1
Introduction

> The gravity threshold issue is far more complex and difficult of solution than may be immediately apparent, and it will … have to engage the attention of the next Prosecutor.[1]

1.1 The Selectivity of Investigations and Prosecutions at the International Criminal Court

Great expectations burden international criminal courts. Such courts are asked to fulfil the objectives of retribution, deterrence, rehabilitation, and expressivism, to contribute to international peace and security, to create a historical record,[2] and to 'end[] impunity, outlaw[] evil, incapacitat[e] political leaders, or provid[e] catharsis for victims',[3] all while protecting the rights of the accused.[4] In no case is this burden more pronounced than in that of the International Criminal Court (ICC, the Court).

With substantial support from states, the ICC was established, with the adoption in 1998 and the entry into force in 2002 of the Rome Statute of the International Criminal Court (Rome Statute, the Statute), as the first permanent international criminal court for the prosecution of crimes under international law.[5] The preamble to the Statute declares that 'the most serious crimes of concern to the

[1] Overall Response of the International Criminal Court to the 'Independent Expert Review of the International Criminal Court and the Rome Statute System—Final Report': Preliminary Analysis of the Recommendations and Information on Relevant Activities undertaken by the Court, 14 April 2021 (hereafter 'Overall Response to the Independent Expert Review') para 413.

[2] M Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 Chicago-Kent Law Review 329, 331–40; C Stahn, 'The Future of International Criminal Justice' (2009) 4 Hague Justice Journal 257, 261–64; MM deGuzman and WA Schabas, 'Initiation of Investigations and Selection of Cases' in S Zappalà and others (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 163.

[3] C Stahn, *Justice as Message: Expressivist Foundations of International Criminal* Justice (OUP 2020) 410.

[4] F Guariglia, 'Investigation and Prosecution' in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (Kluwer Law International 1999) 234.

[5] For Cassese, the ICC, 'with its drive to universality, constitutes the only true and fully-fledged realization of the ideal of justice'. A Cassese, 'The International Criminal Court Five Years On: *Andante* or *Moderato*?' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 22–23.

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international community as a whole must not go unpunished' and emphasizes the need to 'put an end to impunity for the perpetrators of these crimes'.[6] This might be taken to imply 'a strong imperative' on the part of the Court to investigate and prosecute all crimes within its jurisdiction.[7] Such an imperative would also find support in a principled commitment to the equal application of the law.[8]

Yet preambular commitments notwithstanding, elsewhere the Rome Statute suggests that the investigation and prosecution of crimes within the jurisdiction of the Court represent exercises in selectivity. Relevant provisions of the Statute confer on the Prosecutor of the Court the discretion to choose whether to investigate and whether to prosecute.[9] That the ICC's jurisdiction is not restricted to one 'situation' in which crimes have been committed,[10] as has been the case with other international criminal courts, such as those established in relation to the situations in the former Yugoslavia, Rwanda, and Sierra Leone, further suggests a need for discrimination.[11] Speaking more generally, it is accepted in both the common law and the civil law traditions, in one form or another, that the exercise

[6] Paras 4–5, preamble, Rome Statute of the International Criminal Court 1998 (Rome Statute). It was ultimately agreed that the crimes within the jurisdiction of the Court would comprise genocide, crimes against humanity, war crimes, and the crime of aggression. See art 5, Rome Statute. The exclusion of treaty-based crimes during the work of the Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee) resulted in part from concerns among some delegations that their inclusion would have the undesirable effect of 'overburdening the limited financial and personnel resources of the court or trivializing its role and functions'. UN General Assembly, 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee During March–April and August 1996)' (13 September 1996) UN Doc A/51/22 (hereafter 'Preparatory Committee Report 1996') 25 para 103. See also draft art 20, International Law Commission's Draft Statute for an International Criminal Court 1994; UN General Assembly, 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly, Fiftieth Session' (6 September 1995) UN Doc A/50/22 (hereafter 'Ad Hoc Committee Report 1995') paras 38, 54–56, 81; H von Hebel and D Robinson, 'Crimes within the Jurisdiction of the Court' in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (Kluwer Law International 1999) 80–81.

[7] P Webb, 'The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"' (2005) 50 Criminal Law Quarterly 305, 307. See also ibid 307–09.

[8] R Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005) 193. The equal application of the law is in turn a manifestation of a commitment to the rule of law. ibid 194–95.

[9] The Statute recognizes the limited capacity of the ICC to investigate, if not also to prosecute, all allegations of criminality. G Turone, 'Powers and Duties of the Prosecutor' in A Cassese, P Gaeta, and JRWD Jones (eds), *The Rome Statute of the International Criminal Court* (OUP 2002) 1174; AM Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 American Journal of International Law 510, 518–19; M Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 Journal of International Criminal Justice 71, 75. For some commentators, the ICC's capacity constraints also imply that the Prosecutor's obligation to 'investigate incriminating and exonerating circumstances equally' cannot be carried out in relation to all potential prosecutions. See art 54(1)(*a*), Rome Statute. Danner, ibid 519; Brubacher, ibid 76.

[10] For the definition of a 'situation' at the ICC, see Section 1.6.1.

[11] Brubacher (n 9) 76; L Moreno Ocampo, 'The International Criminal Court in Motion' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 14.

of prosecutorial power involves the exercise of discretion,[12] thereby 'promot[ing] fairness, efficiency and transparency' in the allocation of limited resources.[13] In light of the considerable expectations that have been placed on the ICC, this selectivity is frequently described as 'the Achilles' heel' of the Court,[14] and it is in the light of these expectations that the Court's various forms of selectivity are scrutinized.

Scrutiny to date of the selection of investigations and prosecutions at the ICC has been overwhelmingly critical of prosecutorial decisions. Commentators from various quarters have levelled allegations of inconsistency, bias, or politicization on the part of the Prosecutor[15] or the favouring of 'institutional interests'[16] over 'geopolitical egalitarianism in who or what is prosecuted'[17]—leaving only 'the illusion of universality'.[18] They have questioned, amongst other things, the investigation of some situations and not others, the prosecution of certain crimes and cases to the exclusion of others,[19] and the near exclusive focus on the alleged perpetrators of crimes belonging to non-state groups as the price of securing the cooperation of states in investigations and prosecutions.[20]

Against this backdrop, the question how to justify, in a manner faithful to the Rome Statute and its supporting instruments, the selectivity of investigations and prosecutions at the Court has been posed. This question, among others, was taken up, at the request of the ICC's Assembly of States Parties, by the Independent Expert Review of the International Criminal Court and the Rome Statute System (Independent Expert Review), which published its report in 2020. The report, noting the scarce investigative and prosecutorial resources at the disposal of the Prosecutor, suggested the use of the Rome Statute's admissibility criterion of

[12] See K Ligeti, 'The Place of the Prosecutor in Common Law and Civil Law Jurisdictions' in DK Brown and others (eds), *The Oxford Handbook of Criminal Process* (OUP 2019) 150–53; Cryer (n 8) 192, footnotes 5–6; Turone (n 9) 1174–75; deGuzman and Schabas (n 2) 157–63.

[13] Webb (n 7) 307.

[14] C Stahn and G Sluiter, 'From "Infancy" to Emancipation? A Review of the Court's First Practice' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 5. See also W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 Harvard International Law Journal 53, 53–54.

[15] See eg SMH Nouwen and WG Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 European Journal of International Law 941; CN Ezennia, 'The *Modus Operandi* of the International Criminal Court System: An Impartial or a Selective Justice Regime?' (2016) 16 International Criminal Law Review 448; CC Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 International Criminal Law Review 445, 452; M Kersten, 'Taking the Opportunity: Prosecutorial Opportunism and the International Criminal Court' in M deGuzman and V Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward Elgar 2020) 181–82.

[16] Kersten (n 15) 182.

[17] J Reynolds and S Xavier, '"The Dark Corners of the World": TWAIL and International Criminal Justice' (2016) 14 Journal of International Criminal Justice 959, 963.

[18] ibid 960.

[19] For definitions of a 'situation' and a 'case', see Section 1.6.

[20] See A Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity' (2016) 14 Journal of International Criminal Justice 939.

the sufficient gravity of a case[21] to facilitate the allocation of these resources and thereby to justify the Prosecutor's decisions whether to investigate and whether to prosecute.[22] As a contribution to the ongoing debate, this book examines the application and function of the admissibility criterion of sufficient gravity in the selection of investigations and prosecutions at the Court.

The gravity or seriousness of a crime or case features in various legal frameworks, at both the international and national levels, for the investigation and prosecution of international crimes. It serves as a basis on which to divide the task of prosecuting such crimes as between international and national criminal courts and, at the national level, as between ordinary and specialized criminal courts. This demarcation function is reflected in the circumscribed jurisdiction *ratione materiae* of international criminal courts, which may be limited to 'serious violations of international humanitarian law'[23] or, in the case of the ICC, to 'the most serious crimes of concern to the international community as a whole'.[24] At the national level, the gravity of the crimes is commonly used to draw the line between the respective mandates of ordinary and specialized criminal courts, as with the recently constituted Kosovo Specialist Chambers,[25] and between courts and truth and reconciliation mechanisms, as was the case in post-independence East Timor.[26] In addition to defining the jurisdiction *ratione materiae* of different courts, the allocative function served by the gravity of a crime or case may be reflected in referral procedures that use such criteria to apportion the investigation and prosecution of

[21] See art 17(1)(*d*), Rome Statute.

[22] See Final Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System, 30 September 2020 (hereafter 'Independent Expert Review') paras 647, 650, R227.

[23] See art 1, Statute of the International Criminal Tribunal for the former Yugoslavia 1993; art 1, Statute of the International Criminal Tribunal for Rwanda 1994; art 1(1), Statute of the Special Court for Sierra Leone 2002.

[24] art 5, Rome Statute. This is not to say that the same conduct cannot constitute both an international crime and an ordinary crime under national law. SMH Nouwen and DA Lewis, 'Jurisdictional Arrangements and International Criminal Procedure' in G Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (OUP 2013) 116.

[25] The jurisdiction *ratione materiae* of the Kosovo Specialist Chambers includes crimes against humanity, war crimes, and 'other crimes under Kosovo law'. See arts 13–15, Law No 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015). Additionally, the Chamber has the power to 'order the transfer of proceedings within its jurisdiction from any other prosecutor or any other court in the territory of Kosovo'. art 10(2), Law No 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (3 August 2015).

[26] The special panels in the District Court of Dili in East Timor had exclusive jurisdiction over 'serious criminal offences', which were defined to include genocide, war crimes, crimes against humanity, murder, sexual offences, and torture. In contrast, the Commission for Reception, Truth and Reconciliation in East Timor was responsible for the reintegration of individuals responsible for 'the commission of minor criminal offences and other harmful acts'. Section 3(1)(*h*), United Nations Transitional Administration in East Timor (UNTAET) Regulation No 2001/10 (13 July 2001). Like the Specialist Chambers in Kosovo, the special panels in the District Court of Dili enjoyed the power to require other panels or courts in East Timor to defer to them in the prosecution of a case. Section 1, UNTAET Regulation No 2000/15 (6 June 2000). The Commission for Reception, Truth and Reconciliation in East Timor could also refer 'matters of serious criminal offences' to 'the appropriate authority', presumably the special panels. Section 38(1), UNTAET Regulation No 2001/10 (13 July 2001).

international crimes as between the international and national levels. The completion strategy of the International Criminal Tribunal for the former Yugoslavia, for example, adopted with a view to the efficiency of the Tribunal's operation,[27] provided for the referral of cases to relevant national jurisdictions on the basis of 'the gravity of the crimes charged'.[28] Conversely, a national criminal court was obliged to defer a case to the International Criminal Tribunal for Rwanda if '[t]he seriousness of the offences' warranted it.[29]

In the context of the ICC, the criterion of the sufficient gravity of a case, specified in Article 17(1)(*d*) of the Rome Statute, sits alongside the complementarity criteria in Article 17(1)(*a*)–(*c*) to determine the admissibility of a case before the Court. The complementarity criteria stipulate conditions for the inadmissibility of a case at the ICC where investigations or prosecutions have been undertaken or are being undertaken by a state with jurisdiction over the case, including where a trial has concluded. Article 17(1)(*d*) obliges the Court to determine that a case is inadmissible where '[t]he case is not of sufficient gravity to justify further action by the Court'. It is the application and function of the admissibility criterion of the sufficient gravity of a case in the selection of investigations and prosecutions by the Prosecutor of the ICC which constitutes the focus of this book.

1.2 The Gravity Criterion for Admissibility in Article 17(1)(*d*) of the Rome Statute

This book was written against the backdrop of the ongoing debate as to how to justify, in legal terms, the selectivity of investigations and prosecutions at the ICC. In this light, it addresses the question of how the admissibility criterion of 'sufficient gravity' specified in Article 17(1)(*d*) of the Rome Statute is to be applied in the context of the Prosecutor's decisions whether to investigate and whether to prosecute. The question is answered in two ways. First, the book ascertains how the gravity criterion has been applied in the Court's twenty years of practice. On the basis of this analysis, it proposes a more coherent and persuasive application of the criterion as part of the Prosecutor's respective decisions whether to investigate and to prosecute. Second, the book clarifies the respective roles of the Prosecutor and the relevant Chambers of the Court during admissibility proceedings to arrive at an appropriate balance in this context between prosecutorial discretion and

[27] O Bekou, 'Rule 11 BIS: An Examination of the Process of Referrals to Nationals Courts in ICTY Jurisprudence' (2009) 33 Fordham International Law Journal 723, 726; S Williams, 'ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price?' (2006) 17 Criminal Law Forum 177, 178.

[28] Rule 11bis(C), Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia 1994 (as amended in 2009).

[29] Rule 9(ii)(*a*), Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda 1995 (as amended in 1997).

judicial oversight. The answer to the question of the application of the gravity criterion bears in turn on the question of its function in the context of the Prosecutor's decisions whether to investigate and whether to prosecute, including any role for the gravity criterion in justifying the selectivity of investigations and prosecutions at the Court.

The Rome Statute provides for various assessments of admissibility as part of the respective decisions by the Prosecutor whether to investigate a situation, encompassing multiple potential cases,[30] and to prosecute an individual case.[31] In accordance with Article 53(1)(*b*) of the Statute, the Prosecutor is required to undertake an assessment of admissibility in relation to a situation when deciding whether to initiate an investigation into it. Where, under Article 15 of the Statute, the Prosecutor decides to initiate an investigation into a situation *proprio motu*, Pre-Trial Chamber authorization is required, as provided for in Article 15(3) and (4), the latter of which requires the Pre-Trial Chamber to review the Prosecutor's admissibility assessment. Pursuant to Article 53(2)(*b*), the Prosecutor may decide, upon investigation, not to proceed with a prosecution on the basis that the case is inadmissible. Conversely, the admissibility of a case which has been selected by the Prosecutor for prosecution may be determined by the Pre-Trial Chamber or the Trial Chamber, whether *proprio motu*, in accordance with Article 19(1), upon a challenge by any of the parties listed under Article 19(2), in accordance with the same provision, or at the request of the Prosecutor himself or herself, in accordance with Article 19(3). Where a situation has been referred to the Prosecutor by a state party or the United Nations (UN) Security Council, any decision by the Prosecutor not to initiate an investigation or not to prosecute a case, including on the basis of inadmissibility, may be reviewed by the Pre-Trial Chamber at the request of the referring state or the Council, as provided for in Article 53(3)(*a*).

All these assessments of admissibility are conducted by reference to the admissibility criteria specified in Article 17 of the Rome Statute. These include the criterion in Article 17(1)(*d*) of the sufficient gravity of a case.[32] In the context of the admissibility of a situation, the reference in Article 17(1)(*d*) to a 'case' is to the

[30] For the definition of a 'situation', see Section 1.6.1.

[31] For the definition of a 'case', see Section 1.6.2.

[32] Exceptionally, the Pre-Trial Chamber's assessment of admissibility under Article 18(2) and the Pre-Trial Chamber or the Trial Chamber's assessment of admissibility under Article 19(2)(*b*) of the Rome Statute do not include a consideration of gravity. Under Article 18(2), the Pre-Trial Chamber may, at the request of the Prosecutor, determine the admissibility of the situation in the event that a state informs the Chamber that it is investigating or has investigated crimes in relation to the situation in question. Rule 55(2) of the Court's Rules of Procedure and Evidence 1998 provides that the assessment of admissibility under Article 18(2) is made by reference to the criteria in Article 17. Since, however, Article 18(2) specifically addresses ongoing or completed investigations at the national level, it excludes considerations of gravity. The reference in Rule 55(2) is only to Article 17(1)(*a*), (*b*), and perhaps also (*c*). Similarly, under Article 19(2)(*b*), a state with jurisdiction over a case may challenge its admissibility only 'on the ground that it is investigating or prosecuting the case or has investigated or prosecuted' it.

multiple potential cases arising out of the situation.[33] In the context of the admissibility of a case, the reference is to that individual case.

The text of Article 17(1)(*d*) of the Rome Statute provides no more than that a case shall be inadmissible where it is 'not of sufficient gravity to justify further action by the Court'. There is little guidance in the Statute or its supporting instruments as to the application of this open-textured[34] criterion in the context of the Prosecutor's decisions whether to investigate and whether to prosecute. The open texture of Article 17(1)(*d*) is the inevitable result of the limitations of the use of such terms as 'sufficient' and 'gravity'. No doubt 'there is a limit, inherent in the nature of language, to the guidance which general language can provide'.[35] The consequence of such drafting, whether deliberate or otherwise, is that the 'discretion … left … by language may be very wide', so much so that the application of the provision, 'even though it may not be arbitrary or irrational, is in effect a choice'.[36] In short, the application of the gravity criterion requires that 'something in the nature of a choice between open alternatives must be made'.[37]

As a consequence of the open-textured nature of Article 17(1)(*d*), which calls for the exercise of discretion, the application of the gravity criterion may give rise to a lack of consistency and attendant predictability in the assessment of admissibility, as demonstrated by the practice of the Court to date.[38] In the absence of statutory guidance, moreover, the application by the Prosecutor of the gravity criterion as part of the decisions whether to investigate and prosecute respectively may expose the Prosecutor to allegations of arbitrariness or, worse, abuse of discretion.[39] In light especially of the international crimes at issue, '[e]ach choice is open

[33] *Situation in Kenya*, ICC-01/09-19, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization on an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para 48.

[34] For the idea of the 'open texture' of legal language, see HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 124–36. As Hart explains, all rules will 'at some point … prove indeterminate; they will have what has been termed an *open texture*'. ibid 128.

[35] ibid 126. On 'linguistic indeterminacy' in international law, see E Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (Cambridge University Press 2021) 249–50.

[36] Hart (n 34) 127. On the deliberate use of open-textured legal language, or 'vagueness', see T Endicott, 'The Value of Vagueness' in A Marmor and S Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011).

[37] ibid. That the application of the gravity criterion for admissibility involves the exercise of discretion was acknowledged in the report of the Independent Expert Review. Independent Expert Review (n 22) para 649.

[38] As remarked by the Defence in a recent case, 'the Court has yet to enunciate clearly what th[e] [gravity] threshold is'. *Prosecutor v Al Hassan*, ICC-01/12-01/18-475-Red, Defence, Public Redacted Version of Appeal of the Pre-Trial Chamber's 'Décision relative à l'exception d'irrecevabilité pour insufficiance de gravité de l'affaire soulevée par la défence' (ICC-01/12-01/18-459), 21 October 2019, para 2.

[39] S Fernández de Gurmendi, 'The Role of the International Prosecutor' in RS Lee (ed), *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (Kluwer Law International 1999) 181–82; Danner (n 9) 521; G-JA Knoops, 'The Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective' (2004) 1 International Studies Journal 1, 10.

to controversy and claims of politicization'.[40] Conversely, any argument for consistency and predictability in the assessment of the gravity of a case in the specific context of the Prosecutor's respective decisions whether to investigate and to prosecute must be mindful of the balance to be struck between prosecutorial accountability and prosecutorial independence.[41] As one commentator observes, '[p]ure discretion is too unpredictable and easily politicized', while complete judicial control of its exercise compromises the Statute's carefully negotiated commitment to prosecutorial independence.[42] In short, the appropriate balance between prosecutorial discretion and judicial oversight calls for context-specific analysis.

Only limited evidence as to the application and function of the admissibility criterion of sufficient gravity in Article 17(1)(*d*) can be found in the drafting history of the Rome Statute. This drafting history includes the draft statute for an

[40] D Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win' (2015) 28 Leiden Journal of International Law 323, 333. See also F Cowell, 'Inherent Imperialism: Understanding the Legal Roots of Anti-Imperialist Criticism of the International Criminal Court' (2017) 15 Journal of International Criminal Justice 667, 683–84; A Kiyani, 'Afghanistan and the Surrender of International Criminal Justice' TWAIL Review 2019, https://twailr.com/wp-content/uploads/2019/09/Kiyani-Afghanistan-the-Surrender-of-International-Criminal-Justice.pdf, accessed 18 March 2023; Nouwen and Werner (n 15) 951; Ezennia (n 15) 460.

[41] During the drafting of the Rome Statute, states disagreed on the appropriate scope of the Prosecutor's discretionary powers until the very last minute. On one side were those states that, owing to a fear of the politicization of the Court through investigations initiated only on the referral of a state party or the Security Council and with a view to guaranteeing prosecutorial independence, favoured the conferral on the Prosecutor of a power to initiate investigations *proprio motu*. On the other side were those states keen to avoid enabling a politicized prosecutor, a 'lone ranger running wild'. Fernández de Gurmendi (n 39) 181. The power to initiate an investigation *proprio motu* was eventually included in the Statute but was subjected to judicial oversight. In the words of one commentator, '[t]he debate over the role of the Prosecutor's *proprio motu* powers was essentially a fight over the proper scope of the Prosecutor's discretion'. Danner (n 9) 518. See further Fernández de Gurmendi (n 39) 183–84; M Bergsmo, J Pejic, and D Zhu, 'Article 15' in O Triffterer and K Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck 2016) 726–9; Brubacher (n 9) 72–74; D Scheffer, 'False Alarm about the *Proprio Motu* Prosecutor' in M Minow, C Cora True-Frost, and A Whiting (eds), *The First Global Prosecutor* (University of Michigan Press 2015).

[42] Webb (n 7) 307. The issue was debated at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) at which the Rome Statute was eventually adopted. Generally speaking, delegations from the common law tradition feared that prosecutorial independence would be compromised by judicial oversight, while delegations from the civil law tradition countered that justice and the avoidance of abuse of prosecutorial power called for 'at least some degree of judicial supervision'. Guariglia (n 4) 228. In 2020, one Pre-Trial Chamber remarked that, notwithstanding the jurisprudence of the Appeals Chamber on the issue, it remained unclear 'whether and to what extent it may request the Prosecutor to correct errors' relating to her assessment of gravity. *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, ICC-01/13-111, Pre-Trial Chamber I, Decision on the 'Application for Judicial Review by the Government of the Comoros', 16 September 2020, para 110. In the absence of agreement as to a suitable balance between prosecutorial independence and prosecutorial accountability, the tendency within the Office of the Prosecutor and in existing scholarship has been to favour the elaboration by the Prosecutor of *ex ante* guidelines for the application of the relevant criteria, including the criteria of independence, impartiality, and objectivity articulated by the Office of the Prosecutor. See eg Policy Paper on Preliminary Examinations, Office of the Prosecutor, 2013, 7–8; Policy Paper on Case Selection and Prioritisation, Office of the Prosecutor, 2016, 7–9. See also Danner (n 9); Webb (n 7) 317; JA Goldston, 'More Candour about Criteria' (2010) 8 Journal of International Criminal Justice 383; deGuzman and Schabas (n 2) 169.

international criminal court adopted by the International Law Commission (ILC) in 1994, which doubtless had an influence on subsequent developments.[43] The earliest articulation of what would eventually become Article 17(1)(*d*) of the Rome Statute was draft article 35(*c*) of the ILC's 1994 draft statute, which would have rendered a case inadmissible on the basis that the crime was 'not of such gravity to justify further action by the Court'.[44] The gravity of the crime had already acquired a certain significance, however, in the proposed court's jurisdiction *ratione materiae*,[45] leading some members of the Commission,[46] as well as some states,[47] to question the need for its additional consideration in the context of admissibility.[48] That the Commission nevertheless saw fit to restrain the exercise of the Court's jurisdiction through a gravity-based criterion of admissibility suggests that the limited scope of the court's jurisdiction *ratione materiae* was perceived as an insufficient filter, including by states in the UN General Assembly.[49] Indeed, it was thought that 'the court might be swamped by peripheral complaints involving minor offenders, possibly in situations where the major offenders were going free'.[50] Since,

[43] See R O'Keefe, 'The ILC's Contribution to International Criminal Law' (2006) 49 German Yearbook of International Law 201, 234–52.

[44] The term 'sufficient gravity', which appears in Article 17(1)(*d*) of the Rome Statute, appeared in the commentary to the ILC's 1994 draft statute. ILC, 'Report of the International Law Commission on the Work of Its Forty-Sixth Session' (2 May–22 July 1994) UN Doc A/49/10 (hereafter 'ILC Report 1994') 52.

[45] The inclusion in the ILC's 1994 draft statute of jurisdiction *ratione materiae* over treaty-based crimes was only to the extent that the latter constituted 'exceptionally serious crimes of international concern'. Draft art 20(*e*), Draft Statute for an International Criminal Court 1994. See also ILC, 'Summary Records of the Meetings of the Forty-Sixth Session' (2 May–22 July 1994) UN Doc A/CN.4/SER.A/1994 (hereafter 'ILC Summary Records 1994') 226–7, para 40.

[46] See ILC Report 1994 (n 44) 52.

[47] See ILC, 'Report of the International Law Commission on the Work of Its Forty-Sixth Session (1994), Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during Its Forty-Ninth Session Prepared by the Secretariat, Addendum' (22 February 1995), UN Doc A/CN.4/464/Add.1 (hereafter 'ILC Topical Summary 1995') para 147; Ad Hoc Committee Report 1995 (n 6) para 162; Preparatory Committee Report 1996 (n 6) para 169; UN General Assembly, 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum' (14 April 1998) UN Doc A/CONF.183/2/Add.1, 40–41.

[48] For an overview, see S SáCouto and K Cleary, 'The Gravity Threshold of the International Criminal Court' (2007) 23(5) American University International Law Review 807, 817–22. See also H Olásolo, *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff 2005) 183–84.

[49] Draft article 35, which included the gravity criterion for admissibility, was incorporated into the ILC's 1994 draft statute to 'respond[] to the concerns expressed by many States that the court might exercise jurisdiction in cases that were not of sufficient international significance'. ILC Summary Records 1994 (n 45) 193. This was because, notwithstanding the limits of the court's jurisdiction *ratione materiae*, 'there could still be cases in which no action was warranted'. J Crawford, 'The ILC Adopts a Statute for an International Criminal Court' (1995) 89 American Journal of International Law 404, 413.

[50] ILC Summary Records 1994 (n 45) 9. More general concerns about the resource implications of the Court's activities were subsequently expressed in the Sixth Committee of the UN General Assembly and in the Ad Hoc Committee on the Establishment of an International Criminal Court (Ad Hoc Committee). One representative in the Sixth Committee cautioned that 'the demands on scarce resources for prosecutions and especially for investigations were dependent on the scope and reach of the Court's jurisdiction'. ILC Topical Summary 1995 (n 47) para 15. See ibid para 14. In the Ad Hoc Committee, 'some representatives … drew attention to the far-reaching legal and financial implications of the project'. Ad Hoc Committee Report 1995 (n 6) para 12.

according to some members of the Commission, 'the circumstances of particular cases could vary widely',[51] the consideration of the gravity of the crime as an admissibility criterion would 'ensur[e] that the court would deal solely with the most serious crimes' and 'adapt its caseload to the resources available'.[52] Accordingly, it was not only in the conferral of jurisdiction but also in its exercise that the ILC laid emphasis on 'the limited function of the Court, which [was] intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole'.[53] Despite the subsequent substantial narrowing of the Court's jurisdiction *ratione materiae* in what would eventually become the Rome Statute, the admissibility criterion of the gravity of a case, as opposed to a crime, was retained through the drafting discussions in the Ad Hoc Committee on the Establishment of an International Criminal Court (Ad Hoc Committee) and the Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee) constituted by the General Assembly.[54] In the Preparatory Committee, the need for 'a minimum threshold, a screening mechanism or a judicial filter to distinguish between well-founded complaints of sufficiently serious crimes and frivolous or vexatious complaints' was affirmed.[55] The text of the Preparatory Committee's draft article 15(*d*), which was reproduced verbatim in Article 17(1)(*d*) of the Rome Statute, made a finding of inadmissibility where the case was not of 'sufficient gravity' mandatory.[56] At the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference), the suggestion that greater clarity was needed as to the application of this admissibility criterion of sufficient gravity went unheeded.[57]

[51] ILC Report 1994 (n 44) 52.

[52] ibid 22.

[53] Crawford (n 49) 409.

[54] Draft article 35(*c*) of the ILC's draft referred to the gravity of a 'crime', while the Preparatory Committee's draft article 15(1)(*d*) and Article 17(1)(*d*) of the Rome Statute refer to the gravity of a 'case'. On the crimes ultimately excluded from the jurisdiction of the ICC, see note 6.

[55] Preparatory Committee Report 1996 (n 6) para 224.

[56] UN General Assembly, 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Volume II' (15 June–17 July 1998) UN Doc A/CONF.183/13 (hereafter 'Rome Conference II') 40–41. Even earlier, in the Ad Hoc Committee, 'the view was widely held that there should be no discretion for the court to declare a case admissible if the grounds for inadmissibility had been duly made out'. Ad Hoc Committee Report 1995 (n 6) para 159. See also ibid para 42. In contrast, the ILC's draft article 35 would not have obliged the court to declare inadmissible a case which did not satisfy the gravity criterion. O'Keefe, *The ILC's Contribution to International Criminal Law* (n 43) 248.

[57] See eg Rome Conference II (n 56) 215, para 29. The point had also been raised in the Ad Hoc Committee by the US representative, who suggested that the draft statute, including draft article 35(*c*), 'lack[ed] the specificity or emphasis required to avoid burdening the international criminal court with individual crimes that do not satisfy the requirement for seriousness'. UN Secretary-General, 'Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary-General' (31 March 1995) UN Doc A/AC.244/1/Add.2, 13, paras 24–5. As one commentator has remarked, '[s]tates could agree that the ICC's work should be limited to "the most serious crimes …" without having to agree on what that include[d]'. MM deGuzman, 'Gravity Rhetoric: The Good, the Bad, and the "Political" ' (2013) American Society of International Law Proceedings 421, 422.

In spite of the limited attention it received at the Rome Conference, there is little doubt now that '[t]he term "gravity" has come to life and [has] turned into one of the central themes for the selection of situations and cases'.[58] This is not to say that the practice of the Court has brought any clarity to the application of the admissibility criterion of the sufficient gravity of a case eventually specified in Article 17(1)(*d*) of the Rome Statute. The same goes for the criterion's purpose. The Appeals Chamber considers the purpose of the gravity criterion in Article 17(1)(*d*) of the Rome Statute—whether applied by the Prosecutor when deciding whether to investigate and to prosecute respectively or by the Pre-Trial or Trial Chamber when determining the admissibility of a case—to be to exclude cases 'of marginal gravity only'.[59] The Independent Expert Review constituted by the ICC Assembly of States Parties, however, recommended the application by the Prosecutor of a 'higher threshold' of gravity than that articulated by the Appeals Chamber, with a view to the judicious allocation of scarce investigative and prosecutorial resources.[60] As the Court noted in its response to the Independent Expert Review: '[t]he gravity threshold issue is far more complex and difficult of solution than may be immediately apparent'.[61]

In its final analysis, this book argues for a recalibration of the application and a reconsideration of the function of the gravity criterion in the context of the Prosecutor's decisions whether to investigate and whether to prosecute. It finds that the function of the gravity criterion in Article 17(1)(*d*) of the Rome Statute is not only the exclusion of 'marginal cases' from investigation and prosecution, as is suggested by the Court.[62] In reality, the application of the gravity criterion in Article 17(1)(*d*) facilitates the allocation of investigative and prosecutorial resources by the Prosecutor and offers the most convincing basis on which to justify the selectivity of investigations and prosecutions at the ICC.

1.3 Methodology

The book uses a doctrinal methodology to address the question of the application and function of the admissibility criterion of the sufficient gravity of a case in the selection of investigations and prosecutions by the Prosecutor.[63] It proceeds on the

[58] Stahn and Sluiter (n 14) 3.

[59] *Prosecutor v Al Hassan*, ICC-01/12-01/18-601-Red, Appeals Chamber, Judgment on the Appeal of Mr Al Hassan Against the Decision of Pre-Trial Chamber I Entitled 'Décision relative a l'exception d'irrecevabilité pour insufficiance de gravité de l'affaire soulevée par la défense', 19 February 2020 (hereafter '*Al Hassan*, Appeals Chamber Decision 2020') para 53.

[60] Independent Expert Review (n 22) para R227. See ibid paras 647, 650.

[61] Overall Response to the Independent Expert Review (n 1) para 413.

[62] *Al Hassan*, Appeals Chamber Decision 2020 (n 59) para 53.

[63] As one commentator has remarked, the Rome Statute's admissibility provisions leave 'some of the most critical and disputed questions to be resolved though [*sic*] judicial determination and prosecutorial discretion'. AKA Greenawalt, 'Admissibility as a Theory of International Criminal Law' in MM deGuzman and V Oosterveld (eds), *The Elgar Companion to the International Criminal Court* (Edward

basis that the question is chiefly one of the application, rather than the interpretation, of Article 17(1)(*d*) of the Rome Statute. Very little is made in the existing scholarship of the distinction between the 'interpretation' and the 'application' of treaty provisions.[64] The practical difference is a fine one: '[l]a première fixe le sense et le contenu de la norme, la deuxième en tire les conséquences en visant la mis on œuvre pratique'.[65] In other words, interpretation 'refers to a mental process' whereby 'the meaning of a treaty, including of one or more of its provisions, is clarified',[66] while application is the legal characterization of facts in light of the meaning of the provision.[67] Where 'the meaning of the treaty [provision] is clear', therefore, it is not the interpretation but the application of the provision that is in question.[68] Application is the process of 'determining the consequences which the rule attaches to the occurrence of a given fact' or 'the action of bringing about the consequences which, according to a rule, should follow a fact'.[69]

When it comes to Article 17(1)(*d*) of the Rome Statute, the relevant question is one of the application of law to facts.[70] Customary and conventional rules on the interpretation of treaties may assist with the clarification of the meaning of the provision, that is, in declaring what it means in general terms for a case to be 'of sufficient gravity' to justify further action by the Court. Limited support is lent by the rules of treaty interpretation, however, when asking whether a particular case is of sufficient gravity.[71] These rules are not especially helpful in determining the application to facts of open-textured legal language, as with the term 'sufficient gravity'.[72] Simply put, '[t]here cannot be a rule to tell us how to apply every rule: sooner or later one simply makes a judgment'.[73] That being said, some of the

Elgar 2020) 63. Another commentator observes more generally that '[the] lion's share of the normative content of [international criminal law] is an outgrowth of judicial law-ascertainment'. S Vasiliev, 'The Making of International Criminal Law' in C Brölmann and Y Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 386.

[64] See M Bos, *A Methodology of International Law* (North-Holland 1984) 110–14; F Berman, 'International Treaties and British Statutes' (2005) 26(1) Statute Law Review 1, 10.

[65] 'The former sets the meaning and content of the norm, the latter draws consequences in relation to its practical implementation' (author's translation). R Kolb, *Interprétation et Création du Droit International* (Editions Bruylant 2006) 26.

[66] ILC, 'Text of the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties with Commentaries' (2018) UN Doc A/73/10, 43, para 3.

[67] R O'Keefe, 'Interpretation versus Application of Treaties: A Question of Character' (forthcoming).

[68] A McNair, *The Law of Treaties* (OUP 1986) 365.

[69] *Case Concerning the Factory at Chorzow (Claim for Indemnity) (Germany v Poland)* (Jurisdiction) PCIJ Rep Series A No 9 (1927) 39 (Dissenting Opinion of Judge Ehrlich).

[70] Relevant Chambers of the ICC have, for their part, characterized much of the task of application as the 'interpretation' of Article 17(1)(*d*) of the Statute. *Situation in the Democratic Republic of the Congo*, ICC-01/04-02/06-20-Anx2, Pre-Trial Chamber I, Decision on Prosecutor's Application for Warrants of Arrest, Article 58, 10 February 2006 (hereafter '*Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber Decision 2006') paras 44–55.

[71] 'Canons of "interpretation" cannot eliminate, though they can diminish, these uncertainties.' Hart (n 34) 126.

[72] O'Keefe, *Interpretation versus Application of Treaties: A Question of Character* (n 67).

[73] J Waldron, 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 California Law Review 509, 511. As Waldron explains, '[t]he mere fact that terms like "unreasonable" or "excessive"

considerations reflected in the rules on the interpretation of treaty provisions also logically inform, *mutatis mutandis*, the distinct but closely related question of the application of treaty provisions. These are the text of Article 17(1)(*d*) and other relevant provisions of the Rome Statute and its supporting instruments, read in context and with a view to structural considerations, alongside their drafting history.[74] Conversely, limited assistance is lent by the object and purpose of the Rome Statute, any definitive articulation of which is contestable.[75]

It is worth stating at the outset that the existing literature does not consider the gravity criterion for admissibility in Article 17(1)(*d*) of the Rome Statute as open-textured. Nor does it assume, as this book does, that the application of the provision calls for the exercise of discretion. Instead, it is widely agreed that Article 17(1)(*d*) is meant to exclude cases 'of marginal gravity only',[76] an exercise deemed to require little or no discretion. For this reason, among others, the scholarship to date has overwhelmingly excluded the central claim of this book, that the subjective[77] and discretionary application by the Prosecutor of the gravity criterion in Article 17(1)(*d*) facilitates the allocation by him or her of scarce investigative and prosecutorial resources. It is instead suggested that the allocation of these resources, which commentators all acknowledge as being a necessary part of the Prosecutor's decisions whether to investigate and prosecute respectively, is or must be situated elsewhere. Some commentators propose including an additional policy consideration of gravity ('relative gravity') over and above the admissibility criterion under Article 17(1)(*d*), which they suggest permits regard for resource constraints and other practical concerns such as the likelihood of state cooperation, the availability of evidence, and the ability to apprehend suspects.[78] Alternatively, others argue that practical considerations, including resource constraints, may be better accounted for in the 'interests of justice' assessments under Article 53(1)(*c*) and (2)(*c*) respectively of the Statute.[79] The book scrutinizes and ultimately rejects these views.[80]

invite us to make value judgments does not in itself undermine the determinacy of their meanings. On the contrary, it is part of the meaning of these words to indicate that a value judgment is required, a function which the words perform quite precisely'. ibid 527. The same applies to the term 'sufficient' in Article 17(1)(*d*) of the Rome Statute.

[74] See arts 31–32, Vienna Convention on the Law of Treaties 1969.

[75] On the diversity of objectives, see Damaška (n 2) 331–40; deGuzman and Schabas (n 2) 163–64.

[76] *Al Hassan*, Appeals Chamber Decision 2020 (n 59) para 53.

[77] On whether the assessment of gravity is 'objective' or 'subjective', see Chapter 2, Section 2.4.2.

[78] The term 'relative gravity' does not appear in the Rome Statute. MM deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32(5) Fordham International Law Journal 1400, 1432–33; MM deGuzman, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law* (OUP 2020) 113–14; A Pues, 'Discretion and the Gravity of Situations at the International Criminal Court' (2017) 17 International Criminal Law Review 960, 982–84; SáCouto and Cleary (n 48) 813–14; I Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*' (2009) 9 International Criminal Law Review 547, 557.

[79] See C Davis, 'Political Considerations in Prosecutorial Discretion at the International Criminal Court' (2015) 15 International Criminal Law Review 170, 182; deGuzman, *Shocking the Conscience of Humanity* (n 78) 136; deGuzman and Schabas (n 2) 146.

[80] See Chapter 5, Section 5.3.

As a point of methodology, it should suffice to say that this book characterizes the requirement of sufficient gravity in Article 17(1)(*d*) of the Rome Statute as open-textured and assumes that its application involves the exercise of discretion.[81]

Given the limited utility of the rules of treaty interpretation in this context, the application of the gravity criterion in Article 17(1)(*d*) of the Rome Statute proposed in this book relies in large part on what the book argues is the appropriate balance between prosecutorial discretion and judicial oversight under various admissibility provisions. In the context of each provision, the question is asked whether the Pre-Trial Chamber must defer to the Prosecutor's discretionary assessment of the sufficient gravity of a case in Article 17(1)(*d*) and what the extent of any such deference might be. Answering the question involves the consideration of the desire for consistency and predictability in the application of the provision and of the interests underlying relevant provisions, notably those of the referring state party or the UN Security Council, where relevant, and victims. It also requires the clarification of the respective institutional competences of the Prosecutor and the Pre-Trial Chambers, as provided in the Rome Statute and its supporting instruments, as gleaned from their drafting history, and through the consideration more generally of judicial economy. The analysis relies further on the justifications for deference by other international courts, notably in international human rights law, international investment law, and international trade law, where relevant, and the justifications for deference to prosecutors and other administrative authorities in the common law and civil law traditions, elements of which are represented in the Rome Statute.

1.4 Contributions to Practice and Scholarship

In common with the recommendation of the Independent Expert Review, and in contrast with the Court's case-law to date, the book argues for a recalibration of the application and ultimately a reconsideration of the function of the criterion of the sufficient gravity of a case in Article 17(1)(*d*) of the Rome Statute, when applied in the context of the Prosecutor's respective decisions whether to investigate and to prosecute. First, by identifying appropriate indicators of the gravity of potential or actual cases, it contends that the application in all contexts of Article 17(1)(*d*), whether by the Prosecutor or the Pre-Trial Chamber, involves a subjective, case-by-case assessment that calls for the exercise of discretion. When it comes specifically to the assessment by the Prosecutor of sufficient gravity, this discretion facilitates the judicious allocation by him or her of scarce investigative and prosecutorial resources. Second, by clarifying the respective roles of the Prosecutor and

[81] Recall Section 1.2.

the Pre-Trial Chamber in the assessment of the gravity of potential or actual cases in different contexts, the book argues that the considerable discretion conferred on the Prosecutor in the making of this assessment, compared with the limited powers of judicial oversight conferred on the Pre-Trial Chamber, allows the Prosecutor to decline to investigate or prosecute for purposes beyond merely the exclusion of cases 'of marginal gravity only'.[82] By facilitating the allocation by the Prosecutor of limited investigative and prosecutorial resources, the application of the gravity criterion in the context of the Prosecutor's decisions whether to investigate and whether to prosecute provides a legal basis for the selection of investigations and prosecutions.

First, as a contribution to practice and scholarship in international criminal law, the book clarifies how Article 17(1)(*d*) of the Rome Statute has been applied to date and how the provision should be applied, both in the context of the Prosecutor's respective decisions whether to investigate and to prosecute and, in contradistinction, as part of the Pre-Trial Chamber's determination of the admissibility of a case. Second, the book contributes to the scholarship on the exercise of prosecutorial discretion during the initiation of investigations and prosecutions at the Court. This literature has so far addressed neither squarely nor comprehensively the applicable standard or standards of Pre-Trial Chamber review of the Prosecutor's decisions whether to investigate and whether to prosecute.[83] The competing pulls of prosecutorial independence and prosecutorial accountability, and with them the respective interests of the referring state party or the Security Council, the Defence, and victims, all hang in this balance. Third, the book attempts to resolve the ongoing debate over how to justify in legal terms the selectivity of the Prosecutor's investigations and prosecutions. The utilization to this end of the admissibility criterion of the sufficient gravity of the case in Article 17(1)(*d*) of the Rome Statute may prove instructive in other contexts as well. It may offer a

[82] *Al Hassan*, Appeals Chamber Decision 2020 (n 59) para 53.

[83] The following contributions on this subject are noteworthy. Pues discusses the standard of Pre-Trial Chamber review under Article 53(3)(*a*) of the Statute of the Prosecutor's assessment of the admissibility of a situation. A Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart Publishing 2020) 77–81. She does not address the standard of review of the same under Article 15(4). See ibid 71–76. Nor does she discuss the standard of review under Article 53(3)(*a*) of the Prosecutor's assessment of the admissibility of a case. Poltronieri Rossetti takes a different approach entirely, focusing on identifying the reasons for what he argues is a distinction between the 'law in the books' and the 'law in action'. L Poltronieri Rossetti, Prosecutorial Discretion and Its Judicial Review at the International Criminal Court: A Practice-Based Analysis of the Relationship between the Prosecutor and Judges (doctoral thesis, Università Degli Studi di Trento 2017–2018) 282. He does not propose suitable standards of Pre-Trial Chamber review of prosecutorial discretion under relevant provisions. See ibid 310–14. Finally, Zakerhossein limits himself to supporting 'a broad and inclusive judicial review system'. MH Zakerhossein, *Situation Selection Regime at the International Criminal Court: Law, Policy, Practice* (Intersentia 2017) 408. An earlier version of Chapter 3 of this book identifies suitable standards of review under Articles 53(3)(*a*) and 15(4) respectively of the Prosecutor's assessment of the gravity of potential cases arising out of a situation. See P Urs, 'Judicial Review of Prosecutorial Discretion in the Initiation of Investigations into Situations of "Sufficient Gravity" ' (2020) 18(4) Journal of International Criminal Justice 851.

useful device to be deployed in the context of other international or national criminal courts as a means of effectively dividing the task of prosecuting international crimes between international and national criminal courts or, at the national level, between ordinary and specialized criminal courts or between courts and truth and reconciliation mechanisms.[84] As an ancillary fourth contribution, the book offers insights as to the application of other criteria relevant to the Prosecutor's decisions whether to investigate and whether to prosecute.[85] In particular, by contending that the application by the Prosecutor of the gravity criterion facilitates the allocation of limited investigative and prosecutorial resources, it refutes suggestions in the existing scholarship that the application of other criteria, such as the 'interests of justice',[86] better facilitates the allocation of these resources.

Beyond international criminal law, the book contributes to the wider scholarship in public international law on the role of international courts vis-à-vis discretionary decision-makers. This scholarship is focused heavily on the limits of judicial scrutiny of discretionary decisions by states and on the reasons for judicial deference in that context. Adding a new dimension to the discussion, the book identifies similarities across international criminal law and other areas of international law and teases out what emerge as the distinct justifications for and against judicial deference by international criminal courts. It also answers the analogous question of how international courts might address the exercise of discretion by entities other than states, in this case the Office of the Prosecutor of the ICC, an organ of an international court with a distinctive allocative function.

1.5 Scope and Limitations

The book does not assess the application of the admissibility criterion of sufficient gravity in Article 17(1)(*d*) of the Rome Statute against the various underlying objectives of international criminal law.[87] Nor does it investigate any effects the application of this gravity criterion may have on the legitimacy or effectiveness of the ICC as an institution, effects which are addressed at length elsewhere.[88] It does not propose either any broader conception of 'gravity' that transcends international criminal courts and their procedures.[89] These lines of inquiry together represent

[84] See Chapter 5, Section 5.4.2.

[85] In addition to the other three admissibility criteria specified in Article 17(1), all of which reflect the notion of the 'complementarity' of the ICC's jurisdiction, the criteria for the initiation of investigations and prosecutions include the jurisdictional requirements specified in Article 53(1)(*a*) and (2)(*a*) and the 'interests of justice' under Article 53(1)(*c*) and (2)(*c*) of the Statute.

[86] See art 53(1)(*c*) and (2)(*c*), Rome Statute.

[87] On the book's treatment of the object and purpose of the Rome Statute, see Section 1.3.

[88] See deGuzman, *Shocking the Conscience of Humanity* (n 78); deGuzman, *Gravity and the Legitimacy of the International Criminal Court* (n 78).

[89] See M Hacking, The Law of Gravity: The Role of Gravity in International Criminal Law (doctoral thesis, University of Cambridge 2014). For an even broader survey of notions of gravity across

existing approaches to the gravity criterion, to which, it is hoped, the book adds a distinctive formalist perspective.

The focus being the admissibility criterion of sufficient gravity in Article 17(1)(*d*) of the Rome Statute, the book excludes the consideration, in addition to admissibility, of gravity-based limits on the Court's jurisdiction *ratione materiae*, the assessment of the gravity of the alleged crimes as part of an 'interests of justice' analysis, and the use of gravity as a sentencing criterion.[90] The necessary distinction between each of these articulations of gravity and the gravity criterion for admissibility in Article 17(1)(*d*) is drawn below.

1.5.1 Gravity in the Jurisdiction *Ratione Materiae* of the Court

In addition to the admissibility criterion of the sufficient gravity of the case in Article 17(1)(*d*) of the Rome Statute, varying notions of gravity have been used to define the crimes within the Court's jurisdiction *ratione materiae*. The line between these distinct considerations of gravity is at times blurred,[91] most evidently in the Statute's conferral of jurisdiction over war crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.[92] This clause is widely regarded as a policy indication akin to the gravity criterion in Article 17(1)(*d*), rather than as a jurisdictional requirement, and is treated as such in the book.[93] Similarly, when it comes to genocide, the Elements of Crimes[94] indicate that the crime in question must have taken place 'in the context of a manifest

various areas of public international law, see R López, 'The Law of Gravity' (2020) 58 Columbia Journal of Transnational Law 565.

[90] For the additional consideration of these manifestations of gravity, see Pues, *Prosecutorial Discretion at the International Criminal Court* (n 83); deGuzman, *Shocking the Conscience of Humanity* (n 78); Hacking (n 89).

[91] C Stahn, 'Judicial Review of Prosecutorial Discretion: Five Years On' in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff 2009) 247, 268.

[92] art 8(1), Rome Statute.

[93] See WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 225–28; L Arbour, 'The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court' (1999) 17 Windsor Yearbook of Access to Justice 207, 214; F Guariglia and E Rogier, 'The Selection of Situations and Cases by the OTP of the ICC' in C Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 359; M Longobardo, 'Factors Relevant for the Assessment of Sufficient Gravity in the ICC: Proceedings and the Elements of International Crimes' (2016) 33 Questions of International Law 21, 34; deGuzman, *Gravity and the Legitimacy of the International Criminal Court* (n 78) 1408; Cryer (n 8) 268–69. Conversely, Knoops and Zwart suggest that '[t]he lack of a plan or policy would … be a valid consideration to determine that no war crimes … were committed'. G-JA Knoops and T Zwart, 'The *Flotilla Case* before the ICC: The Need to Do Justice While Keeping Heaven Intact' (2015) 15 International Criminal Law Review 1069, 1089.

[94] See art 9, Rome Statute. The Elements of Crimes, adopted by a two-thirds majority in the ICC Assembly of States Parties, assist in the interpretation and application of the provisions of the Rome Statute which define the crimes within the jurisdiction *ratione materiae* of the Court; that is, Articles 6, 7, 8, and 8bis.

pattern of similar conduct'.[95] As one commentator points out, the inclusion of this contextual element, allegedly to avoid 'isolated hate crimes', is superfluous, since such crimes may in any event be filtered out through the use of the gravity criterion for admissibility.[96] The crime of aggression is defined by a more direct reference to gravity. The crime involves 'an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations',[97] the focus being 'on the seriousness, rather than the plainness, of the violation'.[98] So also the jurisdictional requirement of 'a widespread or systematic attack' for crimes against humanity may equally be construed as an indicator of gravity for the purpose of admissibility.[99]

When it comes to the assessment of admissibility, the question arises as to the extent to which the satisfaction of these various gravity-based elements of jurisdiction *ratione materiae* bears on the satisfaction of the criterion of the sufficient gravity of the case under Article 17(1)(*d*). While it is in principle clear that the fulfilment of the admissibility criteria, including the gravity criterion in Article 17(1)(*d*), requires something more than the satisfaction of jurisdictional requirements[100] and, indeed, is 'always a function of the specific conduct alleged in a specific case, not of its formal legal characterization',[101] this distinction has not always been maintained in practice.

The book considers the gravity-based aspects of the Court's jurisdiction *ratione materiae* to the extent of their elision in practice with the admissibility requirement of the sufficient gravity of a case in Article 17(1)(*d*). Maintaining the conceptual distinction between jurisdiction *ratione materiae* and admissibility is key to the application of the provision it proposes.[102]

[95] art 6(*a*), element 4, Elements of Crimes 2002 ('Elements of Crimes'). According to one commentator, this contextual element 'align[s] genocide with crimes against humanity'. Schabas (93) 131.

[96] R O'Keefe, *International Criminal Law* (OUP 2016) 149–50.

[97] art 8bis(1), Rome Statute. See also art 8bis, element 5, Elements of Crimes; understandings 6–7, Understandings regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression 2010, RC/10/Add.1 (referring to 'the gravity of the acts concerned and their consequences' in a determination of whether an act of aggression has been committed and to 'the character, gravity and scale' to establish whether an act of aggression constitutes a manifest violation of the Charter of the United Nations).

[98] O'Keefe, *International Criminal Law* (n 96) 158. In the 2008 Assembly of States Parties, delegations noted that the definition 'would appropriately limit the Court's jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity'. Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Sixth Session, New York, 2–6 June 2008, ICC-ASP/6/20Add.1, 12. See also T Ruys, 'Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC' (2018) 29 European Journal of International Law 887, 906–10.

[99] art 7(1), Rome Statute. See Olásolo, *The Triggering Procedure of the International Criminal Court* (n 48) 183–84; MM deGuzman, 'The International Criminal Court's Gravity Jurisprudence at Ten' (2013) 12(3) Washington University Global Studies Law Review 475, 485–86.

[100] *Situation in the Democratic Republic of the Congo*, Pre-Trial Chamber Decision 2006 (n 70) para 42. See also Longobardo (n 93).

[101] O'Keefe, *International Criminal Law* (n 96) 161. See also Independent Expert Review (n 22) para 661; Longobardo (n 93) 29.

[102] See Chapter 2.

1.5.2 The Interests of Justice and the Gravity of the Crime

When it comes to the Prosecutor's decisions whether to investigate and whether to prosecute, the question arises whether the references in Article 53(1)(*c*) and (2)(*c*) of the Rome Statute to 'the gravity of the crime' as part of the assessment of the 'interests of justice' address the assessment of gravity for the purpose of admissibility under Article 53(1)(*b*) and (2)(*b*) of the Statute. Were this the case, the assessment of the interests of justice under Article 53(1)(*c*) and (2)(*c*) would be equally relevant to an inquiry into the application of the gravity criterion for admissibility.

That the admissibility criterion of 'sufficient gravity' under Article 53(1)(*b*) and 2(*b*) cannot be equated with 'the gravity of the crime' as part of the assessment of the interests of justice under Article 53(1)(*c*) and (2)(*c*) is evidenced by the distinct procedures that Article 53 outlines for Pre-Trial Chamber review of the Prosecutor's assessments of admissibility and the interests of justice respectively. While under Article 53(3)(*a*) the Pre-Trial Chamber may review the Prosecutor's assessment of admissibility, including his or her assessment as to the sufficiency of gravity, only at the request of the referring state party or the Security Council, the Pre-Trial Chamber may review the Prosecutor's assessment of the interests of justice under Article 53(3)(*b*) 'on its own initiative'. Moreover, while under Article 53(3)(*a*) the Pre-Trial Chamber may 'request' that the Prosecutor reconsider his or her assessment of admissibility and thereby of gravity under Article 53(1)(*b*) and (2)(*b*), under Article 53(3)(*b*) 'the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber'. Were the references to 'the gravity of the crime' in Article 53(1)(*c*) and (2)(*c*) intended to address the admissibility criterion of the gravity of the case, the distinction between Pre-Trial Chamber review under Article 53(3)(*a*) and Pre-Trial Chamber review under Article 53(3)(*b*) would be rendered meaningless. Indeed, the distinction between the gravity criterion, to be considered under Article 53(1)(*b*) and (2)(*b*), and the interests of justice, to be considered under Article 53(1)(*c*) and (2)(*c*), would be effaced.[103]

In this light, the book does not address 'the gravity of the crime', which is part of the distinct analysis of the interests of justice under Article 53(1)(*c*) and (2)(*c*). When discussing the function of the gravity criterion in Article 17(1)(*d*) in the context of the Prosecutor's decisions whether to investigate and whether to prosecute, however, the book addresses proposals in the existing scholarship for allocating investigative and prosecutorial resources through the assessment of the interests of justice.[104]

[103] This distinction is supported by the text of each provision. Stegmiller (n 78) 563.
[104] See Chapter 5, Sections 5.3.2.2 and 5.3.3.2.

1.5.3 Gravity and the Court's Sentencing Criteria

The Court's sentencing criteria, as specified in Rule 145 of its Rules of Procedure and Evidence, are discussed to the extent that the Court has considered them relevant to the articulation of the admissibility criterion of the sufficient gravity of the case in Article 17(1)(*d*) of the Statute.

1.6 Terminological Clarifications

The Rome Statute, in various provisions not limited to admissibility, sets out procedures relating to 'situations' and 'cases' respectively.[105] Neither the Statute nor its supporting instruments defines these terms. While the definition of a 'case' may be understood by analogical reference to national criminal law, the same cannot be said of a 'situation', which, even among international criminal courts, is a term employed exclusively by the ICC and which is 'a core feature of [its] procedural regime'.[106]

1.6.1 'Situation'

The exercise of the jurisdiction of the Court is conditioned on the referral by a state party or the Security Council of '[a] situation in which one or more … crimes appears to have been committed' or on the initiation by the Prosecutor of an investigation *proprio motu*.[107] To this end, the Statute entitles a state party to the Rome Statute to refer to the Prosecutor 'a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed' and to request that the Prosecutor 'investigate the situation'.[108] The analogous power of the Security Council to do so is conferred under the Charter of the United Nations.[109] When it comes to the initiation by the Prosecutor under Article 15 of the Rome Statute of an investigation *proprio motu*, the exercise of the Court's jurisdiction, and any subsequent investigation, is likewise in relation to a 'situation'.[110] These references to a 'situation' are to 'the overall factual context in which it is believed that "a crime within the jurisdiction of the court" … has been committed'.[111] When it comes to

[105] The closely related question of how the assessment of admissibility is tailored to a 'situation' and a 'case' is addressed in Chapter 2, Sections 2.3.1.1 and 2.3.2.1.

[106] H Olásolo, 'The Lack of Attention to the Distinction between Situations and Cases in National Laws on Co-operation with the International Criminal Court with Particular Reference to the Spanish Case' (2007) 20 Leiden Journal of International Law 193, 194.

[107] See art 13, Rome Statute.

[108] art 14(1), Rome Statute. See also art 18(1), Rome Statute.

[109] M Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff 2013) 680.

[110] See art 15(5)–(6), Rome Statute.

[111] Cherif Bassiouni (n 109) 680.

the exercise of the Court's jurisdiction on the basis of the acceptance by a non-state party of the jurisdiction of the Court, the reference in Article 12(3) of the Rome Statute to the 'crime', rather than to the 'situation', may be taken to be a drafting oversight.[112]

Notably, Article 53(1), the general provision on the initiation of investigations, does not itself refer to the investigation of a 'situation'. Nevertheless, its references to the Prosecutor's investigation must logically be, by analogical reference to Article 15 and by the fact of the referral by a state party or the Security Council of and the exercise of the Court's jurisdiction over a 'situation', to the investigation of a 'situation'. In this context, the 'situation' 'denotes the confines within which the Court determines whether there is a reasonable basis to initiate an investigation and the jurisdictional parameters of any ensuing investigation'.[113] It is circumscribed by the territorial, temporal, and, where relevant, personal limits of the Court's jurisdiction to the extent that the jurisdiction of the Court has been triggered by a referral, the declaration of a non-state party,[114] or the authorization by the Pre-Trial Chamber of an investigation *proprio motu*.[115] Where clarification as to the scope of a situation proves necessary, the task of delimiting its boundaries falls to the Pre-Trial Chamber.[116]

1.6.2 'Case'

Various provisions of the Rome Statute refer to a 'case'. A 'case' technically comes into existence upon the issuance of a warrant of arrest or a summons to appear in respect of a specific suspect in relation to specific conduct.[117] In contradistinction to a 'situation', thus, '[t]he parameters of "the case" … are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the

[112] ibid 681.

[113] R Rastan, 'Situation and Case: Defining the Parameters' in C Stahn and M El Zeidy (eds), *The International Criminal Court and Complementarity* (CUP 2011) 422.

[114] See art 12(2)–(3), Rome Statute.

[115] Where, however, the alleged commission of the crimes crosses state borders, the definition of a situation by reference to the Court's territorial jurisdiction in respect of individual states may create artificial boundaries within what would otherwise be one situation. This is a problem which remains to be addressed. See Rastan, *Situation and Case* (n 113) 426–28.

[116] For a detailed analysis of relevant practice, see R Rastan, 'The Jurisdictional Scope of Situations before the International Criminal Court' (2012) 23 Criminal Law Forum 1.

[117] See art 58, Rome Statute. See also *Prosecutor v Ruto and others*, ICC-01/09-01/11-307, Appeals Chamber, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011 (hereafter '*Ruto and others*, Appeals Chamber Decision 2011') para 39; *Situation in the Democratic Republic of the Congo*, ICC-01/04-93, Pre-Trial Chamber I, Decision Following the Consultation Held on 11 October 2005 and the Prosecution's Submission on Jurisdiction and Admissibility Filed on 31 October 2005, 9 November 2005, 4.

Statute'.[118] The Rome Statute nonetheless refers to a 'case' also in Article 53(2), in the context of a decision by the Prosecutor not to prosecute a specific suspect in relation to specific conduct.

1.7 Outline

Chapter 2 surveys the application to date of the criterion of the sufficient gravity of a case in Article 17(1)(*d*) of the Rome Statute with a view to identifying and evaluating the suitability of the various indicators of gravity articulated in the policy of the Office of the Prosecutor and in the decisions of the various Chambers of the ICC. On this basis, it determines whether the application of the relevant indicators under Article 17(1)(*d*) requires an objective or a subjective assessment of gravity and, accordingly, the extent of the discretion involved in their application.[119]

Chapters 3 and 4 aim to clarify the respective roles of the Prosecutor and the Pre-Trial Chamber in the assessment of the gravity of potential and actual cases in the contexts of 'situations' and 'cases' respectively. Chapter 3 analyses the intensity of Pre-Trial Chamber oversight of the Prosecutor's application of Article 17(1)(*d*) of the Statute as part of his or her decision whether to initiate an investigation into a 'situation'. It draws a distinction between the review procedure applicable under Article 53(3)(*a*) to the initiation of investigations generally and the initiation of investigations by the Prosecutor *proprio motu*, as reviewable by the Pre-Trial Chamber under Article 15(4). The chapter identifies what it argues is the most suitable standard of review of the Prosecutor's assessment of gravity under each provision.

The first part of Chapter 4 considers the intensity of Pre-Trial Chamber review under Article 53(3)(*a*) of the Prosecutor's application of Article 17(1)(*d*) of the Statute as part of his or her decision not to proceed with the prosecution of a 'case'. It proposes the appropriate standard of review of the Prosecutor's assessment of gravity in this context. In contradistinction to the Prosecutor's application of the gravity criterion in the context of his or her decision whether to prosecute, the second part of Chapter 4 addresses the assessment of the gravity of a case as part of the Pre-Trial or Trial Chamber's own determination of the admissibility of a case in accordance with the procedures specified in Article 19(1)–(3) of the Statute. The relevant question in this context is whether the Pre-Trial or Trial Chamber may assess the gravity of the case during proceedings pertaining to the issuance of a

[118] *Al Hassan*, Appeals Chamber Decision 2020 (n 59) para 127; *Prosecutor v Gaddafi and Al-Senussi*, ICC-01/11-01/11-547-Red, Appeals Chamber, Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled 'Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi', 21 May 2014, para 1. See also *Ruto and others*, Appeals Chamber Decision 2011 (n 117) para 39.

[119] On the book's use of the terms 'objective' and 'subjective', see Chapter 2, Section 2.4.2.

warrant of arrest or a summons to appear; that is, before the appearance before the Court of the suspect.

Chapter 5 first recapitulates the analysis undertaken in Chapters 2, 3, and 4, offering guidance as to how to apply the criterion of the sufficient gravity of a case in Article 17(1)(*d*) in the context of the Prosecutor's decisions whether to investigate and whether to prosecute. It then scrutinizes by reference to the various strands of inquiry undertaken in Chapters 2, 3, and 4 the purpose of the gravity criterion in Article 17(1)(*d*) of the Statute as articulated by the Court. It examines whether the application of the gravity criterion requires a reconsideration of what has been stated by the Court and endorsed by the existing scholarship to be the purpose of the gravity assessment pursuant to Article 17(1)(*d*), namely to exclude only marginal cases from investigation and prosecution. On this basis, the chapter makes recommendations for practice at the ICC and reflects on the use of a comparable criterion of gravity at other courts, at both the international and national levels, for the investigation and prosecution of international crimes. It concludes by drawing attention to the contribution of international criminal courts to the wider literature on the interaction between international courts and discretionary decision-makers.