

GRAVITY THRESHOLD BEFORE THE INTERNATIONAL CRIMINAL COURT: AN OVERVIEW OF THE COURT'S PRACTICE

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www.internationalcrimesdatabase.org

ICD Brief 19
January 2016

ABSTRACT

Although all the crimes under the jurisdiction of the International Criminal Court (ICC) are of a serious nature, a case is inadmissible before the ICC if the case does not have sufficient gravity to justify further action by the Court. This limitation on the exercise of ICC jurisdiction is called the “gravity threshold”. This Brief attempts to reveal how and to what extent the gravity threshold in the case and situation selection of the ICC has been formulated by the Court’s practice. An analysis of the ICC’s practice in chronological order shows a dual gravity threshold in the way that the gravity of a “case” and “situation” has been formulated. Furthermore, this Brief discusses the reason for and the impact of applying this dual standard.

I. INTRODUCTION

Whether the Prosecutor of the International Criminal Court (ICC or the Court) has a duty to prosecute all serious crimes of sufficient gravity within the jurisdiction of the ICC has been one of the most crucial but controversial issues concerning the activities of the Court. However, to answer this question, a more fundamental issue must be solved by challenging the hypothesis behind this question: can the Prosecutor be sure that a case is “of such gravity to justify further action by the Court”? The degree of gravity required to justify the Court’s further action is called the “gravity threshold”. The definition of sufficient gravity and the criteria to assess whether a case meets the gravity threshold have been discussed in various ways since the creation of the ICC.

This Brief attempts to reveal how and to what extent the gravity threshold of the ICC has been formulated through the Court’s practice. First, this Brief examines the relevant provisions of the Rome Statute of the International Criminal Court (ICC Statute) and the discussion that took place during the drafting process. Second, the Brief analyses the Court’s related practice, including the decisions and judgments of the Chambers, and the submissions and the policy papers of the Prosecutor in chronological order. Third, this Brief demonstrates a dual gravity threshold in the way that the gravity of a “case” and “situation” has been formulated and discusses the reason for and the impact of applying a dual standard.

II. THE RELATED PROVISIONS

A. The gravity threshold

The word “gravity” can be observed in many provisions of the ICC Statute. “Gravity” seems to reflect the purpose and scope of the Court to prosecute and punish the most serious crimes that concern the entire international community. The so-called “gravity threshold” appears as the indicator that is included in Article 17(1)(d) of the ICC Statute, which provides that the Court shall determine a case inadmissible where the case does not have *sufficient gravity* to justify further action by the Court.

The current Article 17(1)(d) of the ICC Statute was contained in Article 35(c) in the 1994 draft of the ICC Statute prepared by the International Law Commission (ILC).¹ The draft provision read as follows: “The Court may (...) decide (...) that a case is inadmissible on the ground that the crime in question (...) (c) is not of such gravity to justify further action by the Court.” The language that is used in the current Article 17(1)(d) first appeared in the commentary to the draft, where the ILC noted that “[t]he grounds for holding a case inadmissible are that the crime in question (...) is not of sufficient gravity to justify further action by the Court”.² By the time of the Rome Conference, this language found its way into the current ICC Statute.³

It was already widely agreed during the preliminary informal consultations that one ground for inadmissibility would be when a case did not have sufficient gravity; thus, this idea was included in an early version of the coordinator’s text and remained throughout the negotiations.⁴ According to the ILC, the Court should have discretion to decline jurisdiction in cases that lacked sufficient gravity, which ensures not only that the Court limits its focus to the most serious crimes but also that the Court can manage its case load.⁵ If it had to address every crime that falls under its jurisdiction, including crimes of lesser gravity, the ICC

¹ *Report of the International Law Commission on the work of its forty-sixth session* (UN Doc. A/49/10), p. 52.

² *Ibid.*

³ *Report on the Preparatory Committee for the Establishment of an International Criminal Court* (UN Doc. A/Conf. 183/2/Add.1), pp. 40-41.

⁴ J. T. Holmes, “The Principle of Complementarity,” in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International, 1999), p. 47.

⁵ S. SáCouto and K.A. Cleary. “The Gravity Threshold of the International Criminal Court.” *American Journal of International Law*, Vol. 23, No. 5 (2008). p. 809.

would be flooded with cases and would become ineffective due to an excessive and disproportionate workload.⁶

The negotiation history of the ICC Statute reveals little concerning the content of the gravity threshold. Nonetheless, the absence of any substantial discussion regarding this question during the negotiations suggests that the drafters did not envision the threshold as a very substantial limit on the exercise of the Court's jurisdiction.⁷

B. Gravity in the selection process

The idea of gravity has an important role in the selection of cases and situations that appear before the ICC. There are two stages in identifying the objects of the proceedings of the ICC. The first stage is the selection of "situations", which is normally the identification of a certain period of time when and the place where the Prosecutor conducts an investigation. There are three modes of selecting situations, namely, a Security Council referral (Article 13), a State Party referral (Article 14) and an investigation *proprio motu* (Article 15). The second stage is the selection of "cases". The Prosecutor conducts its investigation into a situation and chooses cases from the situation by identifying the suspected persons who have allegedly committed the crimes under the Court's jurisdiction.

In these two different stages, the Prosecutor makes decisions on the gravity of the objects. Article 53(1) of the ICC Statute provides that the Prosecutor shall, after evaluating the information that is available to it, initiate an investigation unless it determines that there is no reasonable basis to proceed under the ICC Statute. According to Article 53(1)(b), the Prosecutor shall consider, among other things, the admissibility of possible cases under Article 17, which (eventually) includes an assessment of the sufficiency of gravity.

Concerning the judicial review process of case or situation selection, first, Article 19 provides that the Court may, on its own motion or responding to applications that have been submitted, determine the admissibility of a case in accordance with Article 17. Furthermore, according to Article 53(3), the Pre-Trial Chamber (PTC) may, at the request of the State or Security Council that makes a referral, review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider this decision. In cases of investigation *proprio*

⁶ M.M. El Zeidy, "The Gravity Threshold under the Statute of the International Criminal Court," *Criminal Law Forum*, Vol. 19 (2008), p. 36.

⁷ M.M. deGuzman, "Gravity and the Legitimacy of the International Criminal Court," *Fordham International Law Journal*, Vol. 32 (2009), pp. 1416-1425.

motu, the Prosecutor is required to submit an application to the PTC of the ICC to authorise the initiation of an investigation according to Article 15(3).

A detailed process and some criteria for situation and case selection is provided in the new Regulations of the Office of the Prosecutor (OTP) that entered into force on 23 April 2009. Regulation 29 provides some clues for gravity assessment. Paragraph 2 stipulates that to assess the gravity of the crimes that were allegedly committed in a situation, the Prosecutor “shall consider various factors including their scale, nature, manner of commission, and impact.”

III. CHRONOLOGICAL ASSESSMENT OF THE ICC’S PRACTICE

As noted above, there had been no legal criteria to determine the issue of gravity before April 2009. To understand the concept of gravity and the meanings of the four factors that were included in Regulation 29, it is important to review the Court’s practice before this time. Furthermore, even though these four factors were officially recognised as the appropriate legal criteria to determine the issue of gravity, the Court’s practice since the adoption of the Regulation appears to have taken a slightly different path.

A. The first debate - The decision not to proceed on the situation in Iraq

Although the Prosecutor recognised from the beginning of its operation in 2005 that gravity is the most important criteria for the selection of cases,⁸ the early ICC decisions did not address the merits of gravity.⁹ The issue of gravity suddenly appeared to be a controversial topic when the Prosecutor used this concept to justify its decision not to initiate an investigation concerning the situation in Iraq in February 2006. The complaints that were filed with the Prosecutor regarding the Iraq situation concerned the behaviour of the British troops in Iraq since the 2003 invasion.¹⁰

The Prosecutor, Luis Moreno Ocampo, clearly explained that in assessing gravity, “a key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape.”¹¹ Because the number of potential victims of the crimes in the Iraq situation was of a different scale than the number of victims in the other situations that the Prosecutor was

⁸ ICC-OTP, *Statement by Luis Moreno-Ocampo* (24 October 2005), p. 6.

⁹ See e.g., *Situation in Uganda* (ICC-02/04-01/05-1) Pre-Trial Chamber II (8 July 2005), para. 2.

¹⁰ ICC-OTP, *Response to Communications Received Concerning Iraq* (9 February 2006).

¹¹ *Ibid.* p. 9.

investigating, the Prosecutor concluded that the Iraq situation did not appear to meet the required threshold of the ICC Statute.¹²

This practice has been evaluated to be as close as the Prosecutor has come to providing criteria for the selection of situations.¹³ Thus, at the beginning of the Court's practice, the "threshold" was treated as a relative analysis that was based primarily on the number of victims in each situation.¹⁴

B. Formulation of the gravity of a case

(1) The Lubanga PTC decision – First invention of criteria

In the same month as the Prosecutor's statement regarding the situation in Iraq, the Chamber was given the first occasion to interpret the gravity threshold. In the decision on the Prosecutor's application for two arrest warrants for Lubanga and Ntaganda, the PTCI interpreted the gravity threshold by applying a literal, contextual, teleological interpretation and referred to the applicable principles and rules of international law.¹⁵

The PTCI concluded that to meet the gravity threshold, three questions must be answered affirmatively:

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

¹² *Ibid.* However, because these other three situations were referred by States Parties or the Security Council, which means that the Prosecutor did not have any discretion not to investigate, it is unclear the extent to which this comparison explains his decision. W.A. Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court," *Journal of International Criminal Justice*, Vol. 6 (2008), pp. 740-741.

¹³ W.A. Schabas, "Victor's Justice: Selecting "Situations" at the International Criminal Court," *Journal of Marshall Law Review*, Vol. 43 (2010), p. 544.

¹⁴ deGuzman, *supra* note 7, p. 1432.

¹⁵ *Prosecutor v. Lubanga* (ICC-01/04-01/06-8-US-Corr) Pre-Trial Chamber I (24 February 2006), paras. 42-60. The original decision including the statements regarding Ntaganda was unsealed by the Decision ICC-01/04-520, which was incorporated in the record of the case of the Prosecutor v. Ntaganda as ICC-01/04-02/06-20-Anx2.

iii) does the relevant person falls within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he or she belongs commit systematic or large-scale crimes which are in the jurisdiction of the Court, and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?¹⁶

Having assessed the gravity of these two cases, the PTCI concluded that the gravity was sufficient in the *Lubanga* case but not in the *Ntaganda* case.

The standard that the PTCI provided was based on the idea that the selection of the crimes under the Court's jurisdiction had already been gravity-driven, and if isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold.¹⁷ The PTCI understood that for a case to reach the gravity threshold, the "relevant conduct must present particular features which render it especially grave".¹⁸ Furthermore, the PTCI noted that, from a teleological interpretation, "an additional gravity threshold is a key tool provided by the drafters to maximise the Court's deterrent effect", and Article 17 "is intended to ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for the crime."¹⁹

(2) The Ntaganda appeals judgment – The dismissal of the first invention

The *Lubanga* PTC decision was criticised by Murphy who indicated that pragmatism cannot be the basis of prosecutorial policy and pragmatism may allow the alleged perpetrators of egregious international crimes to avoid prosecution simply because they do not hold leadership positions.²⁰ The Prosecutor appealed the *Ntaganda* decision by arguing a similar point to Murphy.²¹ The Prosecutor argued that the PTCI's test had inappropriately limited the

¹⁶ *Ibid*, para. 63.

¹⁷ *Ibid*, para. 46.

¹⁸ *Ibid*, paras. 45-46.

¹⁹ *Ibid*, paras. 48, 50.

²⁰ R. Murphy, "Gravity Issues and the International Criminal Court," *Criminal Law Forum*, Vol. 17 (2006), p. 312.

²¹ Just after the issuance of the *Lubanga* decision by the PTCI, the OTP issued a Policy Paper that clearly states that the ICC Prosecutor focuses its efforts on the individuals who bear the greatest responsibility for the crimes. ICC-OTP, *Report on Prosecutorial Strategy* (14 September 2006), p. 5. This statement was repeated in the policy paper that was issued in 2009. ICC-OTP, *Prosecutorial Strategy 2009-2012* (1 February 2009), para. 19.

Prosecutor's discretion and would make it impossible to investigate and prosecute perpetrators who were lower on the chain of command.²²

Responding to the appeal, on 13 July 2006, the Appeals Chamber (AC) delivered a judgment that reversed the PTCI's decision on the inadmissibility of the case of *Ntaganda* and claimed that the PTCI erred in law in its interpretation of "sufficient gravity" under Article 17(1)(d). The AC found that there was no legal basis for the requirement of large-scale or systematic conduct that caused social alarm.²³ Further, the AC stated that the imposition of rigid standards that were primarily based on top seniority may result in achieving neither retribution nor prevention.²⁴

Thus, because the first concrete definition of gravity that the PTCI attempted to advance was successfully appealed and reversed, the gravity issue had to be re-addressed *ab initio*.²⁵ Although the AC presented a detailed reasoning to rebut the PTCI's assessment of gravity, the Judges did not outline their own ideas of gravity.²⁶ Certainly, the AC had no obligation to develop a gravity test, but it left the Court with a legal vacuum.²⁷

(3) *The Abu Garda PTC decision – Second attempt to set criteria and standards*

In February 2010, the PTCI was given another chance to provide criteria to determine sufficient gravity in the decision that confirmed the charges against *Abu Garda*. The new Regulation of the OTP had already entered into force and provided the four factors that the Prosecutor shall consider to assess the gravity of crimes.

The PTCI agreed with the Prosecutor that in assessing the gravity of a case, the issues regarding the nature, manner and impact of the alleged attack are critical.²⁸ In addition, by referencing the opinion of Williams and Schabas, the PTCI determined that the gravity of a given case should not be assessed only from a quantitative perspective; rather, the

²² *Situation in the Democratic Republic of the Congo* (ICC-01/04-169) Appeals Chamber (13 July 2006), para. 66.

²³ *Ibid*, para. 73.

²⁴ *Ibid*, para. 74.

²⁵ I. Stegmiller, "Interpretative Gravity under the Rome Statute," in C. Stahn & M.M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press, 2011), p. 612.

²⁶ Judge Piki, in his Separate and Partly Dissenting Opinion, attempted to determine "gravity", but he did not develop a test beyond his initial thoughts. *Decision on 13 July 2006*, *supra* note 22, Separate and Partly Dissenting Opinion of Judge Georghips M. Piki, paras. 39-40.

²⁷ Stegmiller, *supra* note 25, p. 616.

²⁸ *Prosecutor v. Abu Garda* (ICC-02/05-02/09-243-Red) Pre-Trial Chamber I (8 February 2010), para. 31.

qualitative dimension of the crime should also be considered.²⁹ Furthermore, the Chamber found that certain factors listed in Rule 145(1)(c) of the Rules of Procedure and Evidence (RPE), which the Chamber shall consider in determining sentences, could serve as useful guidelines for the evaluation of the gravity threshold that is required by Article 17(1)(d) of the Statute. In particular, these factors included “the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime”.³⁰

Thus, in the assessment of gravity, the PTCI of the ICC apparently found a way to discard the factors that related to the positions or roles of the perpetrator; instead, it focused on the victim’s perspective, such as the damage or impact of the crimes.

(4) The Ali PTC decision – Excluding the element of the mode of commission in the gravity assessment

Furthermore, the level of participation (role) of the perpetrator was declared irrelevant in the assessment of gravity in the *Ali* case. The Defence argued that the case against Ali, one of the three persons prosecuted in the *Kenya I* case, did not have “sufficient gravity”, both as a matter of law and as a matter of fact, if the “conduct in question” was defined as alleged police inaction by the suspect or the individuals who were under his command.³¹

Concerning whether inaction has sufficient gravity, the PTCII noted that there was nothing in the Statute that could be interpreted to exclude acts by omission from the purview of the Court. This exclusion would be contrary to the ICC’s object and purpose to interpret Article 17(1)(d) of the Statute in a way that would reduce, as a matter of law, the subject-matter jurisdiction of the Court.³² Therefore, the PTCII considered untenable the Defence’s contention that a case concerning omission did not rise to the level of sufficient gravity.³³ Regarding whether this police inaction had sufficient gravity, the PTCII determined that the argument that only the cases that were brought against principals or direct perpetrators had sufficient gravity to justify action by the Court was legally unfounded.³⁴

²⁹ *Ibid.*

³⁰ *Ibid.*, para. 32.

³¹ *Prosecutor v. Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-338) Pre-Trial Chamber II (19 September 2011), paras. 56-71.

³² *Prosecutor v. Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-382-Red) Pre-Trial Chamber II (23 January 2012), para. 46.

³³ *Ibid.*

³⁴ *Ibid.*, para. 47.

Thus, the irrelevance of the perpetrator's position or role in the assessment of the gravity of a case was confirmed by the *Abu Garda* and the *Ali* cases. However, the suspect's position or role became significant in the other process: the selection of a situation.

C. A different formulation of the gravity of a situation

(1) The Kenya PTC decision – Returning to the first Lubanga PTC decision

Just one month after the *Abu Garda* decision, the PTCII issued its decision and applied different criteria on the assessment of gravity. The controversy was a situation, not a case, and the PTCII attempted to establish some guidelines to assess gravity at the stage of authorising an investigation into a situation.

The Prosecutor requested authorisation from the PTCII on 26 November 2009 to investigate the situation in Kenya. When the PTCII requested more information concerning the alleged crimes, speculation emerged that there were concerns regarding gravity.³⁵ The Prosecutor's submission followed Regulation 29. The submission introduced information involving the scale of the violence, the widespread and systematic characteristics of the attack, brutal modes of commission of the crimes and sexual violence of great impact, and the selectivity of victims based on their ethnicity.³⁶ Neither the rank nor the role of the perpetrators was included as an indicator of the gravity of the situation. The information concerning the persons or the groups that were involved was introduced in the context of whether the alleged crimes were within the jurisdiction of the Court.³⁷

In the decision on 31 March 2010, the PTCII established the criteria to authorise an investigation into the submitted situation.³⁸ The PTCII stated that "an assessment of admissibility during the Article 53(1) stage should in principle be related to a 'situation' (admissibility of a situation)."³⁹ However, "admissibility at the situation phase should be assessed against certain criteria defining a 'potential case'" such as:

- (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

³⁵ ICC Press Release, ICC Judges Request Clarification and Additional Information with Regard to the Situation in Kenya (19 February 2010).

³⁶ Situation in the Republic of Kenya (ICC-01/09-3) Pre-Trial Chamber II (26 November 2009), paras. 56-59.

³⁷ Ibid, paras. 74-75.

³⁸ Situation in the Republic of Kenya (ICC-01/09-19) Pre-Trial Chamber II (31 March 2010).

³⁹ Ibid, para. 45.

(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).⁴⁰

Regarding the first element of a potential case, the PTCII considered “that it involves a generic assessment of whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed.”⁴¹ Then, the PTCII confirmed that the supporting material refers to the high-ranking positions of the persons who are likely to be the focus of the Prosecutor’s future investigation and their alleged role in the violence.⁴² Concerning the second element, the PTCII stated that “the gravity of the crimes will be assessed in the context of their *modus operandi*.”⁴³ The PTCII added that it took a quantitative as well as a qualitative approach and referenced the decision of the *Abu Garda* case.⁴⁴

Among the various criticisms of this decision,⁴⁵ the PTC again considered the element of the perpetrator’s rank or role in the assessment of gravity without any clear reasons regarding why it is relevant in the selection of a situation phase, whereas it had been confirmed that this element is irrelevant in the selection of a case phase. This reasoning confused the audience again, and this issue remained unclear because the decision was not successfully appealed so that the AC could assess the consistency of the Court’s view on this issue.

(2) The Colombia and Ivory Coast situations and the OTP Policy Paper – The Prosecutor’s Recognition of the Kenya PTC Decision

By the end of October 2010, the Prosecutor started to mention the additional consideration in the selection of the situation. On 19 and 20 October 2010, during the Thematic Session on the situation in Colombia, the Prosecutor explained his approach towards the selection of situations. It seemed that the Prosecutor have considered two additional elements, which are

⁴⁰ *Ibid*, para. 50.

⁴¹ *Ibid*, para. 60.

⁴² *Ibid*, para. 198.

⁴³ *Ibid*, para. 61.

⁴⁴ *Ibid*, para. 62, n. 57.

⁴⁵ One criticism is that there is nothing in the application to indicate why the situation in Kenya is more compelling than other situations elsewhere in the world that may fall within the jurisdiction of the Court, e.g., Schabas, *supra* note 13, p. 545. Nmaju assessed that the scale of the crimes in Kenya may not have had sufficient gravity on a narrow reading of the term. M.C. Nmaju, “Violence in Kenya: Any Role for the ICC in the Quest for Accountability?,” *African Journal of Legal Studies*, Vol. 3 (2009), pp. 78-95.

“the importance of the suspect and his role”.⁴⁶

Furthermore, in the request for authorisation to initiate an investigation regarding the situation in Ivory Coast that was submitted on 26 June 2011, the Prosecutor explained that he had examined the gravity of the potential cases based on the preliminary list of persons or groups that appeared to bear the greatest responsibility for the most serious crimes.⁴⁷ Then, the Prosecutor emphasised their high-ranking political or command positions and their alleged role in the violence.⁴⁸ The PTCIII used the parameters from the *Kenya* PTC decision concerning the assessment of gravity.⁴⁹ The PTCIII considered the scale of the crime and especially the rank and role of the individuals (particularly the ex-President) who were likely to be the focus of any future investigation.⁵⁰

The change in approach was also reflected in the OTP’s Policy Paper on Preliminary Examination, which was completed in November 2013. The draft of the policy paper, which was published on 4 October 2010, stated that the Prosecutor would apply the same criteria as an admissibility threshold for case selection in the situation stage.⁵¹ However, in the completed paper, this expression was removed, and it only stated that “the Office assesses the gravity of each potential case that would likely arise from an investigation of the situation”.⁵²

Around the end of 2013, it seemed that both the Prosecutor and the Chambers recognised the criteria that were re-invented in the *Kenya* PTC decision. The two criteria for assessing gravity at the stage of the selection of a situation have obtained their own line of case law separately from the assessment of the gravity of a case, without a clear explanation regarding why they are different.

⁴⁶ K. Ambos and F. Huber, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?*, at https://www.icc-cpi.int/fr_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/network%20with%20partners/consultations%20with%20civil%20society/Pages/the%20colombian%20peace%20process%20and%20the%20principle%20of%20complementarity%20of%20the%20internat.aspx, pp. 2-3.

⁴⁷ *Situation in the Republic of Côte d'Ivoire* (ICC-02/11-3) Pre-Trial Chamber III (23 June 2011), para. 56.

⁴⁸ *Ibid*, para. 57.

⁴⁹ *Situation in The Republic of Côte d'Ivoire* (ICC-02/11-14) Pre-Trial Chamber III (3 October 2011), paras. 201-204.

⁵⁰ *Ibid*, para. 205.

⁵¹ ICC-OTP, *Draft Policy Paper on Preliminary Examinations* (4 October 2010), para. 67.

⁵² ICC-OTP, *Policy Paper on Preliminary Examination* (November 2013), para. 59.

(3) *The Gaza situation - Twist of the Lubanga-Kenya PTC standards*

The latest practice, the decision on 16 July 2015 by the PTCI, which requested the Prosecutor to reconsider its decision not to initiate an investigation, added further meaning to the element of the suspect's rank or role. The PTCI treated the gravity of position or role of the potential suspect as an "alternative" to the gravity of the crimes.

Responding to the referral by the Comoros, the new Prosecutor, Fatou Bensouda, submitted a report that explained her decision not to initiate an investigation in the Gaza situation on registered vessels of Comoros, Greece and Cambodia because of the insufficiency of gravity.⁵³ The Humanitarian Aid Flotilla that was bound for the Gaza Strip was carrying over 500 civilian passengers when ten were killed by Israeli Defence Forces (IDF) and approximately 50-55 were injured; the number of passengers who suffered outrages upon their personal dignity was unclear. The Prosecutor concluded that the potential case(s) that would likely arise from the investigation into the situation would be inadmissible pursuant to Article 17(1)(d) of the Statute. The Prosecutor determined that "considering the scale, impact and manner of the alleged crimes, the Prosecutor is of the view that the flotilla incident does not fall within the intended and envisioned scope of the Court's mandate".⁵⁴

The PTCI took the view that the Prosecutor had erred. First, the PTCI recalled that in the decisions on the situations of Kenya and Ivory Coast, there were two different elements to establish. These elements were:

- (i) whether such groups of persons that are likely to form the object of 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 a "qualitative" viewpoint and factors such as the 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.⁵⁵

⁵³ ICC-OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report* (6 November 2014).

⁵⁴ *Ibid*, para. 142. On the contrary, one commentator suggested that based on a comprehensive analysis of the situation, there is a reasonable basis to believe that all criteria are satisfied and encouraged the Prosecutor to open a formal investigation into the situation. Russell Buchan, "The Mavi Marmara Incident and the International Criminal Court," *Criminal Law Forum*, Vol.25 (2014), p. 496.

⁵⁵ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (ICC-01/13-34) Pre-Trial Chamber I (16 July 2015), para. 21.

Then, the PTCI especially noted that, concerning the first element, the Prosecutor did not provide, in its evaluation of the gravity of the potential case(s), an analysis of the factor of the potential accused's level of responsibility. Instead, the Prosecutor concluded that there was not a reasonable basis to believe that "senior IDF commanders and Israeli leaders" were responsible as perpetrators of the identified crimes.⁵⁶ This case indicated that a possibility that a potential case could lead to the prosecution of high-ranking officers may even overcome the insufficiency of the gravity of the crimes in selecting a situation.

IV. FORMULATED GRAVITY THRESHOLD BEFORE THE ICC

A. Summary of the findings

The findings from the assessment of the law and practice of the ICC can be listed as follows.

- (1) In mainly two different dimensions, gravity plays an important role: the selection of a situation and the selection of a case. The formulation of criteria to assess sufficient gravity may have been formulated by reflecting on the features of these two dimensions.
- (2) The relevant factors that seem to have been confirmed are the scale, nature, manner and impact. These factors are relevant to the assessment of both the gravity of a case and the gravity of a situation.
- (3) The rank or role of an accused person was found not to be relevant to the gravity of a case (especially the *Ntaganda* AC judgment and the *Ali* PTC decision). On the contrary, these elements were considered in the assessment of the gravity of a situation (for example, the decisions on the situations in Kenya, Ivory Coast and Gaza).
- (4) The idea of focusing on the most responsible person is valid to guide the Prosecutor's selection process according to the policy papers.

Concerning the formulation of the gravity threshold in the ICC, there exist mainly two different approaches towards the gravity assessment. One approach focuses only on the crimes themselves and the victims' perspective. The other approach considers the suspect's side, such as the position or rank in the organisation to which the suspect belongs or the

⁵⁶ *Ibid*, paras. 22-23.

roles that are played by the suspects. An assessment of the ICC's practice in chronological order indicates that the ICC has formulated a dual gravity threshold: there are different criteria to assess the gravity of a case and the gravity of a situation. To date, it seems that the assessment of the gravity of a case considers only the crimes themselves and the victims' perspective, and the assessment of the gravity of a situation also includes the suspect's role or rank.

B. The reason for and impact of a dual standard

Why is there a dual standard when these two assessments are both based on the same concept of gravity that is provided in Article 17(1)(d)? In earlier studies, it has been noted that both the Chambers and the Prosecutor confused the legal and discretionary aspects in their initial gravity statements.⁵⁷ Thus far, among the commentators on international criminal law, it seems to have become a trend to argue the dual gravity threshold from this perspective.⁵⁸ These earlier studies reflect the Court's practice before the *Kenya* PTC decision, and it is true that the treatment of the gravity threshold appears to be different between the Chambers and the Prosecutor until recently. However, from an analysis of the recent ICC decisions and policy papers, at least the Chambers and the Prosecutor seem to have attempted to reconcile their positions. The difference depends not on the interpreting departments of the Court any more, but on the "stages" of the selection process.

Obviously, a strict, literal reading of the relevant provisions would deny the two different assessments of the concept of gravity. Article 53(1)(b) clearly states that "the Prosecutor shall consider whether: (...) (t)he case is or would be admissible under Article 17". Therefore, the standard of sufficient gravity should be the same between Article 17 and Article 53(1)(b). If the Prosecutor decides not to proceed according to Article 53(1)(b), this should simply mean that the Prosecutor concludes that the case does not or would not fulfil the requirements of Article 17, including the gravity of the (potential) case.

⁵⁷ Stegmiller, *supra* note 25, p. 617.

⁵⁸ SáCouto and Cleary indicate that it has not always been clear when the Prosecutor discusses gravity as a requirement under the ICC Statute compared with gravity as one of presumably many factors that leads to the Prosecutor's decision to prosecute certain crimes over other crimes. SáCouto and Cleary, *supra* note 5, p. 52. deGuzman similarly argues that gravity has two dimensions: first, a relative (discretionary) gravity that allows the Prosecutor to prioritise cases and situations involving discretionary decisions; and second, a theoretically static concept of a (non-discretionary) gravity threshold that requires the Prosecutor and the Chamber to reject inadmissible situations and cases that fall below this legal barrier. deGuzman, *supra* note 7, p. 1405. Stegmiller suggests an approach that divides the idea of gravity into "legal" gravity and "relative" gravity. Stegmiller, *supra* note 25, pp. 603-636.

Practically, the situation selection process is the procedure to explain the reasonability to spend a budget to investigate. Situation selection is the stage to assess the possibility of a case, and the required level of proof is relatively low because the Prosecutor is supposed to have only publicly available information at this stage. Without the investigation, it may be impossible to prove that the gravity is “not” sufficient. In contrast, the selection of a case is normally based on an investigation and necessarily leads to an actual arrest of the suspect. It appears paradoxical that there are less criteria to assess gravity at the case selection stage; it is understandable if the assessment of gravity is stricter at this stage than in the selection of a situation. Therefore, the fewer criteria in the case selection phase may be justified as a practical consideration. The selection of a case has already overcome many difficulties including providing a reasonable basis to arrest the person, the establishment of jurisdiction and a complementarity analysis, obtaining States’ cooperation, and reviewing the human rights considerations during the arrest and surrender process. It is imaginable that the sole element of gravity insufficiency should not prevent this “rare” achievement of case selection. Thus, it seems that the gravity threshold still remains not “a very substantial limit on the exercise of the Court’s jurisdiction”⁵⁹ as envisioned by the drafters of the ICC Statute.

Interestingly, this formulation of the gravity threshold somewhat impacts the Prosecutor’s discretion in the selection process. An unexpected phenomenon is observed. The *Gaza* decision adopted the threshold that requires the sufficient gravity of the crimes “or” the rank or roles of the person who is responsible for the crime in a way that lowers the threshold, and the PTCI ordered reconsideration. In contrast, the PTCI’s approach in the *Ntaganda* case required the sufficient gravity of the crimes “and” the ranks and roles, increasing the level of requirements, and the PTCI decided the case inadmissible. It is not difficult, at the situation selection stage, to prove that a potential case might include individuals who are high-ranked and the most responsible because the Prosecutor only needs to indicate that such a possibility exists. Conversely, the Prosecutor is now required to consider, when deciding not to initiate an investigation, the importance of the persons who may be targeted in future cases.⁶⁰

⁵⁹ deGuzman, *supra* note 7, p. 1425.

⁶⁰ deGuzman analysed that the *Gaza* decision determined that the Prosecutor has no discretion concerning which situations are sufficiently grave, but it is instead constrained by ‘existing legal requirement’. M.M. deGuzman, *What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation*, ASIL Insight, Vol. 19, Iss. 19 (11 August 2015), at <http://www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber>.

V. CONCLUSION

This Brief demonstrates that there have been mainly two different approaches towards the gravity assessment: the approach that focuses only on the crimes themselves and the victims' perspective; and the approach that also considers the ranks or roles of the suspects. The approach that focuses on the crimes and the victims is adopted in the case selection process, whereas the situation selection process requires the approach that also considers the ranks or roles of the suspects.

To provide a theoretical answer to the question concerning why and how the stage of situation selection is different from the stage of case selection and why the selection process of a situation requires the additional element of the suspect's side, whereas case selection only requires the factors regarding the victim's side, the author requires an additional assessment of the structural characteristics of these two stages. Therefore, this Brief is limited to noting some influential factors that surround this issue.

Actually, whether there 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. Neither approach has actually provided standards or a definition of sufficient gravity but only factors/criteria/elements to be considered. These factors are just the topics to be considered, and an actual standard, such as what degree of scale, brutality or impact or what level of rank or involvement of persons, has not yet been defined. The issues regarding degrees or levels can only be observed through the comparative analysis of future jurisprudence.