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## The International Criminal Court's Gravity Jurisprudence at Ten

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# THE INTERNATIONAL CRIMINAL COURT'S GRAVITY JURISPRUDENCE AT TEN

MARGARET M. DEGUZMAN\*

## I. INTRODUCTION

In taking stock of the work of the International Criminal Court (the “ICC” or the “Court”) in its first ten years, one of the most important questions to ask is how the Court has approached the task of determining which cases fall within its mandate. How the judges approach this task will have significant consequences for the ICC’s developing role in the global legal order. A narrow approach to the Court’s mandate would limit the institution’s ability to achieve the important goals to which it aspires, in particular, the prevention of serious crimes. On the other hand, a broad approach could conflict with widely held expectations of the Court’s role, and thus undermine the institution’s legitimacy.<sup>1</sup>

The ICC was established to adjudicate “the most serious crimes of concern to the international community as a whole.”<sup>2</sup> This category is given content in the ICC’s Rome Statute, which limits the Court’s jurisdiction to war crimes, crimes against humanity, genocide, and aggression.<sup>3</sup> Except for aggression, which remains a work in progress, the Rome Statute defines each of these crimes,<sup>4</sup> and the “Elements of Crimes” provide further specifics.<sup>5</sup> Nonetheless, these documents leave the ICC judges significant discretion to determine which crimes are serious enough

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1. For an exploration of this issue, see Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265 (2012) [hereinafter deGuzman, *Choosing to Prosecute*]. Moreover, an inclusive understanding may undermine the system of state sovereignty that remains the bedrock of the international system. Margaret M. deGuzman, *How Serious Are International Crimes? The Gravity Problem in International Criminal Law*, 15 COLUM. J. TRANSNAT’L L. 18 (2012) [hereinafter deGuzman, *How Serious Are International Crimes?*].

2. Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. *Id.* art. 5(1)(a)-(d).

4. The crime of aggression was originally undefined in the Rome Statute. *See id.* art. 5(2). The Assembly of States Parties has since adopted an amendment defining the crime, but the Court will not be able to exercise jurisdiction over aggression until 2017 at the earliest. *See* I.C.C. Doc. RC/Res. 6 art. 15 *ter* (June 11, 2010).

5. Rome Statute, *supra* note 2, art. 9.

to merit the Court's attention. In particular, the Statute requires the judges to deem inadmissible cases within the Court's jurisdiction that are "not of sufficient gravity to justify further action by the Court."<sup>6</sup> This requirement is known as the gravity threshold for admissibility.

This Essay analyzes the Court's early jurisprudence interpreting the gravity threshold for admissibility. It argues that the threshold, while useful in garnering support for ratification of the Rome Statute, now seems destined to play a minor role in determining the ICC's reach. While there are multiple possible explanations for this development,<sup>7</sup> an important doctrinal cause identified in the jurisprudence is that the gravity threshold for admissibility is in tension with the Rome Statute's provisions regarding jurisdiction. At least with regard to the admissibility of cases,<sup>8</sup> the judges have concluded that interpreting the gravity threshold to exclude certain types of defendants or crimes from the Court's reach would amount to an impermissible revision of the Court's jurisdiction. To avoid this outcome, the judges have developed a flexible multi-factor approach to the gravity threshold that enables them to justify admitting virtually any case within the Court's jurisdiction.

The Essay concludes by arguing that, in light of the tension between admissibility and jurisdiction, the judges are right to relegate the gravity threshold to a minor role in determining the cases the Court adjudicates. To the extent the judges seek to limit the ICC's reach, they should do so by interpreting the Court's jurisdictional provisions directly rather than through the back door of admissibility.

## II. GRAVITY THRESHOLD JURISPRUDENCE

Although the ICC's founders agreed that the institution's mandate should be limited to the most serious crimes of global concern, they did not share a common vision of which crimes fit that description.<sup>9</sup> Some states and many members of the influential community of non-governmental organizations envisioned a criminal court for the promotion

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

7. See deGuzman, *How Serious Are International Crimes?*, *supra* note 1.

8. As discussed below, with regard to the gravity of situations—geographic and sometimes temporal spaces in which crimes have been committed—the judges have left the door open for a broader application of the gravity threshold.

9. For a more detailed discussion of the controversy regarding which crimes should fall within the jurisdiction of the Court, see Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORDHAM INT'L L.J.* 1400, 1416–25 (2009).

of human rights norms with a broad subject matter jurisdiction.<sup>10</sup> Other states were more protective of national jurisdiction and felt the ICC's reach should be restricted to crimes on the scale of the Holocaust, the Rwandan genocide, and ethnic cleansing in the former Yugoslavia.<sup>11</sup> The Rome Statute bridges this divide, in part, by including a gravity threshold for admissibility.<sup>12</sup> The Statute leaves the concept of gravity ambiguous, allowing states with divergent visions of the Court's role to believe, or at least hope, that their vision will prevail.

The Rome Statute thus relegates to the judges the task of interpreting the concept of gravity and, in particular, deciding how the gravity threshold relates to the Statute's provisions regarding jurisdiction. Procedurally, the question comes before the judges at various stages. First, when the Prosecutor seeks to initiate an investigation of his or her own accord, the judges must determine whether the cases likely to be prosecuted in the situation meet the gravity threshold.<sup>13</sup> Second, when a state party or the United Nations Security Council ("Security Council") refers a situation to the Court, the Prosecutor can decide not to investigate or prosecute based on insufficient gravity.<sup>14</sup> In that case, the referring entity can request judicial review of the decision, and the judges can ask the Prosecutor to reconsider.<sup>15</sup> Third, once the Prosecutor brings a case, the accused or a state with jurisdiction may challenge the admissibility of the case based on insufficient gravity, or the judges may raise the issue of their own accord.<sup>16</sup> The gravity threshold is thus applied to situations in the first instance and later to particular cases.

In the first ten years of the Court's operation, the judges have interpreted and applied the gravity threshold for admissibility on several occasions. These early decisions, while limited in number and scope, nonetheless indicate that the judges are inclined to require only minimal gravity for admissibility beyond what is inherent in the Rome Statute's provisions regarding jurisdiction.

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10. For further discussion and support, see *id.* at 1419–20.

11. *Id.*

12. The drafters also included an optional "threshold" for war crimes that provides that the Court has jurisdiction over war crimes "in particular" when they are "committed as part of a plan or policy or on a large scale." Rome Statute, *supra* note 2, art. 8.

13. Rome Statute, *supra* note 2, art. 15.

14. Rome Statute, *supra* note 2, art. 53(1)–(2).

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

16. *Id.* art. 19.

### A. *Lubanga/Ntaganda Arrest Warrant Decision*

The most important holding regarding the gravity threshold for admissibility—indeed the only holding from the Appeals Chamber—came in the Court’s first case. In the situation in the Democratic Republic of Congo, the Prosecutor applied to Pre-Trial Chamber I (“PTC I”) for arrest warrants for two men accused of having committed war crimes: Thomas Lubanga and Bosco Ntaganda. Although the Prosecutor did not raise the question of admissibility, PTC I decided that to issue an arrest warrant, it must first ascertain whether the proposed case is admissible.<sup>17</sup> The Chamber thus considered the gravity threshold for admissibility on its own motion.

PTC I began by noting that since the Court’s subject matter jurisdiction is already limited based on gravity, the gravity threshold must require something additional to the seriousness inherent in the definitions of crimes.<sup>18</sup> Accordingly, the Chamber termed the gravity threshold the “*additional gravity threshold*.”<sup>19</sup> This additional threshold, according to PTC I, has three components. First, it requires that the conduct at issue in the case be systematic or large-scale.<sup>20</sup> In this regard, the Chamber stated that “due consideration” must be given to the “social alarm” the conduct has caused.<sup>21</sup> Second, the accused must be among the most senior leaders in the situation under investigation.<sup>22</sup> Third, the accused must be among those most responsible for the crimes alleged.<sup>23</sup> To justify the second and third prongs of the gravity threshold test, the judges relied heavily on the idea that focusing the Court’s attention on the most responsible senior leaders would best promote the Court’s central goal of deterring serious crimes.<sup>24</sup> After applying this test, the Chamber issued an arrest warrant for

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17. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, annex I, ¶ 18 (Feb. 24, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF>.

18. *Id.* ¶ 41.

19. *Id.* ¶ 46 (emphasis added).

20. *Id.*

21. *Id.*

22. *Id.* ¶ 50.

23. *Id.*

24. *Id.* ¶¶ 53–54.

Lubanga<sup>25</sup> but declined to issue one for Ntaganda on the grounds that he was not one of the senior leaders most responsible for the crimes at issue.<sup>26</sup>

The Prosecutor appealed the decision and the Appeals Chamber reversed, disagreeing with PTC I in virtually every aspect of its holding.<sup>27</sup> First, the Appeals Chamber held that a determination of admissibility is not required to issue an arrest warrant.<sup>28</sup> In fact, the Appeals Chamber determined that Pre-Trial Chambers should only rarely exercise their discretion to consider admissibility at this stage because the defendant is not yet represented before the Court.<sup>29</sup> In light of this procedural basis for reversing PTC I's decision, the Appeals Chamber did not need to address the lower court's gravity threshold test.<sup>30</sup> Nonetheless, the Appeals Chamber decided to do so, stating that the Pre-Trial Chamber's interpretation of the gravity threshold "could have an impact on the Court as a whole."<sup>31</sup>

The Appeals Chamber found fault with each aspect of PTC I's gravity threshold test. First, the Appeals Chamber determined that PTC I's requirement that the conduct be systematic or large-scale blurs the distinction between war crimes and crimes against humanity since the former have such a requirement, but the latter do not.<sup>32</sup> Second, the idea of "social alarm" is too subjective to be an appropriate basis for admissibility.<sup>33</sup> Finally, limiting admissibility to the most responsible senior leaders would undermine rather than promote deterrence since it would leave all other perpetrators of international crimes beyond the ICC's reach.<sup>34</sup> The application for an arrest warrant against Ntaganda was thus remanded to the Pre-Trial Chamber, which granted the application.<sup>35</sup>

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25. *Id.* ¶ 75.

26. *See* Situation in the Democratic Republic of Congo, Case No. ICC-01/04-169, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest," art. 58, ¶¶ 62–65 (July 13, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf> (describing sealed section of PTC I decision).

27. *See generally id.*

28. *Id.* ¶¶ 41–45.

29. *Id.* ¶¶ 52–53.

30. Some subsequent decisions have treated the Appeals Chamber's gravity threshold analysis as dictum. *See, e.g.*, Prosecutor v. Omar Hassan Ahmad A Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 48 n.51 (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf>.

31. Situation in the Democratic Republic of Congo, Case No. ICC-01/04, ¶ 54.

32. *Id.* ¶¶ 70–71.

33. *Id.* ¶ 72.

34. *Id.* ¶ 73–79.

35. *Id.* ¶ 92.

These decisions brought to light the tension between the gravity threshold and the Rome Statute's jurisdictional provisions. PTC I's proposed interpretation of the gravity threshold as limiting admissibility to cases involving systematic or large-scale criminality by the most responsible senior leaders amounted to a modification of the Court's subject matter and personal jurisdiction. If the Court categorically declines to exercise jurisdiction over smaller scale crimes by less responsible perpetrators on the basis of admissibility, it would be meaningless to assert that such cases are still within the Court's jurisdiction.

Having rejected this categorical approach, the Appeals Chamber declined to explain how the gravity threshold should be interpreted. Only one judge, George Pikis, wrote separately to express his view on this question. According to Judge Pikis, the gravity threshold for admissibility should be interpreted very narrowly to exclude only the most insignificant war crimes.<sup>36</sup> For Judge Pikis, the Rome Statute's jurisdictional provisions mandate this interpretation—the gravity threshold cannot be interpreted in a way that significantly limits the Court's jurisdiction.<sup>37</sup>

#### *B. Abu Garda Confirmation of Charges Decision*

After the Appeals Chamber issued this decision, the gravity threshold did not receive serious consideration again until four years later when PTC I confirmed charges against Bahar Idriss Abu Garda in the Darfur situation. Abu Garda was charged in connection with an attack that killed twelve peacekeepers and wounded eight others. In addressing whether the case met the gravity threshold, PTC I again emphasized that the threshold requires something additional to the gravity inherent in the Court's subject matter jurisdiction.<sup>38</sup> This time, however, rather than interpret the threshold to include implicit limitations on the Court's personal and subject matter jurisdiction, PTC I took a more flexible approach. First, the gravity threshold did not exclude prosecution of any particular type of defendant.<sup>39</sup> With regard to crimes, PTC I adopted a view advanced in the Prosecutor's policy statements that the gravity of crimes should be assessed according to both quantitative and qualitative factors.<sup>40</sup> The

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36. *Id.* ¶ 40 (Judge Pikis, Separate and Partly Dissenting).

37. *Id.* ¶ 41.

38. Prosecutor v Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 30 (Feb. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf>.

39. *Id.* ¶¶ 28–34.

40. *Id.* ¶ 31.

quantitative element refers to the number of victims while the qualitative aspect concerns “issues of the nature, manner and impact” of the crimes.<sup>41</sup>

To elaborate on the qualitative component of the gravity threshold, the Court turned to the Rules of Procedure and Evidence related to sentencing. Gravity determinations for sentencing require the judges to consider “the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime.”<sup>42</sup> The judges adopted these factors for gravity threshold determinations as well.<sup>43</sup>

This flexible, factor-based approach makes it reasonably easy for the judges to justify admitting virtually any case within the Court’s jurisdiction. For most cases, at least some of the factors will support a finding of sufficient gravity. The Abu Garda case provides an apt illustration. The case involved such a low number of direct victims that it could be considered insufficiently grave to meet the threshold on that basis. PTC I found the case admissible, however, by privileging the qualitative factors over the quantitative.<sup>44</sup> The Chamber held that despite the low number of direct victims, the case met the gravity threshold because the crimes seriously impacted the broader community by causing a reduction in peacekeeping forces in the area.<sup>45</sup>

### *C. Kenya Article 15 Authorization Decision*

The next time the judges gave substantial consideration to the gravity threshold was in relation to the Prosecutor’s request for authorization to investigate the situation of post-election violence in Kenya. Prior to this request, the Court had not faced the question of whether a situation, as opposed to a case, met the gravity threshold. All prior situations had been referred to the Court by a state or the Security Council and, consequently, the Prosecutor did not require authorization to investigate. This was also the first time that Pre-Trial Chamber II (“PTC II”) was called upon to

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41. *Id.*

42. Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, Rule 145(1)(c) (2000).

43. Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 31.

44. *Id.* ¶¶ 33–34.

45. *Id.* ¶¶ 33–34. The Pre-Trial Chamber ultimately declined to confirm the charges against Abu Garda on grounds of insufficient evidence. *Id.* ¶¶ 215–16. In another case, the Pre-Trial Chamber adopted and applied the gravity threshold analysis in Abu Garda without further analysis or elaboration. Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case No. ICC-02/05-03/09, Corrigendum of the “Decision on the Confirmation of Charges,” ¶ 27–28 (Mar. 7, 2011).



apply the gravity threshold. The decision includes several important holdings regarding the gravity threshold.

First, PTC II agreed with PTC I that, as a matter of statutory construction, the gravity threshold must be read to require something additional to the gravity inherent in the crimes within the Court's jurisdiction.<sup>46</sup> However, PTC II went on to observe that the purpose of the threshold is to prevent the Court from adjudicating "peripheral cases."<sup>47</sup> PTC II thus seems to adopt Judge Pikis' view that the gravity threshold is quite low.

Second, PTC II held that when determining whether a situation is sufficiently grave to merit investigation, the Court should not evaluate the gravity of the situation as a whole as the Prosecutor had proposed, but rather should consider the gravity of the cases likely to be brought in the situation.<sup>48</sup> This interpretation significantly narrows the inquiry.

Finally, PTC II adopted a two-part analysis for determining whether the likely cases in a situation meet the gravity threshold. First, with regard to the crimes likely to be prosecuted, PTC II followed the approach of PTC I in the Abu Garda confirmation decision, looking to both quantitative and qualitative factors to assess whether the potential crimes are sufficiently grave.<sup>49</sup> Second, with regard to potential defendants, PTC II held that the groups likely to be investigated must include those who bear the greatest responsibility for the crimes alleged.<sup>50</sup> Applying these gravity factors, PTC II held that the Kenya situation is sufficiently grave to merit investigation.<sup>51</sup>

PTC II's second requirement, somewhat surprisingly, appears to revive PTC I's holding in the Lubanga arrest warrant decision that the gravity threshold requires a certain kind of defendants—those most responsible.<sup>52</sup> However, because the question in the context of situational gravity concerns the cases the Prosecutor is likely to bring, rather than cases

46. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 56 (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

47. *Id.*

48. *Id.* ¶ 58.

49. *Id.* ¶ 62.

50. *Id.* ¶ 60.

51. *Id.* ¶¶ 188–200.

52. In the only other determination of "situational gravity," PTC III followed PTC II's approach in the Kenya case to determine that the Cote D'Ivoire situation also meets the gravity threshold for admissibility. Situation in Côte d'Ivoire, Case No. ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ¶¶ 201–206 (Oct. 3, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf>.

actually before the Court, the requirement does not run counter to the Rome Statute's jurisdictional provisions in the same way. That the investigation must include those most responsible does not mean that those less responsible cannot also be prosecuted.

The effect of this requirement, therefore, is not to limit the Court's exercise of jurisdiction, but rather to limit the prosecution's freedom to shape investigations. Under this test, until the Prosecutor can demonstrate that the investigation will target those suspected of being most responsible for the crimes in a given situation, investigation will not be authorized. For most situations this will have little practical effect since the Prosecutor usually has every incentive to investigate those most responsible. There may be instances, however, in which the Prosecutor is unable to include in the investigation those most responsible for the crimes—for example, when the leaders have fled or died. If the Prosecutor nonetheless wishes to investigate, perhaps to demonstrate the Court's commitment to prosecuting the particular kinds of crimes committed in the situation, this requirement suggests the Court may not authorize investigation.

#### *D. Ali Confirmation of Charges Decision*

PTC II has also addressed the gravity threshold in the Kenya situation in relation to a particular case. At the confirmation of charges stage, Mohammed Hussein Ali argued that the conduct with which he was charged constituted "police inaction" and that such inaction is insufficiently grave to be admissible as a matter of law and fact.<sup>53</sup> He further asserted that only cases against principal or direct perpetrators meet the gravity threshold for admissibility.<sup>54</sup> In response, PTC II held that nothing in the Rome Statute precludes conviction for omissions and that to interpret the gravity threshold as excluding cases against indirect perpetrators would contradict the Rome Statute's provision regarding superior responsibility.<sup>55</sup> PTC II pointed out that it would be contrary to the object and purpose of the Rome Statute to interpret the gravity threshold in a way that reduces the subject matter jurisdiction of the Court.<sup>56</sup> The Chamber then applied the gravity factors elaborated in the

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53. The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 40–41 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

54. *Id.*

55. *Id.* ¶¶ 46–47.

56. *Id.* ¶ 46.

earlier cases to hold that the case against Ali was sufficiently grave.<sup>57</sup> The crimes were committed in two locations over several days and “resulted in numerous deaths and brutal injuries, massive displacement and sexual violence.”<sup>58</sup> Additionally, the manner of commission of the crimes was particularly brutal.<sup>59</sup>

### III. WHAT IS LEFT OF THE GRAVITY THRESHOLD FOR ADMISSIBILITY?

With regard to the admissibility of cases, the early jurisprudence demonstrates the difficulty of identifying a role for the gravity threshold that does not run counter to the Rome Statute’s provisions concerning jurisdiction. The Appeals Chamber rightly rejected PTC I’s early effort to give specific, categorical content to the gravity threshold. Limiting admissible cases to those involving the senior leaders most responsible for systematic or large-scale crimes would have effectively restricted the Court’s personal and subject matter jurisdiction.

In light of the tension between the Rome Statute’s admissibility and jurisdiction provisions, the judges have appropriately concluded that the gravity threshold should play a minor role in determining the cases the Court adjudicates. Since the Appeals Chamber ruling in Lubanga, the judges interpreting and applying the threshold have placed no limit on the kinds of defendants who meet the threshold and have developed a flexible, multi-factor approach to assessing the gravity of crimes.<sup>60</sup> By including a range of quantitative and qualitative factors, the judges have made it reasonably easy to justify admitting virtually any case within the Court’s jurisdiction. Cases of war crimes, crimes against humanity, and genocide will almost always present some features of gravity, whether in terms of the number of victims, the nature of the crimes, or the broader impact on

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57. *Id.* ¶ 49–50.

58. *Id.* ¶ 49.

59. *Id.* ¶ 49. Trial Chamber III passed up an opportunity to address the gravity threshold in response to an admissibility challenge by Jean Pierre Bemba-Gombo in the situation in Central African Republic. Bemba-Gombo argued that his role as military commander made the case insufficiently grave and that his case did not meet the standard the prosecutor had followed in declining to investigate crimes against British soldiers in Iraq. The Trial Chamber rejected the challenge on the procedural ground that the issue was resolved when the Pre-Trial Chamber held the case was sufficiently grave at the confirmation of charges stages and the defendant did not appeal. Prosecutor v Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Admissibility and Abuse of Process Challenges, ¶ 249 (June 24, 2010), <http://www.icc-epi.int/iccdocs/doc/doc899684.pdf>.

60. See, e.g., The Prosecutor v Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶¶ 28–34 (Feb. 8, 2010); Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 55–62 (Mar. 31, 2010).

the community. Indeed, it is difficult to imagine any case involving crimes against humanity or genocide that would fail to meet the threshold. To the extent the judges exclude any cases based on the gravity threshold, they will likely be, as Judge Pikis suggested, cases of small scale, isolated war crimes. Moreover, since the Prosecutor is unlikely to bring such cases to begin with, the threshold seems destined for relative obscurity, at least with regard to cases.

The fate of the gravity threshold may be somewhat different with regard to the admissibility of situations, particularly when the Prosecutor seeks to initiate investigations *proprio motu*. In that context, the lower court judges revived the notion that the ICC should target those most responsible, at least to the extent of including them in the investigation. As the judges continue to develop the gravity jurisprudence in this area, they should bear in mind that in rare situations it may not be possible to investigate the most responsible perpetrators. Precluding the Prosecutor from proceeding under such circumstances may undermine the ICC's goals, in particular the principal goal of crime prevention. Instead, a more flexible approach like the one that has emerged in the context of the gravity threshold for cases may be preferable.

#### IV. CONCLUSION

The Rome Statute gives no indication of what cases meet the gravity threshold or of how this requirement relates to the provisions regarding the Court's jurisdiction. This ambiguity encouraged states with divergent views of the Court's role in the world to support its creation. Now that the Court is operational, the judges have undertaken the task of interpreting and applying the threshold. PTC I's early attempt to give significant meaning to the threshold brought to the forefront the tension between gravity as a basis for restricting the admissibility of cases and the Rome Statute's grants of personal and subject matter jurisdiction to the Court. As a result, subsequent jurisprudence has interpreted the gravity threshold so loosely that judges will rarely have difficulty showing that the threshold has been met. At least with regard to the admissibility of particular cases, therefore, it seems likely that the gravity threshold will continue to play an insignificant role in the Court's jurisprudence regarding the extent of its mandate.

This outcome is appropriate. To the extent the judges see a need to cabin the reach of the ICC, they should do so directly by interpreting the Court's subject matter jurisdiction, rather than via the ambiguous notion of gravity. Judge Kaul's dissent in the ICC's decision to admit the Kenya

situation provides an apt illustration. Judge Kaul did not believe the crimes committed in Kenya merited ICC adjudication.<sup>61</sup> He reached this conclusion by interpreting the policy element of crimes against humanity more narrowly than the majority.<sup>62</sup> Judge Kaul could have reached the same conclusion by invoking the gravity threshold. One of the elements of crimes against humanity under the Rome Statute that makes them sufficiently serious to concern the international community is that they are committed pursuant to an organizational policy. That policy makes it more likely that the crimes will result in significant harm and less likely that they will be prosecuted at the national level. By narrowly interpreting the policy requirement, therefore, Judge Kaul was essentially requiring a higher degree of gravity.<sup>63</sup>

Judge Kaul's decision to interpret the crime rather than rely on the gravity threshold to exclude the situation was the right one. To restrict the Court's reach based on the gravity threshold for admissibility would obscure the important question of how far the ICC's jurisdiction extends. Judge Kaul's dissent serves to highlight the choices the international community must make as it continues to develop the notion of international criminal jurisdiction. Should crimes against humanity include widespread but loosely organized crimes or be limited to crimes organized at the state level or by state-like organizations? The ICC judges should continue to face such questions directly rather than avoid them by employing the ambiguous notion of gravity.

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61. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 3 (Mar. 31, 2010) (Judge Kaul, Dissenting), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

62. *Id.*

63. *See id.* ¶ 53 (arguing that the majority's "approach may expand the concept of crimes against humanity to any infringement of human rights" and that "a distinction must be upheld between human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the most serious crimes of concern to international community as a whole").