Gravity as a requirement in international criminal prosecutions: implications for South African courts

Gus Waschefort[*]

Abstract

The responsibility to bring perpetrators of international crimes to justice lies first and foremost with the municipal criminal justice systems of each state. The Rome Statute relies on the concept 'gravity' on four primary levels: 1) for institutional legitimacy; 2) situational gravity for the exercise of prosecutorial discretion; 3) as a precondition to admissibility; and 4) as a substantive component of each of the Rome Statute crimes. In relation to prosecutorial discretion and admissibility, the Rome Statute uses the concept 'gravity' as a device with a primary aim of preventing the International Criminal Court's (ICC) limited capacity from being usurped by less severe infringements of international criminal law. Municipal jurisdictions are not hampered by an inherently limited capacity, as is the case before the ICC. As such, gravity is to be applied *mutatis mutandis* to municipal prosecutions in a manner suited to the nature of municipal criminal justice systems and the demands of justice. This contribution concludes with an analysis of 'gravity' in South African courts in the context of prosecutions of international crimes. Nevertheless, the broader points made hold true equally for a number of jurisdictions internationally, and in particular, those jurisdictions that adhere to a common law tradition.

INTRODUCTION

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.[1]

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* LLB (Pretoria); PhD (London). Associate Professor: Department of Public, Constitutional and International Law, Unisa. Much of the work on this article was completed during a visting fellowhip to the Center for Human Rights and Global Justice, at New York University School of Law. I remain indebted to the Center for having me and making availible its facilities. Nervertheless, the views reflected in this contribution and any potentential errors are my own.

1 Jackson 'Opening Statement before the International Military Tribunal' (21 November 1945).

With these words Robert H Jackson opened proceedings before the Nüremburg Tribunal on 21 November 1945, declaring that the gravity of the crimes committed by the Nazi high command required that these crimes be prosecuted before an international tribunal. A similar refrain has heralded the establishment of each subsequent international criminal tribunal, all of which exist or existed to bring to justice those most responsible for the most serious crimes of concern to the international community, that is to say, the gravest of crimes.[2]

The International Criminal Court (ICC), by definition, is hampered by an extremely low capacity to dispense justice.[3] Gravity, as a requirement for admissibility, serves as a triage mechanism, ensuring that the court's limited capacity is reserved for the most serious international criminals. As it stands, the business of international criminal justice is perhaps the sector internationally where the demands for a product (justice) most exceed the supply of the product. The ICC serves only an elite clientele; the who's who of international warlords, and indeed, enemies of all mankind (*hosti humani generis*). The municipal incorporation of the Rome Statute, and in time the increase in such municipal prosecutions, will bring with it an economy of scale to the business of international criminal justice. Ultimately, it is possible that the demands for justice will increasingly be met by its supply. However, to achieve this it is imperative that the gravity requirement be applied *mutatis mutandis*, in a manner suited to the sphere of municipal courts and the demands of international criminal justice. Blindly and mechanically adopting the approach to gravity of the ICC will not serve the interests of justice.

By adopting the Implementation of the Rome Statute of the International Criminal Court Act (the Rome Statute Implementation Act) during 2002,[4] South Africa provided for the prosecution of Rome Statute crimes in South African municipal courts. The Priority Crimes Litigation Unit was

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2 See de Guzman 'Gravity and the legitimacy of the International Criminal Court' *Fordham International Law Journal* 32 (2008) 1400–1465.

3 More than eleven years have passed since the Rome Statute came into force on 1 July 2002. During this time the Court has only delivered one Trial Chamber Judgment that resulted in a conviction, in the *Lubanga* case (*Prosecutor v Lubanga* ICC–01/04–01/06, Trial Chamber I (14 March 2012), the appeal of which is pending. Moreover, although 36 people have been publicly indicted, only seven are in the pre-trial phase, and another four are at trial at the time of writing. Four of these situations came about through state party referrals, two by way of United Nations Security Council referrals, and two were triggered by the Prosecutor's authority to commence an investigation *proprio moto*.

4 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

established within the National Prosecuting Authority to give effect to this legislation.[5] The Priority Crimes Litigation Unit has a narrow mandate that specifically includes the prosecution of Rome Statute crimes. Rights groups have already instituted proceedings, aiming to compel the Priority Crimes Litigation Unit to investigate, and ultimately prosecute, a number of individuals for the commission of Rome Statute crimes. Indeed, on 8 May 2012 the North Gauteng High Court delivered judgment in the matter of *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* (the '*Southern African Litigation Centre* case'), the appeal judgment of which was rendered by the Supreme Court of Appeal on 27 November 2013.[6] To date, this is the only reported case involving the Rome Statute Implementation Act (the appeal judgment is yet to be reported).

These developments necessitate investigation into the proper application of the Rome Statute within municipal law in general, and within South African law in particular. In this paper I argue that the rationale and function of the gravity requirement before the ICC differs substantially from the role it may play in municipal prosecutions, and as such, it should be applied very differently by South African courts. While the emphasis is on the South African example, the broader points made hold true equally for a number of jurisdictions internationally, and in particular, those jurisdictions that adhere to a common law tradition. Moreover, given that to date the ICC has focused most of its attention on crimes committed in Africa, and specifically given the controversy this has generated, South Africa as a regional force is very important in the broader ICC discourse. In her detailed account of the implementation of the Rome Statute in South Africa, Stone specifically emphasised South Africa's role as a leader among African states in the implementation of the Rome Statute.[7]

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5 The Priority Crimes Litigation Unit forms part of the National Prosecuting Authority of South Africa, and was established by Presidential Proclamation on 23 March 2003.

6 *Southern African Litigation Centre v National Director of Public Prosecutions* 2012 (10) BCLR 1089 (GNP); [2012] 3 All SA 198 (GNP) (8 May 2012); and *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (485/2012) [2013] ZASCA 168 (27 November 2013). This matter relates to crimes against humanity, torture in particular, that are alleged to have occurred in Zimbabwe. In addition to this case, South African authorities have applied their minds to other high-profile incidents relating to Rome Statute crimes, such as, the Gaza Flotilla Raid, Operation Cast Lead, also in Israel, and the Ogaden Matter, relating to the alleged commission of war crimes in Ethiopia.

7 Stone 'Implementation of the Rome Statute in South Africa' in Murungu and Biegon (eds) *Prosecuting international crimes in Africa* (2011) 305–330, at 305–306.

The remainder of the contribution is divided into two parts; a detailed, but largely descriptive discussion of the gravity requirement before international criminal tribunals, is followed by a more analytical discussion of the gravity requirement before South African courts in relation to the Rome Statute Implementation Act.

THE GRAVITY REQUIREMENT: INTERNATIONAL CRIMINAL TRIBUNALS

Early international, or transnational, criminal law developed around the notion of acts *hosti humani generis* (enemies of all mankind).[8] Early on, perpetrators of marine piracy and slavery were deemed to be enemies of all mankind, and as such fell outside the protection of their home states in international law, regardless of the proscriptive content of any given state's municipal law. They were, therefore, subject to any state's regime of punishment and violence.[9] Similarly, in contemporary society, crimes against humanity, war crimes, and genocide are deemed to be internationally wrongful. The gravity of these crimes served as one of the main reasons for their being classified as *hosti humani generis*, indicating that gravity has played a key role in international criminal law throughout its history.

Likewise, in the context of contemporary international criminal law, gravity continues to play a key role. However, its purpose has shifted somewhat. The gravity requirement has been integral in all of the international and hybrid criminal tribunals that have existed. Gravity is legally relevant in four spheres in relation to the ICC:

1. The foundational philosophy for establishing an international criminal tribunal with subject matter jurisdiction over only a few select crimes, ie such tribunals exist to exercise jurisdiction 'over the most serious crimes of concern to the international community as a whole'.
2. The gravity of the situation, eg the gravity of the Rwanda genocide resulted in the establishment of an *ad hoc* tribunal.
3. The gravity of the individual conduct of the accused or potentially accused person.
4. The gravity of the substantive crime.

Gravity also plays a central role in sentencing. However, theoretically this is true in relation to the imposition of any sanction following a formal

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8 See Alfred '*Hostes humani generis*: an expanded notion of US counterterrorist legislation' 6 *Emory International Law Review* (1992) 171–214.

9 *Ibid*.

criminal prosecution, be it international or municipal. As such, gravity in this context is not addressed in this discussion.

Gravity as source of legitimacy

The ICC is founded on the premise that it serves to bring to justice those most responsible for the 'most serious crimes of concern to the international community as a whole'.[10] This notion is somewhat philosophical and vague in the sense that it is very often difficult to be certain that certain individuals bear the greatest responsibility for specific crimes, and that those crimes are the most serious. Take, for example, the ICC's first successful prosecution, that of Thomas Lubanga Dyilo, founder and leader of the *Union des Patriotes Congolais* (UPC), an armed belligerent group party to the Ituri conflict (1999–2007) in the Democratic Republic of the Congo. The Ituri conflict was an extremely brutal armed conflict where atrocities even included 'systematic campaigns of cannibalism directed at civilians'.[11] Notwithstanding the extremely brutal deeds committed during this armed conflict, Lubanga was charged only with the military use, conscription, and enlistment of children younger than fifteen as a war crime.[12] He was convicted, and sentenced to fourteen years' imprisonment, of which he had served six by the time of sentencing.[13] The question may well be asked whether, in the context of the excessively brutal Ituri conflict, bringing war crime charges only related to child soldiering against an individual, meets the threshold of responsibility for the most serious crimes committed.[14] Equally, comparing the disparity between Lubanga's sentence and that of Charles Taylor,[15] recently convicted on a range of charges including the military use and recruitment of child soldiers and sentenced to fifty years' imprisonment

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10 Preamble of the Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (hereinafter the 'Rome Statute').

11 Bowman 'Lubanga, the DRC and the African Court: Lessons Learned from the First International Criminal Court Case' 7 *African Human Rights Law Journal* (2007) 412 at 416; Burke-White 'Complimentary in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo' 18 *Leiden Journal of International Law* (2005) 557 at 587.

12 Warrant of Arrest, *Lubanga* (ICC–01/04–01/06), Pre-Trial Chamber I, 10 February 2006.

13 Decision on Sentence pursuant to art 76 of the Statute, *Lubanga* (ICC–01/04–01/06), Trial Chamber I, 10 July 2012.

14 The UPC was one of the most brutal participants during the Ituri conflict, and Lubanga was their leader. I am not arguing that he was not in actual fact one of those most responsible for the most serious crimes of concern to the international community as a whole. Rather, I am suggesting that only charging him with child soldier-related offences brings into question whether the specific prosecution meets this threshold.

15 *Charles Ghankay Taylor* SCSL–03–01–T, Trial Chamber II (18 May 2012). The sentence was confirmed in *Prosecutor v Charles Taylor* SCSL–03–01–A, Appeals Chamber (26 September 2013).

by the Special Court for Sierra Leone,[16] highlights the fact that it is likely that Lubanga's prosecution may have fallen short of the gravity element inherent in the concept 'most serious crimes of concern to the international community as a whole'.

However, gravity, as a foundational philosophy for the actual establishment of the ICC, as opposed to gravity in relation to the other listed spheres, exists to give legitimacy to the existence of the court, it is not an admissibility, jurisdictional, or substantive requirement or threshold.[17] As such, within the doctrinal work of prosecuting specific individuals for their deeds, gravity as a foundational philosophy has a severely diminished function beyond bringing legitimacy to the prosecution itself. As Schabas has noted, 'in a sense, the article might well have been omitted from the Rome Statute, as it adds little or nothing in terms of legal consequences'.[18] Rather, legal effect is given to this foundational premise by incorporating it into the other three spheres in which gravity plays a role.[19]

Situational gravity and prosecutorial discretion

In the context of *ad hoc* responses to mass atrocity crimes, the decision to create a tribunal with retrospective jurisdiction only, already indicates and is to some extent in response to the gravity of the situation and associated crimes. For example, the International Criminal Tribunal for Rwanda (ICTR) was created because of the gravity of the crimes committed during the 1994 genocide in that country.[20] Conversely, the ICC has prospective jurisdiction in relation to future crimes committed in innumerable circumstances and regions that are beyond reasonable anticipation.[21] As such, when the prosecutor considers a situation, situational gravity must be considered in relation to each situation. Yet, with *ad hoc* tribunals, the situational gravity is largely settled by the decision to create a tribunal.

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16 *Charles Ghankay Taylor* (SCSL–03–01–T), Sentencing Judgment, Trial Chamber II, 30 May 2012, par 40.

17 On gravity as a legitimising factor to the ICC see Danner 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court' 97 *American Journal of International Law* (2003) 510–552.

18 Schabas *The International Criminal Court: a commentary on the Rome Statute* (2010) at 57.

19 See also Triffterer *Commentary on the Rome Statute of the International Criminal Court – observers' notes, article by article* (2 ed 2008) at 51–52.

20 Security Council Resolution 955 (8 November 1994) expresses the Security Council's 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda'.

21 Article 12 and 126 of the Rome Statute.

The Rome Statute draws a material distinction between an 'investigation' and a 'prosecution'. These terms indicate a chronological progression regarding a matter with which the prosecutor is seized. Importantly, an investigation is in respect of a 'situation', whereas a 'prosecution' or 'case' relates to an individual, or group of individuals, against whom proceedings have been, or are to be initiated. As such, a situation refers to the broader context within which international crimes have been committed, eg the situation in the Democratic Republic of the Congo (DRC), whereas 'prosecution' or 'case' refers to proceedings having been instituted against a specific individual (or a group), eg the *Lubanga* case. The jurisdiction of the court can be triggered in one of three ways: a referral by a state party;[22] a referral by the Security Council of the United Nations;[23] and a *proprio motu* investigation launched by the prosecutor.[24] Article 53 of the Statute, which provides for the initiation of an investigation, is activated only once the court's jurisdiction has been triggered by the first two jurisdiction triggers above. Where the prosecutor acts *proprio motu,* the launching of an investigation is regulated by article 15.[25]

When the court's jurisdiction is triggered, this is in response to a situation, as no individuals have yet been identified as potential indictees. For example, the much-publicised arrest warrant issued by the ICC for the arrest of Sudanese President al-Bashir followed a referral by the Security Council of the 'situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court', not of al-Bashir personally.[26] Once the jurisdiction of the court has been triggered, the prosecutor launches an investigation.[27] At this point, it is not required that an individual be identified for prosecution. Nevertheless, the Rome Statue makes it clear that the prosecutor must undertake a gravity analysis to determine whether or not to proceed with the investigation, and ultimately request arrest warrants. In this context article 53(1) Rome Statute uses the following language

> The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

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22 *Id* at article 13(a) and 14.
23 *Id* at article 13(b).
24 *Id* at article 13(c) and 15.
25 See Schabas n 18 above at 660.
26 Security Council Resolution 1593 (31 March 2005).
27 Article 53 and 54 of the Rome Statute.

1. the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
2. the case is or would be admissible under article 17 [which includes gravity as a ground for admissibility]; and
3. taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

The inclusion of the words 'in *deciding* whether' and 'shall *consider*' indicates that this gravity analysis forms part of the prosecutor's discretion in exercising her mandate. Indeed, the ICC prosecutor's extreme margin of discretion has lead Justice Arbour to comment that '[t]he main distinction between domestic enforcement of criminal law, and the international context, rests upon the broad discretionary power granted to the international Prosecutor in selecting the targets for prosecution'.[28]

Subparagraphs (a) and (b) of article 53(1) relate respectively to jurisdiction and admissibility. Both these concepts are legally accepted and are central to the functioning of the ICC. Subparagraph (c), on the other hand, brings the vague concept, 'the interests of justice', within the ambit of prosecutorial discretion. Nevertheless, the prosecutor must take account of the 'gravity of the crime and the interests of victims', as counterbalancing factors to the notion of the 'interests of justice'. Moreover, should the prosecutor decide not to go ahead with an investigation solely on the basis of article 53(1)(c), she must inform the Pre-Trial Chamber of this decision, and the decision may be reviewed.[29]

The question, then, is whether the prosecutor exercises this discretion in relation to the situation, ie is the situation of sufficient gravity to warrant investigation; or in relation to a particular case, ie are the deeds of the individual of such gravity that they warrant an investigation. Article 53(1) relates to an 'investigation' only, and no mention is made of a prosecution.[30] Some of the practice of the Office of the Prosecutor (OTP) seems to support

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28 Bergsmo 'The jurisdictional regime of the International Criminal Court (Part II, Articles 11–19)' 6 *European Journal of Crime, Criminal Law & Criminal Justice* (1998) 29 at 39. As also quoted in Danner n 17 above at footnote 70.

29 Article 53(1) and 53(3)(b) of the Rome Statute.

30 *Id* at article 53(1)(b) makes reference to 'case' and not 'situation' indicating that specific individuals are singled out. However, Schabas has characterised this feature of article 53 as 'anomalous'. A contextual interpretation of this provision is to be preferred over a literal one, meaning 'case' should be construed as 'situation'. The same holds true for the use of the word 'case' in article 15(4). See Schabas n 18 above at 660.

this contention, for example the response sent by the OTP to individuals who submitted a docket to the office regarding alleged crimes committed in the course of the war in Iraq.[31] Accordingly, former Chief Prosecutor Moreno-Ocampo responded

> […] it would then be necessary to consider the general gravity requirement under Article 53(1)(b) … The number of potential victims of crimes within the jurisdiction of the Court in this situation [Iraq] – 4 to 12 victims of willful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of willful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people … Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute.[32]

Nevertheless, Moreno-Ocampo frequently relied on gravity as a basis to justify his decisions, with regard to both the initiation of investigations and to the prosecution of individuals. While article 53(1) speaks only to the gravity threshold in respect of the initiation of investigations, it goes without saying that the prosecutor will not pursue a case against an individual where she is of the view that the deeds of the individual will fail the gravity threshold as a precondition for admissibility (see below). It appears, in this context, that the distinction between investigating a situation and the conduct of an individual, although legally mandated, is contrived in practice. For example, the prosecutor justified his decision to initiate proceedings against the Lords Resistance Army, and not any other groups in Northern Uganda, on the basis of gravity. No individual decision maker, applying her or his mind to the situation in Northern Uganda up until and before 2006, could do so without a strong focus on the Lord's Resistance Army. Moreover, article 58 – which deals with the issuing of arrest warrants by the Pre-Trial Chamber – provides that 'at any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person'. This clearly indicates the common-sense reality of such an investigation, that the more mature the investigation

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31 Such a response from the Prosecutor is required in terms of article 15(6) of the Rome Statute.

32 Letter of Prosecutor regarding submission of information related to the war in Iraq (9 February 2006) at 8.

becomes, the more it will focus on a small group of individuals until the prosecutor has determined against whom she will request the Pre-Trial Chamber to issue arrest warrants. Moreover, 53 refers explicitly to the admissibility criteria in article 17.[33] Admissibility, like jurisdiction, can only be determined with reference to identified individual indictees. For example, one can only be certain whether a national prosecutorial authority is prosecuting an individual, once the individual has been identified.

Gravity of individual conduct and formal admissibility

It is within the context of admissibility that the Rome Statute gives direct and peremptory legal effect to the gravity requirement within formal proceedings of the court: '…the Court shall determine that a case is inadmissible where […] the case is not of sufficient gravity to justify further action by the Court'.[34] Along with gravity, the admissibility of a matter before the court is to be determined on the additional grounds of complementarity,[35] meaning a case is inadmissible if it is being investigated or prosecuted by a state with jurisdiction, and *ne bis in idem*,[36] meaning the matter will be inadmissible if the person concerned has already been tried for the conduct in question.

The primary function of gravity as a criterion for admissibility is to ensure that the court's very limited capacity is reserved for the most serious cases. Although the *travaux préparatoires* of the Rome Statute provide little guidance in this regard, gravity, as a precondition for admissibility, was first conceived of during the work of the International Law Commission's (ILC) Working Group on a Draft Statute for an International Criminal Court. When the Working Group's final draft was tabled during 1994, James Crawford was the Chairman Special Rapporteur. Commenting on the function of gravity as a ground for admissibility, Crawford stated that grounds for admissibility

> … might include, say, … the fact that the acts alleged were not of sufficient gravity to warrant trial at the international level. Failing such power the court

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33 Van Schaack is also of the view that the Prosecutor's discretion includes a gravity analysis in relation to the conduct of the individual's charges, see Van Schaack 'The concept of gravity before International Criminal Courts' *Accountability: Newsletter of the International Criminal Law Interest Group of the American Society of International Law* (Winter 2008/2009).

34 Article 17(1)(d) of the Rome Statute.

35 *Id* at article 17(1)(b).

36 *Id* at article 17(1)(c) provides for the principle of *ne bis in idem* as a ground excluding admissibility. However, greater content is given to this principle in article 20.

> might be swamped by peripheral complaints involving minor offenders, possibly in situations where the major offenders were going free.[37]

For his part, Gudmundur Eriksson, a member of the working group, commented that it would be wise to provide for the exclusion of some cases even where the court would have jurisdiction, in order to ensure that the court 'deal solely with the most serious crimes, would not encroach on the functions of national courts and would be sufficiently realistic to adapt its case-load to the resources available'.[38] As the Rome Statute directs the prosecutor to consider gravity in launching investigations, and provides for gravity as a precondition for admissibility, the question arises whether there is in fact a double gravity requirement in the context of individual prosecutions before the ICC, in that both the situation as well as the conduct of the potential individual indictee must be weighed against a gravity threshold.

In an early ICC Appeals Chamber decision, it was held that the criterion of social alarm, which the Pre-Trial Chamber applied[39] in the context of gravity as a ground for admissibility, is dependent upon 'subjective and contingent reactions to crimes rather than upon their objective gravity'.[40] Additionally, the Appeals Chamber rejected the Pre-Trial Chamber's interpretation of gravity, as meaning that the court should focus only on the highest-ranking perpetrators.[41] Instead, the Appeals Chamber preferred a qualitative determination to a quantitative one. The Appeals Chamber judgment can be interpreted as a rejection of the Pre-Trial Chamber's finding that even though the limited subject matter jurisdiction of the court was determined on the basis of gravity, ie the court has jurisdiction only in relation to the gravest crimes, an additional gravity analysis must be performed in terms of article 17. This suggests that gravity is superfluous as an admissibility requirement.

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37 *International Law Commission, Summary Record of the 2333rd Meeting*, UN Doc A/CN 4/SR 2330 (1994) at 9.

38 *Ibid*.

39 *Prosecutor v Lubanga* Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, ICC–01/04–01/06, Pre–Trial Chamber 1 (10 February 2006).

40 *Prosecutor v Lubanga* Judgment on the Prosecutor's Appeal against the Decision of Pre–Trial Chamber I entitled 'Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58', ICC–01/04, Pre–Trial Chamber (13 July 2006) par 72.

41 *Id* at par 52 and 64.

However, there are commentators who interpret the judgment as not supporting this implication.[42]

Schabas has relied on this authority to support his conclusion that as an admissibility criterion, gravity is insignificant.[43] He reached this conclusion in part on the basis that gravity is already afforded due consideration in the context of prosecutorial discretion, and in the role it has played in limiting the court's subject matter jurisdiction. However, it is important to note that the Appeals Chamber only rejected the Pre-Trial Chamber's interpretation of gravity as an admissibility criterion; it did not definitively conclude that gravity should not be applied as such. Additionally, this Appeals Chamber judgment has since been interpreted and applied as *obiter dictum* by at least one Pre-Trial Chamber.[44] It seems doctrinally unsound to argue that the prosecutor's duty to consider gravity in exercising her prosecutorial discretion in some way alleviates the court's function to adjudicate on matters of admissibility, which is framed in peremptory language: '…the Court shall determine that a case is inadmissible where […] the case is not of sufficient gravity to justify further action by the Court'.[45] The court must consider gravity as an admissibility criterion in each case *de novo*, even where other cases in the same situation have already been found admissible.

In light of the above, there is indeed a double gravity requirement in the context of prosecutions before the ICC.

Gravity of the substantive offence as an element of the crime

As a point of departure, the ICC's subject matter jurisdiction is limited to genocide, crimes against humanity, and war crimes,[46] precisely because these offences are considered to be of the gravest concern to contemporary society – that is to say, due to the gravity requirement. This inherent gravity is

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42 In her discussion of this judgment, that is framed specifically in the context of the gravity requirement, Van Schaack makes no mention of such an implication of the judgment, see Van Schaack n 33 above.

43 Schabas n 18 above at 348.

44 *Prosecutor v al-Bashir* Decision on the Prosecutor's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, ICC–02/05–01/09, Pre-Trial Chamber I (4 March 2009) par 48, footnote 51.

45 Article 17(1)(d) of the Rome Statute.

46 Formally article 5(1) of the Rome Statute, which provides for the crimes within the jurisdiction of the Court, also includes the crime of aggression. However, the prosecution of individuals for the crime of aggression is subject to the ratification of the amendment by the relevant state in terms of article 121 of the Rome Statute, as well as a decision to be taken by a two-thirds majority of state parties on 1 January 2017. As such, the crime of aggression cannot be charged until such time.

encapsulated in the customary international law definitions of the various crimes. While the drafters of the Rome Statute endeavoured to codify customary international law, the text adopted after an involved negotiation process, often deviates substantially from customary international law, as it existed when the text was adopted. This is true, for example, of the inclusion of the prohibition on the use and recruitment of child soldiers.[47] As discussed below, all of the Rome Statute crimes are inherently grave. However, war crimes are unique in the Rome Statute in that these crimes have a substantive gravity requirement, in addition to the inherent gravity of war crimes within customary international law.[48]

Genocide

The Rome Statute provides: 'For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such…'.[49] Academic opinion and settled jurisprudence are unanimous that, as was stated by the ICTR in the *Akayesu* case

> Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[50]

While addressing the question of whether a single accused can be convicted of different international crimes on the same set of facts, the ICTR went on to conclude that among genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions, none of the crimes embody a lesser form to any of the others. Nevertheless, there is considerable authority holding that genocide is the most despicable, inhumane, and morally reprehensible of all criminal offences – indeed, the ICTR in the *Kayishema*

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47 Bassiouni 'The normative framework of international humanitarian law: overlaps, gaps and ambiguities' 75 *International Law Studies Series US Naval War Collage* (2000) 3 at 20.

48 International crimes consist of three primary elements, *viz* the *chapeau* requirements, *mens rea* (mental element) and *actus reus* (physical element). *Chapeau* requirements are those requirements that must be met in order to charge a specific class of international law crimes. *Chapeau* requirements are essential to distinguish international crimes from ordinary crimes.

49 Article 6 of the Rome Statute.

50 *Prosecutor v Akayesu* ICTR–96–4–T, Trial Chamber I (2 September 1998) par 498.

judgment;[51] the Israeli District Court in the *Eichmann* judgment;[52] and the ICTY in the *Jelisić* judgment, all concluded that, in the words of the Trial Chamber in *Jelisić*, 'a crime characterized as genocide constitutes, of itself, crimes against humanity within the meaning of persecution'.[53]

The *dolus specialis* inherent in genocide, that is the requirement that the perpetrator has the intention to 'destroy, in whole or in part, a national, ethnical, racial or religious group, as such', adds substantially to the gravity of the crime. However, this *dolus specialis* is inherent in the crime of genocide and it forms part of the customary law definition of genocide. Therefore, one can say that the Rome Statute additional gravity to this crime.

Crimes against humanity

The gravity of crimes against humanity, as formulated in the Rome Statute, is to be gleaned from the *chapeau* requirements: 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[54] The concepts 'widespread' and 'systematic' are not defined in the Rome Statute. However, Pre-Trial Chamber II of the ICC held in the *Bemba* Confirmation of Charges decision that the requirements 'widespread' and 'systematic' are disjunctive.[55] In other words, should the court conclude that the attack was widespread, there is no need to determine that it was also systematic, and *vice versa*.

Pre-Trial Chamber I, in both the *al-Bashir* and *Katanga* cases, elaborated on the 'widespread' criterion.[56] The Chamber held that 'widespread' refers to 'the large-scale nature of the attack, as well as to the number of victims'.[57] In *al-Bashir*, an attack was deemed widespread as 'affected hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region'.[58] In *Bemba,* Pre-Trial Chamber II held that for an attack to be widespread, it must be, 'massive, frequent, carried out

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51 *Prosecutor v Kayishema* ICTR–95–1, Trial Chamber II (21 May 1999) par 578.

52 *Attorney General of Israel v Eichmann*, Judgment of the District Court of Israel, in Lauterpacht 'International Law Reports' vol. 36, part VI, para. 201, p 239 (1968).

53 *Prosecutor v Jelisić* IT–95–10–T, Trial Chamber I (14 December 1999) par 68.

54 Article 7 of the Rome Statute.

55 *Prosecutor v Bemba* Decision Pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC–01/05–01/08, Pre-Trial Chamber II (15 June 2009) par 82.

56 Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad al-Bashir n 43 above; *Prosecutor v Katanga* Decision on the Confirmation of Charges, ICC–01/04–01/07, Pre-Trial Chamber I (30 September 2008).

57 *Id*, *al-Bashir* par 81.

58 *Id* par 84.

collectively with considerable seriousness and directed against a multiplicity of victims'.[59] It must involve an attack 'carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians'.[60] Finally, in the *Kordić* case, Trial Chamber II and the Appeals Chamber of the ICTY held that a widespread crime may be a 'cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'.[61]

To date, the *Katanga* case provides the clearest pronouncement from the ICC on what 'systematic' entails

> The term 'systematic' has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as 'patterns of crimes' such that the crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis'. Thus, in the context of a systematic attack, the requirement of a 'multiplicity of victims' pursuant to article 7(2)(a) of the Statute ensures that the attack involved a multiplicity of victims of one of the acts referred to in article 7(1) of the Statute.[62]

In the *al-Bashir* case, the court observed that the 'systematic' requirement relates to 'the organized nature of the acts of violence and to the improbability of their random occurrence'.[63]

The finding in the *al-Bashir* case regarding the meaning of 'widespread' might create the perception that the Pre-Trial Chamber has set the bar very high by referring to 'hundreds of thousands of individuals' and 'large swathes' of territory. However, it was held that the relevant attack in that case was likely widespread (the court did not have finally to determine this in the pre-trial phase) as it involved 'hundreds of thousands of individuals' and 'large swathes' of territory, and not that it is required that 'hundreds of thousands of individuals' and 'large swathes' of territory be involved for an attack to be widespread.

That crimes against humanity must be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge

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59 *Bemba* n 55 above par 83.
60 *Ibid*.
61 *Prosecutor v Kordić* IT–95–14/2–T, Trial Chamber III (26 February 2001) par 179; *Prosecutor v Kordić* IT–95–14/2–A, Appeals Chamber (17 December 2004) par 94.
62 *Katanga* n 56 above paras 397–398.
63 *al-Bashir* n 56 above par 81.

of the attack', distinguishes crimes against humanity from the ordinary underlying offences – such as murder and torture (which would often be charged as assault in municipal criminal justice systems). As such, it is this requirement that elevates the gravity of acts such as murder and torture, and renders them punishable as international crimes. Nevertheless, this requirement forms an inherent part of the notion of crimes against humanity as proscribed by customary international law, and not an added gravity component.

War crimes

The inherent gravity of war crimes, as formulated in customary international law, is founded in the requirement that the underlying offence is committed within the context of armed conflict. However, during the drafting of the Rome Statute, the question of whether to grant the court jurisdiction in respect of war crimes committed during non-international armed conflict, proved contentious.[64] Ultimately, the Statute adopted indeed provided for such jurisdiction.[65]

Where the definition of war crimes within the Rome Statute is unique is that article 8(1) of the Statute creates a *chapeau* requirement, in addition to those found in customary international law, that 'the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.[66] This requirement directly elevates the threshold of gravity required for the successful prosecution of a perpetrator for war crimes.

The Appeals Chamber, as well as Pre-Trial Chamber II of the ICC are *ad idem* that the inclusion of the words 'in particular' renders this requirement directive, and not peremptory.[67] Moreover, the requirement of a large-scale commission of such crimes is in the alternative to the requirement that the commission of such crimes form part of a policy.[68] Nevertheless, no chamber of the ICC – not even the Trial Chamber in the *Lubanga* case – has provided much clarity on the nature of this *chapeau* requirement. The OTP has, however, relied on this article to decide which cases to take forward to the

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64 Schabas n 18 above at 195–199.

65 Article 82(c) and (e) of the Rome Statute.

66 *Id* at article 8(1).

67 Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', *Situation in the Democratic Republic of the Congo* (ICC–01/04), Pre-Trial Chamber I (13 July 2006) par 70. Also, *Bemba* n 55 above par 211.

68 *Ibid*.

investigation phase. In the same letter from the prosecutor, cited above, regarding alleged war crimes in the context of the war in Iraq, the prosecutor states

> For war crimes, a specific gravity threshold is set down in article 8(1), which states that 'the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'. This threshold is not an element of the crime, and the words 'in particular' suggest that this is not a strict requirement. It does, however, provide Statute guidance that the Court is intended to focus on situations meeting these requirements.[69]

To what extent this *chapeau* requirement directs the court in terms of law, remains open. Justice Arbour has noted that the real challenge facing the ICC prosecutor is 'to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones'.[70] As the demands for justice are so high, it is unlikely that the court would, in the near future, hear a matter that was committed neither as 'part of a plan or policy', nor 'as part of a large-scale commission of such crimes'. Considering the entrenched nature of the gravity requirement in the Rome Statute, in my view the correct interpretation of the inclusion of the words 'in particular', is that where there are no competing complaints that comply with article 8(1), the court could properly prosecute individuals for war crimes where there has been no compliance with article 8(1). However, in the face of competing claims that comply with article 8(1), the court could not entertain a matter that does not comply with article 8(1).

GRAVITY BEFORE SOUTH AFRICAN COURTS

The Implementation of the Rome Statute of the International Criminal Court Act (the Rome Statute Implementation Act) makes no reference to the word 'gravity'. The Act consists of four essential parts, the Act proper; Schedule 1, which contains a verbatim restatement of the Rome Statute provisions proscribing genocide, crimes against humanity, and war crimes; Schedule 2, which provides for laws amended; and an Annexure, which contains the Rome Statute in total. Moreover, the preamble to the Act provides that

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69 'Letter of Prosecutor regarding submission of information related to the war in Iraq' n 32 above at 8.

70 Arbour 'Statement to the preparatory commission on the establishment of an international criminal court' (8 December 1997), 1997 *ICTY Yearbook* 229 at 232, UN Sales No E 99 III P 2.

> the Republic of South Africa is committed to – bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court …

The point being made is that the Act serves to give effect to South Africa's international obligations, and not to enact every aspect of the Rome Statute into South African law. South Africa's supreme Constitution provides that an international agreement will form part of South African law if 'it is enacted into law by national legislation'.[71] This is generally achieved by any one of three methods: the provisions of a treaty may be reflected in the text of an Act of parliament; the treaty may be included as a schedule to the Act; and finally, enabling legislation can afford executive power to bring specific treaties into the ambit of municipal law.[72]

A material distinction exists between a schedule to an Act and an annexure to an Act. A schedule incorporates the content of the schedule into the Act itself, and thus creates law within the Republic. This is substantiated in the current context by the definitions clause of the Rome Statute Implementation Act, where the definition of, for example, genocide is 'any conduct referred to in Part 1 of Schedule 1'.[73] An annexure, on the other hand, serves only to provide contextual information to the reader. This is made clear by the ICC Act, which provides 'a copy of the English text [of the Rome Statute] is attached in the Annexure for information'.[74]

It is thus clear that the Rome Statute has not been enacted into South African municipal law *in toto*. Indeed, most of the provisions of the Rome Statute cannot be implemented municipally, such as article 36 which regulates the 'qualifications, nomination and election of judges' to the ICC. Moreover, modes of liability – such as command responsibility – have not been enacted into South African law through the Rome Statute Implementation Act. It seems that many South African lawyers and academics operate under the assumption that command responsibility does form part of South African law – *The Southern African Litigation Centre* case is rife with reference to 'command responsibility'. For example, in the court a quo's judgment it is stated that the Southern African Litigation Centre sought 'the investigation

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71 Section 231(4) of the Constitution of the Republic of South Africa, 1996.
72 Dugard *International law: a South African perspective* (4ed 2011) at 55.
73 Section 1 of the Rome Statute Implementation Act.
74 *Id* at section 1(xix). This point is made again on the first page of the annexure to the Act.

of six Ministers and Heads of Department on the basis of "command responsibility"'.[75] Ultimately, when a South African court is faced with a prosecution that relates to command responsibility, the prosecution will have to rely on a comparable basis of criminal liability from within South African law, and not command responsibility as defined in international law.

On the other hand, the Rome Statute Implementation Act provides for procedures which differ from those of the Rome Statute. Most strikingly, the Act provides for limited universal jurisdiction.[76] The Rome Statute is thus to be applied to the South African situation *mutatis mutandis*, and only to the extent enacted.. The question is: what does this entail in as far as the gravity requirement is concerned?

Gravity as source of legitimacy

South African courts, like all municipal courts the world over, are competent to give judgment in relation to a wide range of crimes, spanning the divide between the most petty and the most serious Moreover, the legitimacy of municipal courts is in no way dependent on the gravity of the crimes over which they exercise jurisdiction. One might argue that the criminal jurisdiction of the High Court in South Africa is limited, in that these courts hear only more serious offences, and gravity does therefore play a role in the legitimacy of the court. However, this misses the point in that the court structure in South Africa provides appropriate fora for the prosecution of persons responsible for infringing any criminal norm that exists within the Republic. Accordingly, gravity plays no legitimising role in the context of municipal prosecutions for Rome Statute crimes.

Situational gravity and prosecutorial discretion

Within the common-law and civil-law traditions, as far as the institution of criminal prosecutions is concerned, municipal jurisdictions can be divided between states following a principle of compulsory criminal prosecution, and those following a principle of limited discretion in criminal prosecution. Germany, for example, adheres to the principle that prosecutors are duty-bound to initiate a prosecution where they have sufficient evidence to do so.[77] In South Africa prosecutors have a duty to prosecute if there is a *prima*

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75 *Southern African Litigation Centre v National Director of Public Prosecutions* n 6 above par 35.

76 Section 4(3)(c) of the Rome Statute Implementation Act.

77 Herrmann 'The rule of compulsory prosecution and the scope of prosecutorial discretion in Germany' 41 *University of Chicago Law Review* (1973–1974) at 468. Of course there is nevertheless an inherent discretion as to whether the available evidence is sufficient

facie case and there are no compelling reasons for a refusal to prosecute.[78] Such compelling reasons may, for example, relate to the age of the perpetrator,[79] the antiquated nature of the offence,[80] and so forth. Accordingly, South African prosecutors are afforded a limited discretion to proceed with prosecution. As discussed above, the prosecutor in the ICC is afforded a much wider margin of discretion in deciding whether to initiate investigations, and she is expressly allowed to gauge the gravity of the relevant conduct in informing her decision to investigate or not.[81]

Indeed, the *Southern African Litigation Centre* case – the only High Court judgment on the Rome Statute Implementation Act to date – involved a review of the decision of the National Director of Public Prosecutions, the Head of the Priority Crimes Litigation Unit, and the National Commissioner of the South African Police Service not to institute an investigation into alleged crimes against humanity (torture in particular), committed in Zimbabwe.[82] The applicants succeeded in their application,[83] but Fabricius J did not offer any specific guidance on the interplay between gravity and prosecutorial discretion as it manifests on the municipal plane *vis-à-vis* the international plane. Instead, his judgment maintained a narrow focus on the facts peculiar to the case at hand, and the associated administrative decision-making matrix. This matter went on appeal to the Supreme Court of Appeal at the instance of the National Commissioner of the South African Police Service and the National Director of Public Prosecutions. The appeal was dismissed with costs. However, the court *a quo*'s order was slightly amended.[84] The appeals judgment by Navsa ADP also offered no clarity on the interplay between gravity and prosecutorial discretion.

As with all prosecutions, in the prosecution of Rome Statute crimes the discretion of members of the National Prosecuting Authority – established by South Africa's supreme Constitution and mandated to exercise 'its functions without fear, favour or prejudice'[85] – is limited to establishing the existence of a *prima facie* case ands excluding compelling reasons for a

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for a successful prosecution.

78 Bekker (*et al*) *Criminal procedure handbook* (7 ed 2005) at 59–62.

79 See for example, *S v Lubaxa* 2001 (2) SACR 703 (SCA) at 707i.

80 *S v Steenkamp* 1973 (2) SA 221 (NC).

81 Article 53 of the Rome Statute, as discussed above.

82 *Southern African Litigation Centre v National Director of Public Prosecutions* n 6 above at 1.

83 *Id* at 93–96.

84 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* n 6 above at 3.

85 Section 179(4) of the Constitution of the Republic of South Africa, 1996.

refusal to prosecute. For Rome Statute crimes, the relative gravity of the conduct in question can never factor in as a compelling reason for a refusal to prosecute, as even the least grave incidences of such crimes are hugely grave when compared to most municipal law crimes. As such, unlike before the ICC, gravity plays no role in the discretion of the prosecutor to prosecute Rome Statute crimes.

Moreover, the process in terms of which the Priority Crimes Litigation Unit exercises its discretion with regard to whom to pursue for Rome Statute crimes, is focused on individual conduct and not on situational gravity. This is because municipal prosecutors do not follow the articles 53 and 54 Rome Statute procedure for investigation, as these articles have not been enacted into municipal law in terms of the Act. It must be acknowledged that the situational gravity within which Rome Statute crimes are committed is not easily divorced from gravity as a substantive component of the relevant crime, and this aspect is discussed below.

Gravity of individual conduct and formal admissibility

As an admissibility ground before the ICC, complementarity by definition plays a central role in the Rome Statute Implementation Act and in municipal prosecutions for Rome Statute crimes.[86] However, the same is not true of gravity as a bar to admissibility before the ICC, the reason being that complementarity serves precisely to regulate the relationship between the ICC and municipal courts with jurisdiction over Rome Statute crimes.[87] In fact, as Kleffner asserts, the regulation of the complementary relationship between the ICC and municipal jurisdictions is an incentive to municipal incorporation.[88] It is thus intrinsic to its nature that complementarity would be relevant in the context of such municipal prosecutions. Gravity, on the other hand, serves as a filter mechanism to ensure that the limited capacity of the ICC is reserved for the gravest violations. This need does not exist in the context of municipal prosecutions as any prosecution in a municipal court for a Rome Statute crime would be deemed of the gravest order of crimes the

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86 Indeed, the preamble to the Act already sets out the complementary relationship between the ICC and South African Courts. For more on this complex relationship see Du Plessis 'South Africa's implementation of the ICC Statute: an African example' 5 *Journal of International Criminal Justice* (2007) at 460.

87 See for example, article 1 of the Rome Statute.

88 Kleffner 'The impact of complementarity on national implementation of substantive international criminal law' 1 *Journal of International Criminal Justice* (2003) 86 at 88–89.

relevant court may hear. Moreover, admissibility is not a feature of South Africa's law of criminal procedure.

Gravity of the substantive offence as an element of the crime

In the context of municipal prosecutions, it remains true that what sets Rome Statute crimes apart from the relevant underlying offence, ie regular municipal law crimes, is the *chapeau* requirements for the crime (the contextual element). All three of the Rome Statute crimes have unique contextual elements, all of which elevate the gravity of the relevant offence beyond that of the underlying offence. Moreover, war crimes, as proscribed by the Rome Statute, require added gravity in that 'the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes'.[89] Quite simply, if the gravity inherent in the substantive content of the relevant crime is not present, then the conduct does not amount to genocide, a crime against humanity, or a war crime, as the case may be. However, it is very likely that the person will still be subject to prosecution for the underlying offence, such as murder, rape, torture, and so forth.

Universal jurisdiction

Winston Churchill once commented, 'when a country collapses, the chaos reproduces itself in every microcosm'.[90] It is for this reason that if they are effectively to fight impunity, municipal courts must be vested with universal jurisdiction for Rome Statute crimes. The Rome Statute Implementation Act provides South African courts with limited universal jurisdiction in respect of Rome Statute crimes

> …any person who commits a [Rome Statute] crime … outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if –
> […]
> (c) that person, after the commission of the crime, is present in the territory of the Republic;
> […].[91]

Most states within which genocide, war crimes, or crimes against humanity occur are at a stage of relative collapse, and history shows that an

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89 Article 8(1) of the Rome Statute.

90 Langworth (ed) *Churchill's wit: the definite collection* (2009) at 41, the statement is attributed to Churchill during 1941.

91 Article 4(3)(c) of the Rome Statute Implementation Act.

independent judiciary and prosecutorial authority that acts without fear or favour is usually an early casualty of the ensuing chaos. Moreover, given the contextual elements of Rome Statute crimes, for example, that crimes against humanity be committed 'as part of a widespread or systematic attack',[92] government forces and agents are often implicated in the commission of the crimes. This results in a reluctance to prosecute, specifically where the independence of the judiciary and/or prosecutorial authority have been compromised. The implication is that municipal courts in states who have incorporated the Rome Statute and who are truly committed to fighting impunity for mass-atrocity crimes, will likely have more opportunity to prosecute individuals for Rome Statute crimes that occurred outside of their territorial jurisdiction, than for crimes committed within the state. The courts of states that have enacted the Rome Statute crimes into their municipal law and which have universal jurisdiction, will be able to hear matters over which the ICC will not have jurisdiction. States that share geographical borders with states in which Rome Statute crimes are committed will have the greatest opportunity to bring an economy of scale to the business of international criminal justice.

Indeed, jurisdiction in the *Southern African Litigation Centre* case is founded on universal jurisdiction, and the docket relates to crimes committed in Zimbabwe which shares a common border with South Africa.[93] Given the fact that South Africa is in many respects better developed than Zimbabwe, the Zimbabwean elite often travels across the border for shopping and entertainment. In the *Southern African Litigation Centre* case, Fabricius J held that the anticipated presence of a person alleged to have committed a Rome Statute crime in South Africa is sufficient for a formal investigation to be launched, but that the Rome Statute Implementation Act requires the physical presence of the accused in South Africa should the matter go to trial.[94] Accordingly, South African authorities are competent to investigate the commission of Rome Statute crimes by persons in Zimbabwe (or any other country for that matter), and to monitor their borders. This will allow

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92 Article 7(1) of the Rome Statute.

93 *Southern African Litigation Centre v National Director of Public Prosecutions* n 6 above.

94 *Id* at 90–91. However, Judges Higgins, Kooijmans and Buergenthal, in their joint separate opinion, and Judge *ad hoc* Van den Wyngaert, in her separate opinion, in the *Arrest Warrant* case held that nothing in international law bars a state from exercising universal jurisdiction for the most heinous crimes of concern to the international community, even *in absentia* (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002, ICJ Reports (2002) 3, at 80, par 59 and 173, par 58).

the South African police to arrest a person once she/he is in the territory of South Africa, and that person can then be brought to trial.

In their joint separate opinion in the *Arrest Warrant case*, Judges Higgins, Kooijmans, and Buergenthal, held that

> It is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community … Piracy is the classical example … But this historical fact does not mean that universal jurisdiction only exists with regard to crimes committed on the high seas or in other places outside national territorial jurisdiction. Of decisive importance is that this jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all. War crimes and crimes against humanity are no less harmful to the interests of all…[95]

Genocide is certainly also of a similar ilk. It is therefore the gravity of the crimes concerned that allows for the expansive jurisdiction that the Rome Statute Implementation Act prescribes for South African courts. No municipal criminal jurisdiction can equip its courts with universal jurisdiction in respect of crimes such as petty theft, or even murder, as these crimes are not *hosti humani generis*. True universal jurisdiction can only be exercised in respect of a limited number of international crimes, including the three Rome Statute crimes.

CONCLUSION

My analysis concludes that for ICC prosecutions a gravity analysis should be/should have been performed during the following stages: during the adoption of the Rome Statute and creation of the ICC as a precondition to institutional legitimacy; a situational gravity analysis should be performed by the prosecutor when the decision is made whether to launch an investigation; a gravity analysis in relation to the individual conduct of the accused should be performed to determine whether the matter is admissible; and finally, the gravity of the conduct in question should be assessed so as to determine whether the definitional elements of the relevant Rome Statute crime are in fact present.

In stark contrast to this multi-tiered function which gravity fulfils in the ICC context, before South African courts hearing matters involving Rome Statute crimes, gravity is only relevant to determine whether the definitional

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[95] *Ibid*. Separate opinion of Judges Higgins, Kooijmans and Buergenthal par 61.

elements of the relevant Rome Statute crime are in fact present, and to legitimise the use of limited universal jurisdiction.

This raises the question of what the gravity threshold is in relation to each of the multiple stages during which gravity is relevant before the ICC. In the event that the threshold is the same for each of the stages, it would matter less that gravity is relevant for fewer stages of the prosecution before South African courts. Quite simply, if the threshold is the same, the first instance during which the gravity analysis is performed should theoretically indicate whether this analysis will be successful in relation to each of the other stages at which it is to be performed. Nevertheless, the nature of, and reason for, the different stages at which a gravity analysis is to be performed indicates that the threshold is not the same for all of the stages.

It is clear from the response sent by the former prosecutor of the ICC in respect of the docket received in relation to alleged crimes committed in Iraq, that it can well happen that the relevant conduct amounts to Rome Statute crimes, but the situation is not grave enough to warrant ICC intervention.[96] Therefore, the threshold of gravity as envisaged by articles 17(1)(d) and 53(1)(b)–(c) of the Rome Statute – admissibility and prosecutorial discretion in respect of opening an investigation respectively – is significantly higher than the gravity inherent in the substantive definition of each of the Rome Statute crimes. If this were not the case, gravity as a precondition to admissibility and gravity in respect of prosecutorial discretion would have no value or function. In the South African context, gravity is also important in legitimising universal jurisdiction as a basis for jurisdiction. However, as was indicated by the *Arrest Warrant* case, quoted above, the legitimacy of universal jurisdiction is founded on the gravity of the substantive crime.[97] Therefore, universal jurisdiction poses no greater gravity threshold than does the threshold inherent in the relevant substantive crime.

It is apt again to rely on the great lawyer and raconteur, Robert H Jackson, when he stated, as part of his opening statement at Nuremburg, that

> The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who

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96 'Letter of Prosecutor regarding submission of information related to the war in Iraq' n 32 above at 8.

97 *Arrest Warrant Case* n 94 above par 61.

> possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.[98]

There are, however, a great number of individuals who find themselves on the periphery – that is to say, in the significant margin that exists between the petty crimes of little people, and the evils of men of great power. Were municipal courts to interpret their function in applying gravity as a threshold to Rome Statute prosecutions in a manner and to a threshold similar to its proper application by the ICC, these individuals would remain beyond the reach of the law. Certainly, that too offends the common sense of mankind. Nevertheless, South African courts are obliged in law to ensure that the gravity threshold inherent in crimes against humanity, war crimes, genocide, as the case may be, is present for a successful prosecution.

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[98] Jackson n 1 above.