four points. Firstly, it holds that the probability that live fire was used before IDF members boarded the *Mavi Marmara* should have been included in the Prosecutor’s evaluation as it indicates, contrary to the Prosecutor’s statement, the existence of a plan to attack persons aboard the vessel.³⁰⁴ Secondly, the Chamber challenges the Prosecutor’s estimation that the cruel and abusive treatment of passengers was not linked to a policy but rather the result of individual misconduct. Instead, it states that “such systematic abuse reasonably suggests a certain degree of sanctioning of the unlawful conduct on the *Mavi Marmara*, at least in the form of tacit acquiescence of the military or other superiors.”³⁰⁵ Although this sentence is illogical, the

²⁹⁸ Ibid. para. 25.

²⁹⁹ Ibid. para. 26.

³⁰⁰ Ibid. para. 27.

³⁰¹ Ibid. para. 29.

³⁰² Ibid. para. 30.

³⁰³ Ibid. para. 31.

³⁰⁴ Ibid. paras 33-36.

³⁰⁵ Ibid. para. 38.

Chamber's point is that the Prosecutor erred in ignoring the systematic manner in which the cruel and abusive treatment was allegedly committed.

Thirdly and fourthly, the Chamber argues that IDF members' attempts to conceal unnecessary cruel treatment and the fact that the same conduct was not found on the other vessels (the Mavi Marmara carried 80 % of the people of the flotilla and no humanitarian supplies), should not be considered as indicators that there was no plan in place – further investigation would be needed to make this assessment.³⁰⁶ Hence, the Chamber concludes that the Prosecutor erred in her assessment of gravity as regards the manner of commission of the identified crimes.³⁰⁷

The Chamber also believes the Prosecutor's evaluation of the fourth criterion, impact, was flawed. While the Prosecutor argued that there was no impact beyond on those immediately affected and their families, the Chamber counters that "[w]hile considerations with respect to the impact of the crimes beyond the suffering of the victims could be relevant [...], it is not required that any such impact, [...], be discernible such that its absence could be taken into account as outweighing the significant impact of the crimes on the victims and ultimately negating sufficient gravity."³⁰⁸ Furthermore, the Chamber believes the Prosecutor's estimation that the alleged crimes did not have an impact on the population in Gaza was, also in light of the international response to the incidents (i.e. creation of fact-finding missions), premature.³⁰⁹

Having found that the Prosecutor's decision was erroneous with regards to all elements of the gravity assessment, the Chamber requests the OTP to reconsider the decision not to investigate the Comoros situation.³¹⁰

It has been argued that with the reference to the international response the Chamber applied the social alarm test developed by PTC in the Lubanga decision.³¹¹ Further, it was criticised that the Chamber blurred the lines between situation and case gravity.³¹²

Judge Kovács attached a partly dissenting opinion in which he argues that "the Pre-Trial Chamber's role is merely to make sure that the Prosecutor has not abused her discretion in

³⁰⁶ Ibid. para. 44.

³⁰⁷ Ibid. para. 45.

³⁰⁸ Ibid. para. 47.

³⁰⁹ Ibid. para. 48.

³¹⁰ Ibid. paras 49-51.

³¹¹ Knoop, Geert-Jan A.; Zwart, Tom, (2015) "The Flotilla Case before the ICC: The Need to Do Justice While Keeping Heaven Intact," 15 *International Criminal Law Review* 1069-1097. p. 1096.

³¹² Ibid. p. 1097.

arriving at her decision”³¹³ and that the majority’s stringent review “clearly interferes with the Prosecutor’s margin of discretion.”³¹⁴ He further largely agrees with the Prosecutor’s gravity assessment.³¹⁵ Judge Kovács argues that neither the number of victims nor the context in which the crimes had been committed were of sufficient gravity. He compares the Comoros situation with the Kenya situation in which 1,200 people were killed and 3,561 people injured in a large geographical area³¹⁶ and the Cote d’Ivoire situation which involved the “deaths of *hundreds* of civilians” to support his assessment.³¹⁷ Here, in contrast to the majority, he makes a comparison with another situation, not with other cases.

He further puts forward that the Court’s jurisprudence shows that certain qualitative factors need to be in place to compensate for a low number of victims to reach a sufficient level of gravity.³¹⁸ According to him, qualitative factors do not reach a level that would countervail the narrow scope of the situation in this instance.³¹⁹ He agrees with the majority that the Prosecutor failed to analyse the second component of gravity, the degree of responsibility of perpetrators, but that that failure had not been decisive for the final gravity determination.³²⁰ He hence does not consider it necessary to ask the Prosecutor to review her decision not to initiate investigations into the Comoros situation.³²¹

The OTP appealed this decision, but the Appeals Chamber found there to be no basis in the Statute for it to review the decision made by the Pre-Trial Chamber (see section 5.3.).³²² Therefore, the judges did not further consider the merits of the appeal and did not discuss the matter of gravity.³²³

³¹³ *Situation on the registered vessels of The Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-34-Anx "Judge Péter Kovács' separate and partially dissenting opinion to the Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation"(16 July 2015). para. 7.

³¹⁴ Ibid. para. 8.

³¹⁵ Ibid. paras 14-19, 22.

³¹⁶ Ibid. para. 19.

³¹⁷ Ibid. para. 23.

³¹⁸ Ibid. para. 20.

³¹⁹ Ibid. para. 22.

³²⁰ Ibid. paras 25-29.

³²¹ Ibid. para. 30.

³²² *Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-51 "Decision on the admissibility of the Prosecutor’s appeal against the ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’" (6 November 2015a). paras. 60, 66.

³²³ Ibid. paras. 37, 67.

The jurisprudence in the context of the Comoros situation is especially relevant as most issues that have previously been identified in the context of assessing situation and case gravity are addressed. The fact that no agreement has been reached on these issues between the Prosecutor and the Chambers and amongst the Chambers and that this most elaborate judicial ruling on gravity faced much criticism, shows the relevance of this discussion. Before the seven identified issues are analysed, the latest jurisprudence on gravity will briefly be looked at.

6.2.7 *Situation in Georgia – Decision on authorisation of investigation*

The third *proprio motu* investigation addresses the Georgia situation. Again, the Pre-Trial Chamber was asked to authorise the Prosecutor to proceed with a formal investigation. As to the gravity threshold, PTC I attempted to summarise the relevant findings made in the decisions on the authorisation of the Kenya and the Cote d'Ivoire situations and in the review of the Comoros situation.³²⁴

It concludes that the gravity assessment should be made in light of potential cases. According to the Chamber “(i) a gravity determination involves a generic assessment (general in nature and compatible with the fact that an investigation is yet to be opened) of whether the groups of persons that are likely to form the object of the investigation capture those who may bear the greatest responsibility for the alleged crimes committed; and (ii) gravity must be assessed from both a quantitative and qualitative viewpoint and factors such as nature, scale and manner of commission of the alleged crimes, as well as their impact on victims are indicators of the gravity of a given case.”³²⁵

The Chamber goes on to apply this gravity test to the situation at hand. With regards to (i) the personal element, the Chamber concludes that the investigations had the potential of targeting those individuals bearing the greatest responsibility.³²⁶ As to (ii) the material element, the Chamber makes the observation that crimes by South Ossetian forces against ethnic Georgians involving “51-113 killings, the destruction of over 5,000 dwellings, and the forced displacement of 13,400-18,500 persons constituting, [...], a 75 % decrease in the ethnically Georgian population in South Ossetia“ could to be considered as one potential case.”³²⁷ These crimes were of considerable scale, had a significant impact and were, at least partially, brutal in conduct

³²⁴ See footnote 73 in *Situation in Georgia*, ICC-01/15-12 "Decision on the Prosecutor's request for authorization of an investigation"(27 January 2016). para. 51.

³²⁵ Ibid.

³²⁶ Ibid. para. 52.

³²⁷ Ibid. para. 54.

according to the Chamber.³²⁸ Adding weight to the impact factor were incidents of attacks on peacekeepers which in the view of the Chamber had consequences beyond affecting immediate victims.³²⁹ The factor “nature” was not assessed beyond the determination that potential cases would likely encompass a series of crimes against humanity and war crimes.³³⁰

“In sum, the Chamber concludes that the potential cases arising from the situation would be largely admissible.”³³¹

The Chamber hence retains the material four factor analysis and the personal “bearing the most responsibility” approach. Further, it holds that the situation should be assessed against cases potentially arising from it, but also in terms consistent with the preliminary nature of the investigation. It would have been helpful if the evaluation of the four factors and on how the described incidents are to be considered as one case had been developed in more detail.

6.2.8 Conclusion – The Chambers’ approach to gravity

First of all, there appears to be agreement that gravity poses an additional safeguard on top of jurisdictional limits (see PTC I’s decision in Lubanga, PTC II’s decision in Kenya and PTC III’s decision in Cote d’Ivoire). The latest jurisprudence is further coherent with regard to the material and personal elements of gravity. The four material factors “scale”, “nature”, “manner of commission”, and “impact”, and the personal “bearing most responsibility” criterion have become the accepted guidelines for assessing gravity.

However, how they are to be applied remains disputed, as demonstrated by the disagreement between the majority and the dissenting judge of PTC I in the decision on the Comoros situation. They could not agree on how much discretion should be awarded to the Prosecutor in the gravity assessment, how broad/narrow the gravity threshold should be and on whether extra-jurisdictional factors (events that fall outside the Court’s territorial and/or temporal jurisdiction) should be considered. Further, the majority compares the situation to a case in their gravity evaluation, while the dissenting judge looks at other situations in their entirety as a yardstick. In the decision on the Kenya situation, PTC II establishes that the gravity of a situation should be evaluated with regard to potential cases arising from it, but it does not follow through with this approach when applying it to the facts. PTC III holds in the context of the Cote d’Ivoire

³²⁸ Ibid.

³²⁹ Ibid. para. 55.

³³⁰ Ibid. para. 53.

³³¹ Ibid. para. 57.

situation that situational gravity should be assessed with regards to potential cases but also in general terms. However, this distinction is not adopted in the ensuing analysis of the facts. Regarding the Comoros situation, the majority repeats the approach adopted in the Kenya decision, but treats the whole situation as one case. The same approach was adopted by PTC I in assessing the gravity of the Georgia situation. The Chamber considers all relevant incidents as one potential case, but does not further elaborate on whether the incidents could be connected to one person or a group of persons. Hence, while the jurisprudence on gravity is more consistent now than it was in the beginning (see disagreement between PTC I and the Appeals Chamber in the Lubanga/Ntganda decision), some issues remain disputed.

7 Analysis of the Court's approach to gravity

The issues that have been identified and listed following the discussion on the criticism of the Court's application of the gravity threshold will be looked at now:

1. Establishment of sufficient gravity in accordance with articles 53 and 17: A legal requirement or open for prosecutorial discretion? In relation to that, can gravity be assessed in relative or only in absolute terms? How exact can the gravity assessment be?
2. How are the four material factors, "scale", "nature", "manner of commission", and "impact" to be assessed? Do all four have to be present or can abundance of one or some factors outweigh non-existence of others?
3. With respect to the personal element of gravity: Should the position of the perpetrator be included in the assessment or only his/her level of responsibility? How is this factor to be assessed at the situation stage?
4. How is situational gravity to be evaluated? Should the gravity assessment pertain to the situation in general or to potential cases arising from it? How can these two be distinguished? Should situations and cases be assessed according to different standards? In relation to this inquiry, should cases be selected across situations or within the same situation?
5. What are the boundaries for assessing a situation? Can facts that lie outside the Court's jurisdiction be included in the gravity assessment?

The Court's approach to these issues will be compared with relevant academic writings and evaluated with the help of the interpretative methods identified in the methodology chapter.

7.1 Controversy 1: Legal v. Discretionary

Critics argue that the Prosecutor should be more careful in differentiating between considerations of gravity for legal and policy purposes: between insufficient gravity as a legal admissibility criterion and between gravity as a policy criterion guiding the Prosecutor in exercising his/her discretion.³³² They request clarification of this distinction in policy papers as well as in the application of the gravity threshold to situations and cases. Underlying this argument is the belief that the admissibility criterion gravity is a strict legal requirement not allowing for discretion. Linked to this issue is also the debate which mainly arose following the Prosecutors DRC/Iraq comparison on whether gravity can be assessed in relative terms, in comparison to other situations/cases (discretionary), or whether it has to be assessed according to an exact legal threshold. In relation to the DRC/Iraq discussion, Schabas makes the point that “the ‘threshold’ was treated as a relative analysis based primarily on the number of victims in each situation” and through the OTP’s analysis being based on a comparison, the understanding of the gravity threshold as a legal requirement was undermined.³³³ Heller further raises the issue of inconsistency between the OTP’s and the Chamber’s approach as to whether it is a strict legal threshold or can be assessed in a relative and discretionary manner.³³⁴

In the first decision on gravity, PTC I establishes that the gravity criterion was to be understood as a legal criterion and was not subject to discretion.³³⁵ This interpretation has largely remained unchallenged in ensuing jurisprudence. Also the majority of judges reviewing the OTP’s decision on the Comoros situation argue that the admissibility criteria stipulated in article 53(1)(a) and (b) were to be understood as legal requirements and only article 53(1)(c), the

³³² Stegmiller, Ignaz (2009) "The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntanga," 9 *International Criminal Law Review* 547-565.; SaCouto, Susana; Cleary, Katherine (2007) "The Gravity Threshold of the International Criminal Court," 23 *American University International Law Review* 808-862. (5). pp. 813-814.; DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. pp. 1432-1433.

³³³ DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. p. 1432.

³³⁴ Heller, Kevin J. (2015) "The Pre-Trial Chamber's Dangerous Comoros Review Decision," *Opinio Juris*, <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/> (accessed 4 August 2016).

³³⁵ See Stahn, Carsten (2009) "Judicial review of prosecutorial discretion: Five years on," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 275.

“interest of justice” criterion, allowed for the exercise of prosecutorial discretion.³³⁶ The dissenting judge, however, finds the majority’s approach too restrictive interfering with the discretion of the Prosecutor. Indeed, one commentator contrasts the majority’s view “that the gravity threshold is a matter of ‘exact legal requirements’” with the Prosecutor’s and dissenting judge’s position “that the Prosecutor has significant discretion in determining which situations are insufficiently grave to merit investigation.”³³⁷

The wording in article 53(1) supports the majority’s approach: The Prosecutor *shall* initiate investigations if there is reasonable basis to do so. The Office therefore has to investigate a situation following a referral and, arguably, a communication, as long as the situation is not outside its jurisdiction or inadmissible.³³⁸ Further, the word “sufficient” is more consistent with a strict threshold.³³⁹ There hence appears to be no room for policy considerations in the situation selection beyond the “interest of justice” criterion.³⁴⁰

Nothing in the Rome Statute, however, forces the prosecutor to investigate cases even if they meet the gravity threshold and the other admissibility criteria.³⁴¹ The Prosecutor is under no obligation to justify not investigating certain cases and there is no judicial review procedure in place in the Rome Statute for these instances. The Pre-Trial Chamber can only prevent the OTP from prosecuting certain cases, but not compel to prosecute. An exception might arise if the Prosecutor does not investigate or prosecute any case within a situation. Article 53(2) states that the OTP shall inform the Pre-Trial Chamber and the referring party if, after conducting formal investigations, it finds the case to be inadmissible, amongst others. This decision then might be reviewed by the Pre-Trial Chamber.³⁴² As elaborated in section 5.3., the term “case” is to be seen in this context as reflecting the cases within a situation in their entirety. It would be illogical and inconsistent with other provisions in the Rome Statute if the Prosecutor had to

³³⁶ *Situation on the registered vessels of The Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-34 "Decision on the request of the Union of Comoros to review the Prosecutor's decision not to initiate an investigation"(16 July 2013). para.14.

³³⁷ Heller, Kevin J. (2015) "The Pre-Trial Chamber's Dangerous Comoros Review Decision," *Opinio Juris*, <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/> (accessed 4 August 2016).

³³⁸ See also Human Rights Watch (2016b) "Office of the Prosecutor, International Criminal Court, Draft Policy Paper on Case Selection and Prioritisation - Comments of Human Rights Watch," <https://www.hrw.org/news/2016/11/11/fifteenth-session-international-criminal-court-assembly-states-parties> (accessed 6 October 2016).

³³⁹ DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. p. 1432.

³⁴⁰ *Ibid.* p. 1410.

³⁴¹ *Ibid.* p. 1415.

³⁴² See Article 53(2) and (3) of the Rome Statute

explain why it chose not to investigate every potential case. This has also never been practised, would deprive the Prosecutor of almost any discretion and would not be feasible given the limited resources the Court has at its disposal.

Therefore, while remaining a legal requirement in the sense that cases not meeting the gravity threshold are to be declared inadmissible, the selection and prioritisation of cases can be based on prosecutorial policies. With regards to cases, the OTP could indeed be more exact in differentiating between the minimum legal bar required to establish sufficient gravity and the gravity considerations it follows in selecting and prioritising cases from all those meeting the minimum threshold. It does not differentiate between the two in the 2016 *Policy Paper on Case Selection and Prioritisation* or in other documents.

Stegmiller suggests that the OTP should only exercise its prosecutorial discretion when applying the “interest of justice” criterion.³⁴³ While this has merit as to selecting situation (as confirmed by PTC I in the Comoros decision), it does not change much for case selection since the Prosecutor is not compelled to investigate even if the case meets the legal threshold. Gravity is also an element of “interest of justice”. Therefore, as long as the Prosecutor distinguishes between which kind of gravity it applies in case selection (legal v. discretionary), the outcome would be the same.

To conclude, the Prosecutor can exercise discretion with regards to gravity only at the case stage. Here, it would be recommendable to pay more attention to distinguishing between gravity as the minimum legal threshold required and gravity as a factor in selecting from this pool of cases.

Having said that, is it possible and desirable to establish a strict and absolute minimum threshold for situations and for cases? Whether and to what extent can the criterion be assessed in restrictive, absolute terms? To what extent does it have to rely on the discretionary weighing of factors in comparison to other situations/cases?

The lack of a precise gravity requirement has been said to lead “to obscure choices among competing values”³⁴⁴ and “a form of unaccountable discretion that basically allows for the

³⁴³ Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. pp. 332, 355.

³⁴⁴ War Crimes Research Office (2008) “The Gravity Threshold of the International Criminal Court,” Washington D.C.: American University Washington College of Law. pp.15-16.

prosecutor to make dramatic decisions about the destinies of individuals and the future of nations without engaging in the politics that this should entail.”³⁴⁵

With respect to the identified criteria adopted to assess gravity, the current approach employed by the OTP reflects the difficult compromise between a stringent and formulaistic gravity definition eliminating any prosecutorial discretion and a vague and imprecise gravity definition giving rise to critical voices claiming a lack of transparency.

Peake argues that although it would probably not be feasible to draw the line at certain numbers, the vagueness about how each factor is assessed and weighed – the reasoning behind the Prosecutor’s selection choices – remains hardly falsifiable and therefore non-transparent.³⁴⁶ When PTC I in the Lubanga/Ntaganda decision introduced a restrictive threshold requiring the presence of certain aspects such as systematicity or seniority, this was highly criticised and rejected by the Appeals Chamber and following jurisprudence. But, while there appears to be agreement between the OTP and the Chambers that the material four factors “scale”, “nature”, “manner of commission” and “impact” and the personal “bearing most responsibility” criterion should be considered, there is no definite threshold in place for either; such as e.g. the impact has to extend beyond the immediate victims or there have to be at least x number of victims or whether one factor can outweigh another. In the analysis of the gravity criterion, the OTP and the Chambers have often referred to other cases or situations as reference points for the gravity evaluation.

It is indeed difficult to determine such an ambiguous concept as gravity in a vacuum. The attempt of the Chilean delegation during the Rome Statute negotiations to discuss the content of “gravity” was not followed-up on.³⁴⁷ This and the fact that article 1 establishes that the Court should focus on the “most serious crimes” indicate that a degree of discretion in interpreting the concept and the possibility to adapt it to changing circumstances was at least not rejected by the drafters. The wording “most serious” can be interpreted as “most serious at the time.” Hence, depending on the amount and level of crimes committed within the jurisdiction of the Court at a certain time, the evaluation of what is considered “most serious” might change.

³⁴⁵ Mégret, Frédéric (2013) "Beyond "Gravity": For a Politics of International Criminal Prosecutions," 107 *American Society of International Law (Proceedings of the Annual Meeting)* 428-431. p. 429.

³⁴⁶ Peake, Jessica (2016) "The Institutional Framework of the Office of the Prosecutor, Legitimacy, and Overcoming Bias Allegations," in R. H. Steinberg, ed. *Contemporary Issues Facing the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 363.

³⁴⁷ El Zeidy, Mohamed M. (2008) "The Gravity Threshold under the Statute of the International Criminal Court," 19 *Criminal Law Forum* 35-57. p. 38.

The criticism alleging vagueness in the Court's assessment of gravity is hence true in that it observes a fact; but a fact that is hardly amendable. While the OTP and the Chambers could be more rigorous in applying the threshold to the facts of the respective situation/case, definitive gravity requirements are impossible to establish.

Hence, gravity is a legal requirement as such, but as the concept itself is so ambiguous and there is no common understanding of it, the application of it cannot follow strict requirements. In the words of Seils:

“[T]he matter of selection cannot be considered as a science, but nor is it so unattached to principle to be nothing but an artistic intuition: if anything it might be considered a craft, based on guiding principles but sufficiently flexible to address the infinite variety of factual scenarios that will present themselves.”³⁴⁸

A legal requirement should not be misunderstood for necessarily being absolute and beyond any interpretative freedom. The application of the gravity threshold must be reasonable, but it might well be that two reasonable people come to different conclusions. As Judge Kovács argues in his dissenting opinion on the decision regarding the Comoros situation: “It does not mean that because the Chamber may have arrived at a different conclusion on the basis of the facts presented that the Prosecutor's decision was erroneous and should be accordingly reconsidered.”³⁴⁹ Another commentator states in this regard:

“Ultimately, however, the reason why it is so difficult to come up with a strict hierarchy of international crimes is simply because it is so difficult to find consensus in a fundamentally pluralist system. People will disagree on whether recruiting a child soldiers is one of the worst crimes possible or a complex phenomenon of adapting

³⁴⁸ Seils, Paul (2009) "The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court," in M. Bergsmo, ed. *Criteria for Prioritizing and Selecting Core International Crimes Cases*. Oslo: FICHL Publication Series.; See also DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. p. 1456.

³⁴⁹ *Situation on the registered vessels of The Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-34-Anx "Judge Péter Kovács' separate and partially dissenting opinion to the Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation"(16 July 2015).

security needs in broken societies; whether torture in Abu Ghraib is less of a crime than killing in Ituri.”³⁵⁰

This flexibility and the discussions arising from it should not just be seen as an unfortunate inconvenience stemming from the vagueness of the Rome Statute, but as a possibility to sharpen and develop our understanding of the purpose and impact of international criminal justice.

7.2 Controversy 2: The Material Element

The determination that it is neither feasible nor desirable to establish a strict gravity scheme in which the relevant information of each situation and case can be entered to produce a definitive outcome, does not mean there is unlimited discretion. Guidelines, boundaries within which discretion can be exercised, need to be in place. These guidelines consist of the material and personal elements of gravity. How they should be assessed and which weight should be given to each factor is and likely will remain the subject of controversy within and between the organs of the Court and in the academic community.

The material element consisting of quantitative and qualitative factors developed by the OTP and adopted by the Chambers appears to be largely unquestioned at this point. It has been first referred to by PTC I in the Abu Garda case and since then continuously applied by the Chambers.

However, there have been discussions in the academic community, especially at early stages, as to the weighing of the factors. Heller argues that the OTP should concentrate on qualitative instead of quantitative considerations such as systemacity and social alarm prioritising crimes perpetrated by state actors.³⁵¹ He is supported by Mégret who claims that a focus on scale would play in favour of Western states as “it risks being part of a very concrete politics that minimizes the collateral casualties of, for example, technologically sophisticated Western wars.”³⁵² Osiel, on the other hand, favours an approach solely based on quantitative considerations: “A utilitarian moralist would further observe that, in prejudicing overall human welfare, there’s nothing like death in large numbers. [...]. Finally, a single-factor test – focused here on raw

³⁵⁰ Mégret, Frédéric (2013) "Beyond "Gravity": For a Politics of International Criminal Prosecutions," 107 *American Society of International Law (Proceedings of the Annual Meeting)* 428-431. p. 429.

³⁵¹ Heller, Kevin J. (2010) "Situational Gravity under the Rome Statute," in Carsten Stahn; Larissa Van Den Henk, ed. *Future Perspectives on International Criminal Justice*. The Hague: T.M.C Asser Press. pp. 228-231.

³⁵² Mégret, Frédéric (2013) "Beyond "Gravity": For a Politics of International Criminal Prosecutions," 107 *American Society of International Law (Proceedings of the Annual Meeting)* 428-431.

numbers of victims of extreme violence – is simply easier and less controversial to apply to any given case than a multi-factor test.”³⁵³

The outline of the material element has significant implications for situation and case selection. Following Osiel’s approach, probably neither the Lubanga case, nor the Iraq situation, nor the Abu Garda case, nor the Al Mahdi case, nor the Comoros situation would have been selected as none involved deaths in large numbers. Heller’s and Mégrét’s approach would have probably prioritised the Iraq situation out of these four due to the possible involvement of a state as perpetrator.

As illustrated in the Abu Garda decision, the four material factors did not come out of nowhere, but were, at least partly, inspired by rules on sentencing. The four factors are reflected in rule 145(1)(c).³⁵⁴ Further, looking at the drafting history, while the International Law Commission (ILC) in preparing the Rome Statute draft “abandoned an effort to detail the precise content of gravity early in its deliberations”,³⁵⁵ the discussion on the criterion led to the following observation:

“‘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.’”³⁵⁶

This statement confirms that quantitative and qualitative factors should play a role in determining the gravity of a crime.

While the ICTY and other international tribunals do not operate with gravity as an admissibility criterion, gravity does play a role in the sentencing. ICTY jurisprudence considers the number of victims in combination with aggravating factors to determine gravity, such as “geographic

³⁵³ Osiel, Mark (2009) "How Should the ICC Office of the Prosecutor Choose its Cases? The Multiple Meanings of Situational Gravity," The Hague Justice Portal, <http://www.haguejusticeportal.net/index.php?id=10344> (accessed 3 August 2016).

³⁵⁴ *Situation in Darfur, Sudan*, ICC-02/05-02/09-243-Red "Decision on the Confirmation of Charges" (8 February 2010). para. 32.

³⁵⁵ DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. p. 1456.

³⁵⁶ *Ibid.* p. 1418.

scope”, “impact”, “type of crime”, “manner of commission” and “vulnerability of victims”.³⁵⁷ The approach of the ICTY hence includes similar material considerations and “recognizes that each situation presents its own unique features indicative of the gravity of the crimes, typically demonstrated by a combination of factors.”³⁵⁸

Absent a definition in the Rome Statute, a contextual interpretation considering rule 145 in combination with the gravity summary of the ILC and the practice of the ICTY have to suffice as sources for determining the content of gravity. These sources support the framework developed by the Court. The only alternative proposed by a Chamber, the approach of PTC I in the Lubanga/Ntganda case, considering social alarm, systemacity and widepreadness as factors of the material element, has largely been rejected. As the Appeals Chamber rightly put forward, the two latter factors would significantly constrain subject-matter jurisdiction of the Court by blurring the distinction between war crimes and crimes against humanity. For a crime to amount to a crime against humanity it would have to be “part of a widespread or systematic attack directed at any civilian population”.³⁵⁹ A war crime does not have to meet these criteria.³⁶⁰

The drafting history supports this reasoning. During the negotiations, it has been discussed to introduce gravity as an element of jurisdiction, but this proposal was not adopted. Instead, already in 1994, it became part of the admissibility test to assess whether “the acts alleged were not of sufficient gravity to warrant trial at the international level.”³⁶¹ The purpose of the gravity criterion was to prevent the Court from being swamped with “peripheral complaints involving minor offenders, possibly in situation where the major offenders go free” and to allow the Court to manage “the case load to the resources available.”³⁶² It was hence intended

³⁵⁷ Angermaier, Claudia (2009) "Case selection and prioritization criteria in the work of the International Criminal Tribunal for the Former Yugoslavia," in M. Bergsmo, ed. *Criteria for Prioritizing and Selecting Core International Crimes*. Oslo: International Peace Research Institute. p. 38.; SaCouto, Susana; Cleary, Katherine (2007) "The Gravity Threshold of the International Criminal Court," 23 *American University International Law Review* 808-862. (5). pp. 841-842.

³⁵⁸ SaCouto, Susana; Cleary, Katherine (2007) "The Gravity Threshold of the International Criminal Court," 23 *American University International Law Review* 808-862. (5). p. 842.

³⁵⁹ Article 7 of the Rome Statute

³⁶⁰ See Article 8 of the Rome Statute

³⁶¹ El Zeidy, Mohamed M. (2008) "The Gravity Threshold under the Statute of the International Criminal Court," 19 *Criminal Law Forum* 35-57. p. 37.

³⁶² Ibid.

to be an additional filter for situations and cases that are “*prima facie* of insufficient concern to an international jurisdiction.”³⁶³

The drafting history would therewith back up the Appeals Chamber’s and the dissenting Judge Pikis’ estimation that PTC I’s approach in the Lubanga/Ntaganda decision was too restrictive. Also, the objective of ending impunity and having a deterrent effect would be endangered if a large category of crimes were excluded *prima facie*. The “social alarm” criterion should also be rejected based on its subjective nature and its influenceability by the CNN-effect.³⁶⁴ An example for this effect is the difference in attention the two terrorist organisations ISIS and Boko Haram receive. While the number of deaths they cause and the brutality with which they operate is comparable (some sources say even higher for Boko Haram), ISIS has undeniably raised more “social alarm” – received more attention by the international community and the media.³⁶⁵

Having concluded that gravity can only be so narrow as to not additionally limit the Court’s jurisdiction, the question remains where the limit on the other side of the spectrum is; when is gravity interpreted too broadly?

Some authors have argued that the factor-based approach leads to a place in which every situation and case can be declared to be of sufficient gravity.³⁶⁶ Indeed, PTC I’s decision declaring the Comoros situation admissible raised some eyebrows. If the situation, the potential

³⁶³ Stahn, Carsten (2009) "Judicial review of prosecutorial discretion: Five years on," in C. Stahn; G. Sluiter, ed. *The Emerging Practice of the International Criminal Court*. Leiden/Boston: Brill Nijhoff. p. 267.

³⁶⁴ Kontorovich, Eugene (2014) "When Gravity Fails: Israeli Settlements and Admissibility at the ICC," 47 *Israel Law Review* 379-399. (3). p. 398.; Osiel, Mark (2009) "How Should the ICC Office of the Prosecutor Choose its Cases? The Multiple Meanings of Situational Gravity," The Hague Justice Portal, <http://www.haguejusticeportal.net/index.php?id=10344> (accessed 3 August 2016).; SaCouto, Susana; Cleary, Katherine (2007) "The Gravity Threshold of the International Criminal Court," 23 *American University International Law Review* 808-862. (5). p. 809.

³⁶⁵ Troup Buchanan, Rose (2015) "Isis overtaken by Boko Haram as world's deadliest terror organisation," The Independent, <http://www.independent.co.uk/news/world/africa/boko-haram-overtakes-isis-as-worlds-deadliest-terror-organisation-a6737761.html> (accessed 3 January 2017).; Smith, Alexander (2016) "ISIS Owns Headlines, but Nigeria's Boko Haram Kills More Than Ever," NBC News, <http://www.nbcnews.com/storyline/2015-year-in-review/isis-owns-headlines-nigeria-s-boko-haram-kills-more-ever-n480986> (accessed 3 January 2017).

³⁶⁶ War Crimes Research Office (2008) "The Gravity Threshold of the International Criminal Court," Washington D.C.: American University Washington College of Law.; DeGuzman, Margaret M. (2013b) "The International Criminal Court's Gravity Jurisprudence at Ten," 12 *Washington University Global Studies Law Review* 475-486. (3). p. 484.

cases arising from it, were of sufficient gravity, which wouldn't? ³⁶⁷ Was it really just a threshold applicable to wholly insignificant cases of negligible conduct, as Judge Pikis proposed?

The statements made by the ILC and the practice of the ICTY suggests that, while no factor alone suffices, at least one should be of particular seriousness to raise the crime to the bar of being of international concern. This was confirmed in the Abu Garda case in which the judges highlight the grave impact the alleged crimes had despite their limited scale. The Preamble's notion that "the most serious crimes of concern to the international community as a whole must not go unpunished" preceded by references to "unimaginable atrocities" and "such grave crimes" that "threaten the peace, security, and well-being of the world" suggests that the gravity bar should be higher than just excluding wholly insignificant cases of negligible inception and conduct (e.g. one soldier stealing food).³⁶⁸ Judge Kovács holds in this regard that the drafters intended the Court "to focus on those situations/cases which are indisputably grave and deserve the attention of the international community."³⁶⁹ Gravity cannot be so broad as to make its existence as a criterion next to subject-matter jurisdiction and the "interest of justice" criterion void.

7.3 Controversy 3: Role of the Perpetrator

Next to material considerations, also the role of the alleged perpetrator plays a role in the gravity assessment. In the Lubanga/Ntganda decision, PTC I establishes that the personal element should constitute of two factors: "most senior leaders" and "most responsible."³⁷⁰ The Appeals Chamber rejects the "most senior leaders" requirement on the basis of article 27(1) stipulating that official capacity should not play a role in the proceedings in light of the object and purpose of ending impunity and of having a deterrent effect.

³⁶⁷ DeGuzman, Margaret M. (2015) "What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation," American Society of International Law, <https://www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber> (accessed 12 June 2016).

³⁶⁸ See Preamble of the Rome Statute

³⁶⁹ *Situation on the registered vessels of The Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-34-Anx "Judge Péter Kovács' separate and partially dissenting opinion to the Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (16 July 2015). para. 8.

³⁷⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr "Decision concerning Pre-Trial Chamber's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo" (24 February 2006). para. 64.

The jurisprudence of other international tribunals shows that being a senior leader does not necessarily equal being most responsible and the other way around and that fulfilling the latter can be sufficient to warrant prosecution, as the case of Comrade Duch shows. The Extraordinary Chamber in the Courts of Cambodia (ECCC) did not view Comrade Duch to have held a very senior position in the Khmer Rouge regime. His conduct, however, was seen as having been particularly notorious and his case was hence chosen for prosecution.³⁷¹ Similar approaches have been taken by the ad hoc tribunals.³⁷²

In recent ICC jurisprudence on gravity, the seniority criterion has not been re-invoked. Instead, as the OTP does in its policy papers, the Chambers focus on those bearing the most responsibility for the alleged crimes. In practice, having a high-ranking position will often go hand in hand with having a high level of responsibility. That goes to explain the sometimes divergent application of this criterion, claiming an alleged perpetrator has or does not have a specific position.³⁷³

However, a high position should not be a requirement, which has been acknowledged by the Chambers. This approach would also allow for cases to be admissible if they deal with a low- or mid-level perpetrator as long as a high degree of responsibility for the crimes can be attributed to her/him and at the same time, exclude high-ranking persons from prosecution if they do not bear most responsibility. This approach is not only sensible with regards to proving a sufficient link between the person and the alleged crime(s) later in court, but also, as the Appeals Chamber stresses, taking into account article 27(1) that official capacity should not play a role in the proceedings and the object and purpose of ending impunity and of having a deterrent effect. If a group of perpetrators would be excluded from prosecutions from the start, these two goals were less likely to be achieved. Further, as held by Judge Pikis in his separate opinion, the threshold by PTC I in the Lubanga/Ntaganda decision would have a negative impact on positive complementarity as States Parties would be relieved of the obligation to prosecute mid- and low-level perpetrators of Rome Statute crimes.³⁷⁴ Stegmiller also supports

³⁷¹ War Crimes Research Office (2008) "The Gravity Threshold of the International Criminal Court," Washington D.C.: American University Washington College of Law. p.6.

³⁷² Agirre Aranburu, Xabier (2009) "Gravity of crimes and responsibility of the suspect," in M. Bergsmo, ed. *Criteria for Prioritizing and Selecting Core International Crimes*. Oslo: FICHL Publication Series. p. 159.

³⁷³ See e.g. *Situation in the Republic of Kenya* ICC-01/09/-02/11-382-Red. "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" (23 January 2012). paras 49-50.

³⁷⁴ *Situation in the Democratic Republic of the Congo*, ICC-01/04-169 "Separate and partly dissenting opinion of Judge Georgios M. Pikis - "Judgement on the Prosecutor's appeal against the decision of

this approach: “Admissibility cannot be construed in such a stringent manner, otherwise the Court would set up a legal barrier that excludes large numbers of perpetrators *ab initio*.”³⁷⁵

While this approach is relatively straight-forward at the case stage, a situation will be examined by looking at whether the groups of persons likely to be the object of the investigations include those who may bear the greatest responsibility for the alleged crimes.

It is difficult to imagine a situation in which the OTP would not declare a focus on these groups. It does not really serve to determine if a situation is graver: there will be a person most responsible for an isolated crime and a person most responsible for a genocide. It is fair to assume that some modes of responsibility or mental elements are graver than others. However, it is difficult to assess something like intent at early stages.³⁷⁶ It has hence been argued that the factor has limited meaning in assessing situational gravity.³⁷⁷ However, it might play a role in situations such as Iraq and Comoros in which it is difficult to link the crimes to persons beyond direct perpetrators, i.e. due to the limited nature of the crime and its commission by low-ranking perpetrators it could be difficult to show that the intent behind the conduct was particularly malicious or to link the crime to those higher up the ranks.

7.4 Controversy 4: Situational Gravity

In examining whether the assessment should follow the same or different standards at the situation and case stage, two options arise:

1. The same standards apply to the gravity assessment of a situation and the gravity assessment of a case, i.e. if a single case in the situation meets the gravity threshold, the situation is admissible.
2. Different standards apply to the gravity assessment of a situation and the gravity assessment of a case, i.e. the gravity of a situation is assessed in its entirety and according to a higher standard than individual cases.

Pre Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58' (13 July 2006). para. 41.

³⁷⁵ Stegmiller, Ignaz (2009) "The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda," 9 *International Criminal Law Review* 547-565. p.557.

³⁷⁶ Agirre Aranburu, Xabier (2009) "Gravity of crimes and responsibility of the suspect," in M. Bergsmo, ed. *Criteria for Prioritizing and Selecting Core International Crimes*. Oslo: FICHL Publication Series. p. 156.

³⁷⁷ DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. p. 1454.

These options are reflected in the academic discussions with some authors arguing that situation gravity equals case gravity and others claiming that situation gravity is higher than case gravity. A proponent of option two is Heller:

“At the outset, it is important to emphasise that we are dealing here with situational gravity, not case gravity. The Rome Statute is **notoriously vague** about the difference between situational gravity and case gravity, even though it formally adopts the distinction in Art. 53. But it is a critical distinction, because the OTP obviously cannot assess the gravity of an entire situation in the same way that it assesses the gravity of a specific crime within a situation.”³⁷⁸

Also Knoop and Zwart believe that “[a] distinction should be drawn between case gravity and situational gravity. [...] Both a situation and a case should meet a certain gravity threshold.”³⁷⁹ This argument is countered by claims that “the gravity requirement applies only to cases, and not to situations.”³⁸⁰ Being in favour of option one, the WCRO holds that “there is no evidence from the drafting history that those who created the ICC wanted to restrict its functioning solely to instances where the Court could pursue many grave cases falling within the same geographical and temporal referral.”³⁸¹

The debate is also reflected in the portrayed examples, namely in the comparison of the Lubanga and Abu Garda cases to the Iraq situation and in the comparison of the Abu Garda and Al Mahdi cases to the Comoros situation.

This debate raises interesting questions, for example, how the previously discussed varying broadness of situations should influence the gravity assessment. If a situation is assessed in its entirety, a situation that covers a large territory over a long period of time would meet the

³⁷⁸ Heller, Kevin J. (2015) "The Pre-Trial Chamber's Dangerous Comoros Review Decision," *Opinio Juris*, <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/> (accessed 4 August 2016).; See also Zakerhossein, Mohammad H. (2016) "Comments on the ICC OTP's draft policy paper on the case selection and prioritisation," *Justice Hub*, <https://justicehub.org/article/comments-icc-otps-draft-policy-paper-case-selection-and-prioritisation> (accessed 15 July 2016).

³⁷⁹ Knoop, Geert-Jan A.; Zwart, Tom, (2015) "The Flotilla Case before the ICC: The Need to Do Justice While Keeping Heaven Intact," 15 *International Criminal Law Review* 1069-1097. pp. 1094-1095. See also Kontorovich, Eugene (2014) "When Gravity Fails: Israeli Settlements and Admissibility at the ICC," 47 *Israel Law Review* 379-399. (3). p. 381.

³⁸⁰ War Crimes Research Office (2009) "The Relevance of "A Situation" to the Admissibility and Selection of Cases Before the International Criminal Court," Washington D.C.: American University Washington College of Law. p. 36.

³⁸¹ *Ibid.* p. 36.

gravity threshold more easily than a situation consisting of a small territory over a shorter period of time. One author comments in this regard that “[b]reaking down a situation into various smaller situations and comparing them individually face to face with one larger situation of an entire State causes falsification.”³⁸² It is also interesting to consider whether one approach would prioritise a certain kind of crimes over another. Option two would likely lead to a focus on crisis situations involving large-scale atrocities over situations of systematic state abuse with a limited number of victims.

The answer can be found in the wording of Art. 53(1)(b): “[T]he case is or *would be* inadmissible [emphasis added]”. According to a literal interpretation, the admissibility of a situation is hence to be assessed in light of (a) potential case(s) – meaning that if one case is found to be of sufficient gravity, the entire situation would be admissible. Or, phrased differently, a situation can only be declared inadmissible if no potential case within the situation meets the gravity threshold. This approach is also in line with the conclusion drawn in section 5.2. that a situation could comprise of a single case. Hence, the broadness/narrowness of a situation should not influence the gravity evaluation *per se*. However, it is naturally more likely for a broader situation to include at least one case of sufficient gravity. The study by Smeulders, Weerdesteijn and Hola empirically evaluating whether the OTP focused on the gravest situations, while providing valuable insights, might hence be of limited applicability as it solely looks at situations in their entirety.³⁸³

Even though there is hence nothing like “situational gravity”, it lies in the nature of things that the potential is usually greater than the actual – meaning the potential number of perpetrators and charges will be higher than those actually prosecuted. Therefore, while the units for gravity assessments are (potential) cases and not situations, practically, the standard for assessing potential cases at the situation stage will and should be higher than for actual cases at the case stage. A combination of option 1 and 2 applies: A situation is admissible if a single case within it meets the gravity threshold, but due to the preliminary nature of the assessment at the situation stage, the gravity standard should be higher here.

³⁸² Stegmiller, Ignaz (2011) *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*. Berlin: Duncker & Humblot. p. 106.

³⁸³ Smeulders, Alette; Weerdesteijn, Maartje; Hola, Barbora (2015) "The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance," 15 *International Criminal Law Review* 1-39.

The OTP and the Chambers also claim to consider *potential* cases in assessing the gravity of a situation. The OTP further specifies in the 2013 *Policy Paper on Preliminary Examinations* that it would evaluate the admissibility of *each* potential case.³⁸⁴ This statement suggests that, theoretically, if one case within a situation meets the gravity threshold, the situation would be admissible according to the Prosecutor. The Prosecutor reiterates this approach in the articles 53 reports on the Comoros situation: “In certain circumstances, a single event of sufficient gravity could warrant investigation by the Office.”³⁸⁵

The application of the gravity threshold to the facts of a situation by the OTP and the Chambers has, however, mostly been general in nature; without going into the details of how many potential cases might arise and how certain crimes are connected to an individual or a group. Also, while the Pre-Trial Chambers in their decisions on authorising investigations into situations argue in favour of an analysis based on potential cases, PTC III in the decision on the Cote d’Ivoire situation proposes that “[...] the assessment should be general in nature and compatible with the pre-investigative stage of a situation.”³⁸⁶ Also, in the latest jurisprudence concerning gravity in the context of the Georgia situation, PTC I establishes that “(i) a gravity determination involves a generic assessment (general in nature and compatible with the fact that an investigation is yet to be opened) of whether the groups of persons that are likely to form the object of the investigation capture those who may bear the greatest responsibility for the alleged crimes committed; [...]”³⁸⁷

Indeed, as the Prosecutor is not authorised to conduct investigations at the preliminary examination phase, “it is inherently difficult to foresee at this stage what evidence can be collected, against whom and for which crime.”³⁸⁸ As already indicated in the discussion on the role of the perpetrator, the personal element is unlikely to play a large role in the gravity assessment at the situation stage. Hence, it will often not be feasible to identify a detailed set of cases at the situation stage for the gravity analysis. However, the OTP and Chambers should

³⁸⁴ Office of the Prosecutor (2013a) “Policy Paper on Preliminary Examinations,” The Hague: International Criminal Court. para. 59.

³⁸⁵ Office of the Prosecutor (2014b) “Situation on Registered Vessels of Comoros, Greece and Cambodia - Article 53(1) Report,” The Hague: International Criminal Court. para. 144.

³⁸⁶ *Situation in the Republic of Cote d’Ivoire*, ICC-01/11-14 “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire” (3 October 2011a). para. 203.

³⁸⁷ *Situation in Georgia*, ICC-01/15-12 “Decision on the Prosecutor’s request for authorization of an investigation” (27 January 2016).

³⁸⁸ Rastan, Rod (2008) “What is a ‘Case’ for the Purpose of the Rome Statute,” 19 *Criminal Law Forum* 435-448. (3). p. 442.

attempt to establish whether there is reasonable basis to believe that one potential case within a situation meets/does not meet the threshold. On one hand, they need to be more precise in this endeavour. Simply listing the number of victims and presence of other material factors characterising the entire situation claiming the investigation would likely focus on persons bearing most responsibility is not sufficient to show whether one or several potential cases would meet the gravity threshold. Assessing gravity in these general terms also contributes to the creation of high expectations regarding persons and charges to be brought to trial – which, if not fulfilled, will encourage criticism.

On the other hand, critics should also be more rigorous in their claims; being aware of the difference between the potential and the actual – the difference between the Court’s aspirations and its powers. Hence, only because the Court puts forward in its gravity evaluation at the situation stage that certain crimes reaching certain quantitative and qualitative factors were committed, does not mean that the cases eventually arising from said situation have to cover the entire or even a significant part of the situation. At the trial stage, the charges and number of perpetrators will likely be more limited than originally aspired due to e.g. limited accessibility of sites, witness protection issues, or a slim possibility to arrest or summon the accused.³⁸⁹

The OTP addresses this issue in the 2016 *Policy Paper on Case Selection and Prioritisation*. The paper informs that the OTP will take pragmatic or “operational” criteria into account in the case prioritisation phase.³⁹⁰ This means cases will be selected independent of the political situation and based on the admissibility criteria set out in articles 17 and 53, but they will be prioritised, amongst others, according to the probability of effective investigation and prosecution. Suspects, such as state representatives, would hence still face the marginalisation linked to an international arrest warrant against them, while the OTP could avoid failure by de-prioritising further investigation and prosecution of the case until the political conditions change. Therewith, the OTP finds a balance between political and pragmatic considerations on one hand and objective and legal considerations on the other in the case selection and prioritisation. It further balances the two goals of ending impunity and ensuring effective prosecutions.

³⁸⁹ See also Obote-Odora, Alex (2009) "Case selection and prioritization criteria at the International Criminal Tribunal for Rwanda," in M. Bergsmo, ed. *Criteria for Prioritizing and Selecting Core International Crimes Cases*. Oslo: FICHL Publication Series. p. 45.

³⁹⁰ Office of the Prosecutor (2016a) "Policy Paper on Case Selection and Prioritisation," The Hague: International Criminal Court.paras. 51-52.

Another remarkable aspect of the policy paper is the statement that the selection and prioritisation of cases according to their gravity will take place within and across situations.³⁹¹ A comparison across situations would again support the notion that the units for gravity assessments are cases. Cases would then be chosen according to, amongst others, their *relative* gravity in relation to all other potential cases under the Court's jurisdiction. As discussed in section 7.1., this would fall under the discretionary use of gravity the OTP can exercise in the selection of cases.

"Ultimately then, as with all policies, the test is not just what the policy commits the Prosecutor and her office to doing, but rather *what* they do and *how*."³⁹² This aspect of the discussion is addressed in Chapter 8.

7.5 Controversy 5: Extra-jurisdictional facts

In reviewing the Comoros situation, PTC I criticises the OTP for not having considered facts that were linked to the alleged crimes but took place outside the Court's jurisdiction.³⁹³ The same issue has arisen in the DRC v. Iraq and Mali v. Comoros discussion. In case of the former, it was claimed that the Court failed to consider the total number of deaths in Iraq situation, which it had in the DRC,³⁹⁴ and in case of the latter, that the aim of the Rome Statue of ending impunity was violated by solely considering incidents that took place aboard the vessels.³⁹⁵

In the section discussing the definition of "situation" and "case", it has been established that the situation is demarcated by, at the minimum, territorial and temporal parameters and that cases prosecuted within the respective situation need to remain within these boundaries. The limits established by (partial) lack of territorial jurisdiction in the Iraq and Comoros situation constrained the scope of the situation to a very limited area/group of people. But, given that the

³⁹¹ Ibid., Ochi, Megumi (2016) "Gravity Threshold before the International Criminal Court: An Overview of the Court's Practice," 16 *ICD Brief*.ibid.

³⁹² Maunganidze, Ottilia A.; Du Plessis, Max (2016) "The new ICC policy paper on case selection and prioritisation is a step in the right direction, but does it really address current concerns?," Institute for Security Studies <https://www.issafrica.org/iss-today/icc-prosecutors-policy-on-case-selection-timely-but-is-it-enough> (accessed 11 October 2016).

³⁹³ *Situation on the registered vessels of The Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-34 "Decision on the request of the Union of Comoros to review the Prosecutor's decision not to initiate an investigation"(16 July 2013). para.11.

³⁹⁴ Schabas, William A. (2008) "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," 6 *Journal of International Criminal Justice* 731-761. p. 741.

³⁹⁵ Buchan, Russell (2014) "Scoping Out the Crime: Palestine, the Mavi Marmara and the ICC," *Justice in Conflict*, <https://justiceinconflict.org/2014/12/08/scoping-out-the-crime-palestine-the-mavi-marmara-and-the-icc/> (accessed 29 September 2016).

OTP has to consider the potential cases arising from the situation, it is limited to these jurisdictional boundaries in the gravity analysis – cases cannot include charges which do not fall within the Court’s jurisdiction. The Court hence should not consider extra-jurisdictional facts in the gravity assessment.

8 Application of the results to the case study

8.1 Iraq v. DRC/Lubanga and Darfur/Abu Garda

All five issues discussed above also arose in the criticism regarding the Court’s gravity evaluation of the Iraq situation in comparison to the DRC situation/the Lubanga case and the Darfur situation/the Abu Garda case. As one commentator puts it: “This comparison of large-scale situations vis-à-vis limited situations, that does not (and cannot) include all crimes committed on the territory of Iraq, has been harshly criticised.”³⁹⁶ This notion is supported by the WRCO which argues the comparison of crimes within the Court’s jurisdiction in the Iraq situation with the total number of killings in other situations was flawed.³⁹⁷ Schabas accuses the Prosecutor of comparing apples with oranges:³⁹⁸

“The Prosecutor could not have been comparing the total number of deaths in Iraq with the total in the DRC or Uganda, because he might have been forced to conclude that the situation in Iraq is more serious. Nor could he have been comparing the total number of deaths resulting from the crimes attributed to Lubanga with those blamed on the British troops in Iraq, because Lubanga was not charged with killing anybody. Thus, the quantitative analysis of gravity, which has a certain persuasive authority appears to get totally muddled in imprecise comparisons.”³⁹⁹

In the first sentence (“total number of deaths in Iraq”), he makes clear that extra-jurisdictional factors should have been included in the gravity assessment. The last sentence presents criticism regarding the material element of gravity: (the conduct/crime(s)) was not correctly and

³⁹⁶ Stegmiller, Ignaz (2009) "The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntanga," 9 *International Criminal Law Review* 547-565. p.559.

³⁹⁷ War Crimes Research Office (2009) "The Relevance of "A Situation" to the Admissibility and Selection of Cases Before the International Criminal Court," Washington D.C.: American University Washington College of Law. p. 5.

³⁹⁸ Schabas, William A. (2008) "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," 6 *Journal of International Criminal Justice* 731-761. p. 741.

³⁹⁹ Ibid. p. 748.

consistently assessed according to him.⁴⁰⁰ Heller believes there to be an over-emphasis on number of victims in the assessment of gravity and suggests that a different weighing of factors would have led to a different result:⁴⁰¹ “In terms of social alarm caused by the global situation of torture, therefore, the situation in Iraq appears no less grave than the situations the OTP is currently investigating.”⁴⁰² Similarly, El Zeidy remarks with regard to the material element that “[w]hen compared to the crimes of wilful killing or rape committed by the British soldiers in Iraq, one may question which crime is more serious: wilful killing or conscripting children? The latter was not even deemed as a violation before the adoption of the Additional Protocols to the Geneva Convention.”⁴⁰³ DeGuzman argues that “the Prosecutor explicitly prioritized the number of victims over other factors such as the fact that the crimes were (arguably) committed as part of an aggressive war. This decision appears to privilege the legitimacy perspective of powerful Western States.”⁴⁰⁴ The point that the factor “aggressive war” should have been taken into account is also found in Schabas’ work.⁴⁰⁵

These points indicate that the Prosecutor did not consider the correct facts – that even though not within the Court’s jurisdiction, the OTP should have considered the entire war in Iraq as a basis for the gravity assessment or used the Lubanga case as a reference point for determining the gravity of the limited Iraq situation. In addition to criticism related to the difference made between situation and case gravity, the concentration on facts that lie within the Court’s jurisdiction, the inconsistent and/or erroneous assessment of the material and personal element of gravity, also the comparison itself was subject to criticism. Schabas makes the point that “the ‘threshold’ was treated as a relative analysis based primarily on the number of victims in each situation” and by the OTP’s analysis being based on a comparison, the understanding of the gravity threshold as a legal requirement was undermined.⁴⁰⁶ The Iraq situation would need to

⁴⁰⁰ El Zeidy, Mohamed M. (2008) "The Gravity Threshold under the Statute of the International Criminal Court," 19 *Criminal Law Forum* 35-57. p. 57.

⁴⁰¹ Heller, Kevin J. (2010) "Situational Gravity under the Rome Statute," in Carsten Stahn; Larissa Van Den Henk, ed. *Future Perspectives on International Criminal Justice*. The Hague: T.M.C Asser Press. p. 228.

⁴⁰² Ibid. p. 234.

⁴⁰³ El Zeidy, Mohamed M. (2008) "The Gravity Threshold under the Statute of the International Criminal Court," 19 *Criminal Law Forum* 35-57. p. 40.

⁴⁰⁴ DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. p. 1460.

⁴⁰⁵ Schabas, William A. (2008) "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," 6 *Journal of International Criminal Justice* 731-761. p. 748.

⁴⁰⁶ DeGuzman, Margaret M. (2008) "Gravity and the Legitimacy of the International Criminal Court," 32 *Fordham International Law Journal* 1400-1465. p. 1432.

be declared inadmissible in its own right, DeGuzman points out.⁴⁰⁷ The OTP's refusal to investigate the Iraq situation was further contrasted with the Abu Garda case. DeGuzman criticises that the OTP applied different standards in its gravity evaluation of the Iraq situation and the Abu Garda case.⁴⁰⁸

Some of these arguments are valid. As established, the Prosecutor does not have discretion with regard to the selection of situations if they meet the required threshold. While an explicit threshold cannot be established, a comparison to other situations does not suffice. Further, the comparison to a situation in its entirety was flawed, as rightly pointed out by Schabas and others. The unit of a gravity assessment are actual or potential cases, not situations as such. However, claims that the OTP should have considered extra-jurisdictional factors have no merit. The section on controversy 5 has demonstrated that they should not be taken into account as they have no impact on potential cases. Hence, the total number of deaths caused by the invasion or the fact that the alleged crimes were committed as part of an aggressive war cannot play a role in the gravity assessment.

The OTP does not make a reference to the level of responsibility of alleged perpetrators in the gravity assessment of the Iraq situation. While the role of perpetrators cannot be addressed in detail at the situation stage as established in the section on controversy 3, the OTP should have still paid more attention to this aspect; i.e. whether the information points to isolated acts of numerous perpetrators or to an organised effort of one or a few person(s). Regarding the material element, the OTP should have further paid more attention to factors other than scale, as Heller points out. To be fair, the material four factor analysis had not been developed at this point in time. But basing the decision not to investigate the Iraq situation simply on the low number of deaths and then initiate charges against Lubanga which did not include any killings indeed appears incoherent. While the reasoning behind the decision was hence flawed, the decision itself was not necessarily. As established in the section on controversies 1 and 2, gravity is a legal threshold, but at the same time not beyond any discretion. The Prosecutor could have reasonably argued that the potential cases arising from the Iraq situation were not characterised by the particular seriousness of any one of the four material factors and hence did not fall within the category of "most serious crimes of concern to the international community."⁴⁰⁹ At the same time, the Prosecutor could have reasonably argued in favour of

⁴⁰⁷ Ibid. p. 1433.

⁴⁰⁸ Ibid. p. 1460.

⁴⁰⁹ Preamble of the Rome Statute

prosecuting the Lubanga and Abu Garda case, by, for example, as PTC II did in the Abu Garda case, bringing forward the particular seriousness of the impact criterion, i.e. effect on the wider community. Further, as highlighted in the section on situational gravity, the actual charges will likely be lower than the potential ones, thereby requiring a lower threshold. Seils illustrates this reality as follows: "In all other warrant applications the Office has brought a wider array of charges. Faced with the choice of gambling on Lubanga's continued detention or ensuring his trial for the serious crime of recruiting child soldiers, the Office opted for the latter. Criticism on this basis seems pusillanimous if not wrong-headed."⁴¹⁰

8.2 Comoros v. Darfur/Abu Garda and Mali/Al Mahdi

In the article 53(1) report on the Comoros situation, the OTP clearly states that it would consider the potential cases likely to arise from the situation in the gravity assessment.⁴¹¹ Pre-Trial Chamber I in its review of the OTP's decision, compares the Comoros situation to the Abu Garda case for the purpose of evaluating its gravity. The dissenting judge on the other hand compares the Comoros situation to the entire Kenya and Cote d'Ivoire situations. Both approaches have faced criticism as illustrated in section 3.3.2. While Dixon and Vogelvang and Clerc argue in favour of a comparison with another case (Abu Garda and Al Mahdi respectively),⁴¹² Heller, Knoops and Zwart, and van Schaak believe the Comoros situation can only be compared to other situations.⁴¹³

Both lines of argument have their flaws. It is true that the reference point for comparisons, if these are feasible at all, are potential and actual cases, not situations as such. However, due to the preliminary nature of the assessment at the situation stage, the gravity threshold is higher

⁴¹⁰ Seils, Paul (2009) "The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court," in M. Bergsmo, ed. *Criteria for Prioritizing and Selecting Core International Crimes Cases*. Oslo: FICHL Publication Series. p. 58.

⁴¹¹ Office of the Prosecutor (2014b) "Situation on Registered Vessels of Comoros, Greece and Cambodia - Article 53(1) Report," The Hague: International Criminal Court. para. 22.

⁴¹² Dixon, Rodney (2015) "ICC and the Gaza Freedom Flotilla: The Lawyers explain," in N. Jakobsson, ed.: Justice Hub. <https://justicehub.org/article/icc-and-gaza-freedom-flotilla-lawyers-explain> (accessed 12 September 2016).; Vogelvang, Eva; Clerc, Sylvain (2016) "The Al Mahdi case: Stretching the principles of the ICC to a breaking point?," Justice Hub, <https://justicehub.org/article/al-mahdi-case-stretching-principles-icc-breaking-point> (accessed 3 November 2016).

⁴¹³ Heller, Kevin J. (2015) "The Pre-Trial Chamber's Dangerous Comoros Review Decision," *Opinio Juris*, <http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/> (accessed 4 August 2016).; Knoops, Geert-Jan A.; Zwart, Tom, (2015) "The Flotilla Case before the ICC: The Need to Do Justice While Keeping Heaven Intact," 15 *International Criminal Law Review* 1069-1097. p. 1095.; Van Schaak, Beth (2014) "ICC Analysis on the Flotilla Incident - Fair & Balanced?," Just Security, <https://www.justsecurity.org/17183/icc-analysis-flotilla-incident/> (accessed 2 August 2016).

here and cannot be compared one-on-one to actual cases.

Another point of criticism is raised by Buchan who is of the opinion that the OTP should have considered facts that lie outside the Court's jurisdiction. He says that the OTP's approach was in line with a literal interpretation but would go against the object and purpose of the Rome Statute of ending impunity. He claims that if the OTP had extended its assessment to incidents occurring after the passengers and IDF had left the vessels (e.g. alleged torture), the gravity threshold of the entire situation would have been met.⁴¹⁴ He therewith agrees with the Pre-Trial Chamber which also criticises the OTP for not considering extra-jurisdictional factors in the gravity evaluation. However, the OTP was correct in not looking at extra-jurisdictional factors as established in section 7.5. This notion further does not go against the object and purpose of the Rome Statute as the Court cannot fight the impunity of perpetrators outside its jurisdiction.

PTC I also points towards the omission of the Prosecutor to take into account the role of alleged perpetrators (the OTP did not refer to this element at all in the article 53(1) report and later only focused on the seniority of alleged perpetrators, not their level of responsibility).⁴¹⁵ The OTP indeed should have mentioned this factor or at least stated that it found the material factors of insufficient gravity and therewith did not need to consider the personal element further. The Office, however, does conduct a detailed analysis of each material factor and concludes "the potential case(s) that could be pursued is inherently limited to an event encompassing a small number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations."⁴¹⁶ It is more specific in its gravity analysis here than in the article 53(1) report on Mali. While the OTP in this situation looks at different incidents individually, "the analysis is devoid of three important points: first, the interplay of the four factors and their weighing procedure is not addressed at all [...]. [...] the OTP does not analyse why further action by the Court is justified, but more or less repeats the facts of each incident" and regarding the impact

⁴¹⁴ Buchan, Russell (2014) "Scoping Out the Crime: Palestine, the Mavi Marmara and the ICC," Justice in Conflict, <https://justiceinconflict.org/2014/12/08/scoping-out-the-crime-palestine-the-mavi-marmara-and-the-icc/> (accessed 29 September 2016).

⁴¹⁵ *Situation on the registered vessels of The Union of the Comoros, The Hellenic Republic and The Kingdom of Cambodia*, ICC-01/13-34 "Decision on the request of the Union of Comoros to review the Prosecutor's decision not to initiate an investigation" (16 July 2013). para. 23.

⁴¹⁶ Office of the Prosecutor (2014b) "Situation on Registered Vessels of Comoros, Greece and Cambodia - Article 53(1) Report," The Hague: International Criminal Court. para. 25.

criterion in the destruction of protected objects “a thorough analysis would have to dig deeper and include surveys on the ground.”⁴¹⁷

Generally, the gravity analysis has become more specific and sophisticated since the decision on the Iraq situation, but there is still room for improvement. However, while the gravity analysis shows some flaws, e.g. no reference to the personal element, the conclusion reached is, again, reasonable. The OTP is right in its assessment that the scale of the Comoros situation was low and the qualitative factors did not outweigh the lack of scale. The Office states that in the Abu Garda case (attack on peacekeepers) which was comparably low numbers, the nature and impact of the crimes were significantly graver affecting the local population and constituting an attack on the international community and its legal system.⁴¹⁸ PTC I on the other hand interprets the gravity threshold too broadly essentially making its existence as an additional safeguard void. In comparing the situation to the Abu Garda case, it fails to acknowledge the higher impact of the Abu Garda case and over-emphasises the factor “scale” in the comparison to the Comoros situation. Also, it does not bring forward that a higher threshold would be required for the Comoros situation.

A focus on “scale” would have probably also led for the Al Mahdi case being declared to be of insufficient gravity. This case is another good example for the higher gravity standard for potential cases. While the situation could have produced more cases *potentially* targeting more serious crimes committed by perpetrators with a higher level of responsibility, they could, for some reason or another, not be selected or prioritised. However, the gravity of the situation as such is assessed against the background of these potential cases and the argument comparing the Al Mahdi case with the Comoros situation is hence flawed. If at all, the potential cases of the Comoros situation should be compared to the potential cases within the Mali situation. This understanding does not go against the previously established notion that a situation could consist of one single case. However, if this situation were to meet the gravity threshold, the single potential case would have to meet the higher situational gravity threshold.

The OTP’s decisions with respect to the Comoros situation and the Abu Garda and Al Mahdi cases were again made within the margin of reasonableness. The PTC’s decision on the Comoros situation, however, was not, as it deprived gravity of its meaning as an additional

⁴¹⁷ Stegmiller, Ignaz (2013) “The International Criminal Court and Mali: Towards more Transparency in International Criminal Law Investigations?,” 24 *Criminal Law Forum* 475-499. p. 497.

⁴¹⁸ Office of the Prosecutor (2014b) “Situation on Registered Vessels of Comoros, Greece and Cambodia - Article 53(1) Report,” The Hague: International Criminal Court. para. 145.

safeguard for the Court to focus on the “most serious crimes of concern to the international community as a whole”.

9 Conclusion

This thesis has found that, first of all, the admissibility test of articles 17 and 53 is and should be applied at the situation and the case stage. Further, with respect to the five issues identified in the discussion on the Court’s application of the gravity threshold, the following conclusions were drawn:

1. Gravity is a legal requirement at the situation and the case stage. But while situations that meet the threshold have to be investigated, cases that meet the threshold do not. Although being a legal threshold, gravity cannot be assessed according to a restrictive formula and allows for discretion within guidelines constituting of a personal and a material element
2. The material element is to be assessed according to the scale, nature, manner of commission and impact of the crime. At least one factor or the combination of all should be of particularly seriousness, so as to raise the situation/case to “the most serious crimes of concern to the international community”. At the same time, gravity cannot be interpreted so narrowly as to limit the jurisdictional reach of the Court.
3. The personal element is to be assessed in light of the level of responsibility of the alleged perpetrator(s). Seniority/high-ranking position of the perpetrator should not be a requirement, but will often be associated with a high degree of responsibility.
4. The gravity of a situation is to be assessed against potential cases likely to arise from said situation. Therefore, the situation should not be evaluated in its entirety, but in light of potential perpetrators and their conduct. However, as the potential is usually higher than the actual, the gravity of situations should be assessed according to a higher standard than the gravity of actual cases.
5. Since the gravity of situations is assessed with respect to the gravity of potential cases, extra-jurisdictional factors should not be considered in the gravity assessment.

Generally, and recently, the OTP and most Chambers have approached gravity in a way consistent with these findings. The analysis of gravity has become more advanced and coherent since the beginnings of the Court’s operations. However, the application of the gravity threshold to the facts of a situation/case has often been too general and imprecise. The same can be said for some of the criticism addressed at the Court. It often lacks a discussion on whether there is

a difference between situation and case gravity and how this difference is to be understood. Also, those who criticise the vagueness of the Court's assessment have failed to show how a restrictive gravity criterion should work and could be implemented to reach fairer selection results.

With the introduction of the 2016 *Policy Paper on Case Selection and Prioritisation*, the OTP answered to criticism claiming the Court was not acknowledging the role played by politics and pragmatism in the selection of situations and cases. While these considerations cannot and should not play a role in the situation selection, it is indeed sensible to take these factors into account in the case selection and prioritisation balancing the competing goals of the Court of ending impunity and ensuring effective prosecutions. For a Court that relies on the cooperation of its member states, this is a prudent approach to the paradox "between the need to conduct expeditious investigations and prosecutions and the need to pursue representative cases involving those most responsible for crimes."⁴¹⁹

It is fair to say that the Court has not delivered a perfect performance in selecting situation and cases and in communicating its choices. Criticism pointing towards these short-comings can be fruitful and lead to productive change, but critics should carefully scrutinise the presumptions their arguments are based on and focus on aspects the Court can actually be held responsible for. Some points might be better addressed at states parties or the international community. Referring to Kant's work, Franceschet stresses in this regard that "[...] ethical outcomes cannot be achieved through moral maxims and legal rules alone: coercive political actors must be willing to support and enforce the law's authority."⁴²⁰ Robinson highlights that the Court nowadays is often faced with an uncritical criticism manifesting itself in non-falsifiable politicisation hypotheses.⁴²¹ As stressed in the introduction, unfounded criticism attacking the Court's legitimacy can negatively impact on the Court's activities. In the words of Danner: "Supporters of international institutions must continue to seek to improve the accountability and legitimacy of these bodies if they are to survive in a climate increasingly wary of the delegation of authority to them."⁴²²

⁴¹⁹ Clark, Phil (2008) "Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," *Courting Conflict? Justice, Peace and the ICC in Africa*. p.41

⁴²⁰ Franceschet, Antonio (2016) "The International Criminal Court's Authority Crisis and Kant's Political Ethics," *International Criminal Law Review* 1-15. p.1.

⁴²¹ Robinson, Darryl (2013) "A Talk About How We Talk About Gravity," 107 *American Society of International Law (Proceedings of the Annual Meeting)* 423-425. p.424.

⁴²² Danner, Allison M. (2005) "Prosecutorial discretion and legitimacy," 97 *The American Journal of International Law* 510-552. p. 552.

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