SHOCKING THE CONSCIENCE OF HUMANITY: GRAVITY AND THE LEGITIMACY OF INTERNATIONAL CRIMINAL LAW

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October 2014

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DECLARATION OF ORIGINALITY

I hereby certify that this thesis is my own work and that due credit has been given to all sources of information contained herein. I have not obtained a degree at National University of Ireland Galway or elsewhere on the basis of this work.

RESEARCH QUESTION & SUMMARY OF CONTENTS

This thesis analyses the relationship between an idea and the legitimacy of an international regime. The idea, captured in the word 'gravity', is that some crimes are so serious that they concern the entire world. That idea provides the central justification for the existence of the international criminal law regime and for many of its doctrines and policies. Legitimacy concerns the normative and sociological justifications for exercises of authority. The idea of gravity serves as the principal force seeking to legitimate the international community's authority to prescribe and adjudicate criminal conduct.

The thesis argues that international criminal law's reliance on gravity for its legitimacy is problematic because the concept lacks clear, agreed content. This ambiguity has served a constructive function in the regime's establishment and early years because it facilitates consensus. Regime founders and actors can agree to particular actions, such as the establishment of the International Criminal Court, based on a shared commitment to the vague goal of ending impunity for especially serious crimes. Such agreements, however, mask unresolved conflicts regarding global values and priorities. For instance, as the controversies surrounding the work of the ICC reveal, there is limited consensus about when international adjudicative authority should be given priority over national adjudicative authority. The aim of this thesis is to expose gravity's role in masking such conflicts and to suggest a new approach to gravity-oriented

decisions that better promotes the legitimacy of the international criminal law regime.

The thesis begins by defining the key terms of 'legitimacy' and 'gravity' and briefly explaining how gravity seeks to legitimate the international criminal law regime. Next, it reviews the history of the regime to show how gravity came to play the central justificatory role that it does today. The thesis then examines the principal theories of international crimes to demonstrate the ambiguity of gravity as a justification for international prescriptive authority. Thereafter, the thesis explores how the concept of gravity informs evaluations of the legitimacy of international adjudication as well as adjudication of international crimes in national courts under the theory of universal jurisdiction. Finally, the thesis proposes a novel approach to operationalizing gravity as a justification for international adjudication that would better promote the legitimacy of the international criminal law regime than current approaches.

METHODOLOGY

In seeking to illuminate gravity's role in legitimating international criminal law, the thesis draws upon such primary sources as international and national case law, treaties, Security Council resolutions, and reports of international bodies, including the International Law Commission. The thesis also engages deeply with the scholarly literature on international criminal law, human rights, and international and criminal legal theory.

INTRODUCTION

This thesis explores the history and consequences of the idea that some crimes are so serious, so shocking to humanity's conscience, that they concern the entire world. This idea, often termed 'gravity' in international criminal law discourse, is used to legitimate much of the work of the international criminal law regime. Authority over criminal law usually resides with states because their governments are charged with implementing the values and norms of their constitutive communities. International criminal law, however, assumes the existence of a global community with authority to implement global values and norms that do not always align with those of affected national communities. The concept of gravity is used to mediate between these competing claims to authority over criminal law matters. Gravity is invoked to explain when it is appropriate for the international community's values to be given priority over conflicting national values. When crimes are sufficiently grave, international criminal law scholars and practitioners assert that the value of accountability trumps the value of non-interference and justifies the application of international accountability norms.

The idea that some crimes are particularly serious is used to justify the authority of the international criminal law regime in two primary ways. First, it justifies placing certain crimes in the category 'international', making them the appropriate subjects of international prescriptive authority. When crimes are labeled international, many scholars and practitioners believe that the international community has authority to develop their normative contours, including elements, defenses, and appropriate punishments. Second, the idea of gravity is commonly used to justify the authority of international courts to investigate and adjudicate situations in which crimes have been committed, as well as particular cases within those situations. This second role is related to the first in that the label 'international crime' helps to justify the adjudicative

authority of the international community, as well as its prescriptive authority. Yet in the context of adjudication, the gravity said to be inherent in all international crimes is not necessarily a sufficient justification for international action. At least for the International Criminal Court (ICC), an additional gravity threshold must be met.

Legitimacy, although a complex and contested concept, essentially denotes justified authority. When legitimacy is used as a normative concept it draws on moral or legal justifications for authority, and when it is deployed in a sociological sense it describes the perceptions of relevant audiences that authority is justified. To say that the concept of gravity provides a justification for the prescriptive and adjudicative authority of the international community therefore means that it seeks to legitimate international action in those areas. Gravity's role in this regard is both normative and sociological: It both seeks to provide a moral and legal foundation for international jurisdiction and to convince relevant audiences of the justice of international action.

Despite the importance of the concept of gravity to international criminal law's legitimacy, surprisingly little effort has been made to understand what makes a crime sufficiently serious to justify international action. People who study the international criminal law regime or practice within it generally assume that the gravity of international crimes is self-evident. Likewise, the general public, to the extent it is aware of international crimes, seems to accept that they are particularly serious without deep inquiry into the elements that might make genocide, crimes against humanity, war crimes or aggression grave.

This thesis argues that, contrary to common belief, it is far from clear what makes international crimes grave enough to justify international criminal law. Rather, the concept of gravity remains ambiguous, masking value choices that are sometimes controversial. This ambiguity has been constructive in the early phases of the regime's development. Because gravity is both ambiguous and

intuitively appealing – people believe they know a grave crime when they see one – invocations of gravity have served to promote consensus. Gravity provides an apparently uncontroversial justification for regime decisions. However, the availability of this ambiguous concept as a justification has also meant that the regime's supporters have not sufficiently engaged in the hard work of identifying and promoting global values to undergird the international criminal law regime. The ambiguity of gravity as a foundational concept in international criminal law therefore increasingly poses a threat to the regime's legitimacy.

Exposing the weaknesses inherent in gravity's efforts to legitimate international criminal law yields both descriptive insights about the strength of the regime and proposals for its reform. The authority of the international community to prescribe and adjudicate international crimes is not nearly as clear as is often assumed. To strengthen the regime's legitimacy, its supporters must begin to unpack the value choices underlying various regime decisions and seek global consensus, or something close to it, concerning those values. Such a process may initially expose the regime to even greater legitimacy challenges – the emperor will have lost his clothes – but in the long term it will strengthen the regime's legitimacy and, hence, its effectiveness.

This thesis therefore has both descriptive and prescriptive aspirations. Descriptively, it aims to elucidate gravity's role in both promoting and undermining the legitimacy of the international criminal law regime. Based on this analysis, the thesis suggests a new way of understanding gravity that will bolster the regime's legitimacy and strengthen the global justice community.

Chapter 1 provides the thesis's theoretical framework. It explains how the thesis uses the terms 'legitimacy' and 'gravity' and describes the mechanisms through which gravity seeks to legitimate international criminal law. Chapter 2 provides the historical framework for the analysis that follows by demonstrating how gravity came to dominate international criminal law discourse. Gravity's

centrality to the regime's legitimacy is a matter of historical fact rather than moral necessity. International criminal law could have developed to address crimes like drug trafficking that cross borders or like piracy that are committed outside any state's territory. Instead, due to the historical context in which it evolved, international criminal law came to rely for its legitimacy on the idea that it addresses particularly serious crimes.

Chapter 3 examines the theories that have developed to explain what makes a crime 'international' and the role that gravity plays in those theories. While the theories seek to uncover moral and legal norms to justify international prescriptive authority, the confusion and ambiguity surrounding gravity's meaning renders those norms uncertain. This uncertainty calls into question both the normative and sociological legitimacy of international prescriptive authority.

Chapter 4 addresses the related question of how gravity contributes to the legitimacy of international adjudicative authority, as well as the authority of national courts to adjudicate international crimes under the doctrine of universal jurisdiction. It shows that gravity in this context is generally viewed as a threshold criterion for legitimate adjudication rather than as one of a number of factors that contribute to legitimacy. I argue that evaluations of the legitimacy of international and universal authority to adjudicate international crimes should instead rest on a comprehensive evaluation of a number of relevant factors, with gravity serving to inform assessments of the comparative benefit and effectiveness of such adjudication. This approach balances the international and national interests at stake rather than treating gravity as a trump card that always favors international action.

Chapter 5 sets forth a proposal for rendering the concept of gravity operational in a way that enhances, rather than threatens, the legitimacy of international criminal law. It argues that instead of analyzing gravity solely according to a set of purportedly 'objective' criteria, decision-makers should

consider gravity for purposes of international prescriptive and adjudicative jurisdiction to be in part a function of the appropriate goals and priorities of the international community. In ascertaining such goals and priorities, decision-makers including judges, prosecutors, state leaders, and international justice activists should engage in a dialogic process of positing global norms and responding to the reactions of global audiences.

CHAPTER 1: THEORETICAL FRAMEWORK

This chapter describes how the terms 'legitimacy' and 'gravity' are used in relevant literature and jurisprudence before explaining how this thesis employs them. Based on these definitions, the chapter provides a theoretical framework for understanding the thesis' claims about the extent to which the concept of gravity legitimates international criminal law and how it might be reconceptualized to better contribute to that legitimacy.

1. The Meanings of Legitimacy

The concept of legitimacy has a long pedigree in political and legal philosophy and is thus subject to many interpretations.[1] Legal scholarship often employs the concept without precision, diminishing its analytic value.[2] Indeed, some legal scholars argue that the concept of legitimacy is so imprecise as to be incapable of serving as a useful analytic tool.[3] However, the 'explosion of interest' in legitimacy among scholars of international law and international relations in the past two decades suggests otherwise.[4] This section briefly describes the major strands of legitimacy theory before explaining how this work uses the concept.

In legal and political theory, legitimacy connotes justified authority – the 'right to rule'.[5] While such authority is most often associated with governments,

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[1] Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004); Andrew Hurrell, 'Legitimacy and the Use of Force: Can the Circle be Squared?' (2005) 31 Rev Intl Studies 15, 17.
[2] David D Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 AJIL 552, 557.
[3] See eg Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 Eur J Intl Rel 395, 409.
[4] Daniel Bodansky, 'Legitimacy in International Law and International Relations' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 321.
[5] Ibid 332.

legitimacy applies to any institution that 'governs',[6] that is, that seeks to require actors outside the regime to comply with regime decisions for reasons other than rational persuasion or forcible coercion.[7] Legitimacy assessments can be made not only of institutions, but also of the decisions they make, and the people who run them.[8] Indeed, the legitimacy of an institution and of its component parts are interconnected. The decisions of an institution that enjoys broad or 'diffuse' legitimacy are more likely to be perceived as legitimate; rendering decisions that are perceived as legitimate generally builds an institution's legitimacy.[9]

The bases for justifying authority can be categorized as legal, moral, and sociological, giving rise to three types or categories of legitimacy.[10] A decision or institution is legitimate in a legal sense if it appropriately follows relevant legal norms; it is legitimate in a moral sense if it reflects relevant moral values; and it is legitimate in a sociological sense if relevant audiences believe that it does one or both of those things.

Although legitimacy is often treated as binary – institutions or decisions are labeled 'legitimate' or 'illegitimate' – it is more appropriately considered to exist along a spectrum. Institutions and decisions can be more or less legitimate depending on the extent to which they meet whatever criteria – whether legal, moral, or sociological – are employed for making the legitimacy determination.[11] Likewise, institutions and decisions can be highly legitimate according to one set of criteria and less so with respect to another. For instance, a decision can have a great deal of legal legitimacy in that it strictly follows relevant legal rules, while

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[6] Ibid 6.
[7] Ibid; see also Richard H Fallon Jr, 'Legitimacy and the Constitution' (2005) 118 Harvard L Rev 1787, 1795.
[8] Ibid 1828; Chris Thomas, 'The Concept of Legitimacy and International Law' (2013) LSE Law, Society and Economy Working Papers 12/2013, 21 <.http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2265503> accessed 16 October 2014.
[9] Fallon, 'Legitimacy and the Constitution' (n 7) 1829.
[10] Ibid 1794; Thomas, 'The Concept of Legitimacy and International Law' (n 8) 5.
[11] Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 47.

its moral legitimacy is weaker in light of conflicting moral norms. Meanwhile, the decision's sociological legitimacy may be strong or weak depending on whether the relevant audience is more concerned with the legal or moral aspects of the decision.

Much of the writing about legitimacy conflates the legal, moral, and sociological aspects of the concept.[12] Some scholars simply fail to specify their understanding of legitimacy, while others engage in analysis that conflates the various types of legitimacy.[13] For instance, scholars sometimes propose conclusions regarding sociological legitimacy based on uncritical assumptions about the norms that generate such legitimacy.[14]

When a distinction is drawn between types of legitimacy, it is often framed as 'normative' legitimacy on the one hand and sociological legitimacy, often called 'descriptive,' on the other.[15] In reviewing the legitimacy scholarship, Daniel Bodansky distinguishes between scholarship that seeks 'some moral or other normative justification' for the exercise of authority and scholarship that evaluates the extent to which an institution or decision enjoys the support of relevant audiences.[16] Categorizing legitimacy theories in this way elides the distinction between legitimacy rooted in moral norms and that grounded in legal

[12] See eg GCA Junne, 'International Organizations in a Period of Globalization: New (Problems of) Legitimacy' in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (UNUP 2001) 189, 191 (citing as sources of legitimacy: justice, correct procedure, representation, effectiveness, and charisma).

[13] See eg Hitomi Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) 4 Amsterdam L Forum 3, 5 (equating procedural legitimacy with normative legitimacy and sociological legitimacy with substantive legitimacy).

[14] Bodansky, 'Legitimacy in International Law and International Relations' (n 4) 329 (discussing scholarship).

[15] See eg ibid 8. This distinction is sometimes given other labels, including *de jure* and *de facto* legitimacy. See eg Thomas, 'The Concept of Legitimacy and International Law' (n 8) 7.

[16] Bodansky, 'Legitimacy in International Law and International Relations' (n 4) 327. Bodansky suggests that there are three types of normative legitimacy – moral, legal, and political – but he does not provide examples of scholarship articulating a category of political justifications for authority distinct from legal and moral justifications. Ibid. Elsewhere Bodansky equates normative and moral legitimacy, stating, for example, that normative legitimacy 'focuses on qualities of the ruler that morally justify its authority'. Ibid.

norms. Such elision enables theorists to avoid the complex centuries old debates in legal philosophy over the relationship between law and morality.[17]

However, discussions of normative legitimacy need not resolve the question of whether law and morals are distinct inquiries as legal positivists argue,[18] or are inextricable as natural law theorists believe,[19] or something in between.[20] Instead, drawing a distinction between legal and moral legitimacy can serve to highlight the different influences of norms that are generally categorized as 'legal' and those considered 'moral'.[21] Likewise, legitimacy theory cannot, and need not, resolve the deeply entrenched debates about whether morals exist independent of people's views about what is moral – whether they are social or universal phenomena.[22] Distinguishing moral and sociological aspects of legitimacy can usefully highlight different kinds of legitimacy judgments without the need for an all-encompassing theory. For instance, institutional design can be informed by a community's beliefs about legitimate punishment (for example, that certain crimes require the death penalty) and also by contrary moral norms at the international level (for example, that the death penalty is immoral).

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[17] For discussions of this debate, see eg Michael S Moore, 'Moral Reality Revisited' (1992) 90 Mich L Rev 2424; Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' (2008) 83 NYU L Rev 1059; Brian Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism' (2000) 75 Notre Dame L Rev 1613.

[18] See eg HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 593.

[19] See eg Lon L Fuller, 'Positivism and Fidelity to Law - A Reply to Professor Hart' (1958) 71 Harv L Rev 630; Andrei Marmor, 'Philosophy of Law' in *Princeton Foundations of Contemporary Philosophy* (Princeton UP 2010); John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 1980).

[20] See eg Ronald Dworkin, *Law's Empire* (Harvard UP 1986).

[21] But see Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 Harv Intl L J 81, 112 (arguing that legitimacy theories 'reflect a positivist or naturalist first premise' and that debates about legitimacy 'are destined to the same indeterminacy as other international legal debates').

[22] For a discussion of the different approaches that political scientists and moral philosophers take to this question and how it impacts their legitimacy theories, see David Beetham, *The Legitimation of Power* (Palgrave MacMillan 1991) 16.

At the same time, the distinctions between legal, moral, and sociological legitimacy should not be overstated. Regardless of one's views on the naturalist/positivist debate, there is little doubt that moral norms influence legal norms and that legal norms shape social perceptions about morality.[23] Likewise, people's views about legitimacy both shape and are shaped by legal norms. As Chris Thomas writes: 'International law embodies, normalises and enforces particular conceptions of the world. It informs our understandings of what is moral even as it is shaped by such understandings.'[24] Thus, while it is analytically useful to distinguish among the three types of legitimacy, it is also important to remember the interactions among them. For instance, while relevant audiences may believe that an institution is acting in accordance with relevant legal and moral norms even when it is not doing so, such belief is presumably much more likely when it is based in reality.

The most frequently invoked basis for normative legitimacy in international law, as in national law, is consent.[25] Starting with John Locke's social contract theory, the dominant source of the legitimacy of governance institutions has been the consent of the governed.[26] National laws and institutions are considered legitimate to the extent they represent the norms and values of the relevant national community – the *demos*.[27] Legitimacy is therefore closely

[23] Anthea Roberts, 'Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?' in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) (arguing against efforts to distinguish legality from normative legitimacy in the context of humanitarian intervention).
[24] Thomas, 'The Concept of Legitimacy and International Law' (n 8) 13.
[25] See Leslie Green, 'Law, Legitimacy, and Consent' (1989) 62 S Cal L Rev 795, 795 ('The democratic tradition has long maintained that the legitimacy of political authority depends on the consent of the governed.').
[26] John Locke, Second Treatise of Government (C.B. MacPherson ed, Hackett Publishing 1980); see also Jean Jacques Rousseau, *The Social Contract* (Wordsworth Editions Limited 1998).
[27] Cf Steven Bernstein and William D Coleman, 'Introduction: Autonomy, Legitimacy, and Power in an Era of Globalization' in Steven Bernstein and William D Coleman (eds), *Unsettled Legitimacy: Political Community, Power, and Authority in a Global Era* (UBC Press 2010) 1, 13 (discussing Habermas' theory of legitimacy).

linked with democracy; the more democratic a governance institution, the more it is considered legitimate.[28] Some theories of democratic legitimacy are process or input-based, while others look more to substance or output.[29] Process-based theories consider institutions and their decisions legitimate if they employ fair procedures, while substance-based theories examine whether the decisions actually serve the community by helping to effectuate its norms and values. Habermas' discourse theory is an example of the former, while Raz' service conception of authority illustrates the latter.[30]

When democratic legitimacy theories are applied to international laws and institutions, state consent often replaces popular consent as the legitimating factor.[31] Because many states are not democratic, this approach tends to generate charges that international institutions lack legitimacy.[32] With the increasing proliferation of global governance institutions, many of which enjoy high levels of social legitimacy, such conclusions seem simplistic.[33] Thus, although state consent remains an important factor in evaluations of the legitimacy of

[28] See eg Allen Buchanan, 'Political Legitimacy and Democracy' (2002) 112 Ethics 689, 689 ('[W]here democratic authorization of the exercise of political power is possible, only a democratic government can be legitimate.').
[29] See Vivien A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2012) 61 Political Studies 2, 4-6 (discussing theories).
[30] Bodansky, 'Legitimacy in International Law and International Relations' (n 4) 331.
[31] Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics and Intl Affairs 405, 412; Charles Beitz, 'Bounded Morality: Justice and the State in World Politics' (1979) 33 International Organization 405, 408 (explaining the 'morality of states' theory whereby 'international society is understood as domestic society writ large, with states playing the roles occupied by persons in domestic society').
[32] For example, the International Criminal Court has been said to suffer from a 'democratic deficit' that hinders its legitimacy. Madeline Morris, 'The Democratic Deficit of the International Criminal Court' (2001) 5 Buffalo Crim L Rev 591.
[33] The UNHCR and WHO are examples of international institutions that enjoy sociological legitimacy at least in part because of their ability to embody the values of the international community.

international institutions and their decisions, it is neither a necessary nor a sufficient condition of such legitimacy.[34]

Scholars have proposed a range of moral and legal norms to supplement or supplant state consent as the basis for the legitimacy of international institutions and decisions. While legitimacy theories in the political science literature are often classified according to whether they focus on procedural inputs or substantive outputs, international law scholars have tended to advance theories that combine elements of both.[35] An influential example upon which this thesis draws heavily is the theory that Allen Buchanan and Robert Keohane articulated in their influential article 'The Legitimacy of Global Governance Institutions'. Buchanan and Keohane define legitimacy for global governance institutions as:

> the right to rule, understood to mean both that institutional agents are morally justified in making rules and attempting to secure compliance with them and that people subject to those rules have moral, content-independent reasons to follow them and/or to not interfere with others' compliance with them.[36]

In exploring the moral reasons that justify authority and compliance, they develop what they call a 'complex standard', which lives up to the name by combining a wide range of procedural and substantive considerations.[37] First, they consider consent, as manifested by the support of democratic states, to be an important, though not sufficient, determinant of legitimacy. Second, they set forth three substantive criteria: minimal moral acceptability, comparative benefit, and

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[34] Bodansky, 'Legitimacy in International Law and International Relations' (n 4) 330; Aaron Fichtelberg, 'Democratic Legitimacy and the International Criminal Court' (2006) 4 J Intl Crim Justice 765, 785 (disagreeing with Madeline Morris that the ICC is illegitimate because it lacks democratic accountability and arguing instead for a 'liberal' legitimacy theory based in fair process).

[35] Bodansky, 'Legitimacy in International Law and International Relations' (n 4) 331.

[36] Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions' (n 31) 411.

[37] The following two paragraphs are drawn from pages 420-432 of Buchanan and Keohane's article.

institutional integrity. Minimal moral acceptability requires that global governance institutions respect the most widely agreed-upon human rights. The authors also suggest that a more demanding requirement of human rights promotion should emerge over time, at least for institutions with mandates related to such rights. Comparative benefit asks whether an institution provides benefits that cannot be more easily obtained elsewhere; institutional integrity looks at the extent to which an institution's practices and procedures further the goals for which it was established. The better an institution satisfies these conditions, the stronger its claim to legitimacy.

The final set of considerations in the 'complex standard' is more closely associated with procedures, although the authors label them 'epistemic-deliberative'. These include accountability – procedures for holding institutional actors accountable for satisfying the conditions of minimal moral acceptability and comparative benefit – and transparency. Transparency includes not only making publicly available information about the institution's activities, but also 'providing for ongoing deliberation about what global justice requires and how the institution in question fits into a division of institutional responsibilities for achieving it'.[38] This 'principled contestation' of institutional goals is a critical component of legitimacy, and one to which actors outside the institution, in particular civil society organizations, must contribute.[39]

Buchanan and Keohane's theory thus not only provides a set of moral considerations for evaluating legitimacy, it also acknowledges that the relevant moral criteria are contested and builds into the theory a mechanism for addressing that contestation. Legitimate institutions have procedures for revising 'their goals, and terms of accountability, and ultimately their role in a division of labor for the

[38] Ibid 425.
[39] Ibid 429.

pursuit of global justice'.[40] They thereby promote the development of more widely accepted moral standards for evaluating their legitimacy over time. Other authors have proposed similar substantive and procedural criteria for evaluating the normative legitimacy of international law and institutions.[41]

While discussions of normative legitimacy are becoming more common, international legal scholarship has tended to focus on questions of sociological legitimacy. Sociological legitimacy is considered to be particularly important internationally because it is believed to promote compliance, a central concern of international law theory.[42] According to Nigel Purvis, 'in a world without external coercion, compliance is secured—to whatever degree it is—by the internal coercion of sovereign psychology'.[43] Compliance, in turn, is a crucial measure of the effectiveness of international institutions.

Like theories of normative legitimacy, discussions of sociological legitimacy appeal to a wide range of criteria for determining legitimacy that are based in both legal and moral norms.[44] Max Weber provided an early and influential account positing that sociological legitimacy arises from a belief in legality, the sanctity of tradition, and the decision-maker's charisma.[45]

Perhaps the most important theory in the context of international law is the one Thomas Franck set forth in his book *The Power of Legitimacy Among Nations*.

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[40] Ibid 433. David Caron has made a similar point, observing that 'a basic challenge for international governance is to seek designs that promote institutional integrity, and that consequently address in the ordinary course of business the circumstances that make possible the resonance of allegations of illegitimacy.' See Caron, 'The Legitimacy of the Collective Authority of the Security Council' (n 2) 561.

[41] See eg Hurrell, 'Legitimacy and the Use of Force: Can the Circle be Squared?' (n 1) 15.

[42] Bodansky, 'Legitimacy in International Law and International Relations' (n 4) 328. But see Caron, 'The Legitimacy of the Collective Authority of the Security Council' (n 2) 559 fn 28 (noting that relationship between legitimacy and compliance in uncertain). Of course, legitimacy is only one element of compliance, which also depends significantly on such factors as power and self-interest. Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 AJIL 596, 602-603.

[43] Nigel Purvis, 'Critical Legal Studies in Public International Law' (n 21) 111.

[44] Ibid.

[45] Max Weber, *The Theory of Social and Economic Organization* (Free Press 1947).

Franck argues that the legitimacy of international law depends on the extent to which its rules are determinate, symbolically validated, coherent, and adhere to primary rules of obligation.[46] This theory focuses significantly on procedural aspects of legitimacy, but also contains a substantive component, in particular, the requirement of adherence to primary rules. Other international law scholars have endorsed similar theories of sociological legitimacy, often highlighting the importance of good process and sometimes including a substantive component.[47] For instance, in evaluating the legitimacy of the UN Security Council, Bruce Cronin and Ian Hurd look to 'deliberation, proceduralism, and effectiveness'.[48] They also note, however, that legitimation through these channels 'is only possible when an organization is identified with purposes and goals that are consistent with the broader norms and values of its society…'.[49] Along these lines, David Caron notes that 'the belief that there is too great a discrepancy between what the organization promises and what it delivers would be at least one major circumstance permitting the resonance of allegations of illegitimacy'.[50]

Writing specifically about the legitimacy of international criminal tribunals, Wayne Sandholtz proposes three categories of legitimacy: purposive, procedural, and performance.[51] Purposive legitimacy requires that the tribunal's purpose is consistent with the broader goals and values of international society. Procedural legitimacy looks to the appropriateness of the mechanisms used to

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[46] Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990).
[47] Aaron Fichtelberg, 'Democratic Legitimacy and the International Criminal Court' (2006) 41 J Intl Crim Justice 765, 775 (arguing that the ICC's legitimacy hinges on its respect for individual rights).
[48] Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 6.
[49] Ibid.
[50] David D Caron, 'The Legitimacy of the Collective Authority of the Security Council' (n 2) 560.
[51] Wayne Sandholtz, *Creating Authority by the Council: The International Criminal Tribunals*, in Cronin and Hurd (eds), *The UN Security Council and the Politics of International Authority* (n 48) 131, 140.

create the tribunal, and performance legitimacy assesses whether the functioning of the tribunal is seen as complying with prevailing norms and values.[52]

Sociological legitimacy is ultimately an empirical question – how legitimate people believe an institution, decision, or actor to be. Nonetheless, the scholarship addressing the sociological legitimacy of international law and institutions has made no effort to date to collect empirical data to supports its claims. This is likely attributable to the herculean task of determining the views of people throughout the world. In Bodansky's literature review he notes the importance of developing an empirical approach to sociological legitimacy, describing much of the extant writing on the topic as 'informed speculation'.[53]

2. The Meanings of Gravity

International criminal law scholars and practitioners frequently invoke the gravity or seriousness[54] of international crimes to justify opinions and decisions about such things as jurisdiction and defendants' rights without providing any indication of what it means to say that international crimes are especially 'grave'.[55] The concept of gravity is thus at once a powerful and highly ambiguous force in international criminal law. A central objective of this thesis is to expose the consequences of that ambiguity for the regime's legitimacy. Ultimately, in Chapter 5, I recommend a new approach to understanding gravity

[52] Ibid.
[53] Bodansky, 'Legitimacy in International Law and International Relations' (n 4) 337.
[54] I use the terms 'gravity' and 'seriousness' interchangeably herein, which is typical of the literature addressing international crimes.
[55] See eg *Prosecutor v Tadic*, (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) IT-94-1-T (10 August 1995) para 28 (asserting that the fair trial standards set forth in the European Convention on Human Rights do not necessarily apply at the ICTY since they concern 'ordinary criminal … adjudications', while the ICTY 'is adjudicating crimes which are considered so horrific as to warrant universal jurisdiction' – without explaining what makes such crimes 'horrific'); Eugene Kontorovich, 'Public International Law and Economics: The Inefficiency of Universal Jurisdiction' (2008) U Ill L Rev 389, 394 ('In a nutshell, the [universal jurisdiction] concept is that certain international crimes, because of their outrageousness, can be punished by any state in the world.').

that takes account of the values and priorities that undergird particular decisions and claims to authority that rest, at least in part, on gravity.

To begin, however, it is important to understand the efforts that have been made to give meaning to the concept of gravity. Seriousness of crimes as a determinant of punishment has long been a focus of legal and philosophical scholarship concerning criminal law generally. Scholars have advanced various theories about what makes conduct bad enough to justify punishment and what makes crimes relatively bad so as to justify particular amounts of punishment.[56] There is widespread agreement that conduct warrants punishment when it (1) causes harm, and (2) is committed with culpability. There is also some credible, though controversial, evidence that people share some basic intuitions about which crimes are more and less serious.[57] While these general theories of crime seriousness are important, particularly for decisions regarding punishment, they do not address the central question of the international criminal law regime: When and why are international courts authorized to prescribe and adjudicate conduct?

Some efforts have been made to explain the meaning of gravity as it affects the legitimate authority of international courts. In particular, those who

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[56] For a utilitarian perspective, see eg John Stuart Mill, *Utilitarianism* (Parker, Son, and Bourn 1863) 83-84. For a retributive theory, see Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* (W Hastie tr, T & T Clark 1887).

[57] See Paul H Robinson, 'Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical' (2008) 67 Cambridge LJ 145, 165 (arguing that intuitions about blameworthiness are consistent across social, cultural, and economic divides); John Darley, 'Realism on Change in Moral Intuitions' (2010) 77 U Chicago L Rev 1643, 1643 (discussing the perspective that people's judgments regarding punishment and justice are due in part to the evolution of cognitive biases); JL Mackie, 'Morality and the Retributive Emotions' (1982) Winter/Spring Crim Just Ethics 3, 8 (suggesting a biological explanation for human desire for retributive justice); Lawrence M Solan, 'Cognitive Foundations of the Impulse to Blame' (2003) 68 Brooklyn L Rev 1003, 1004 (arguing that humans' quick assignment of blame is a result of the triggering of cognitive elements by certain impulses); but see Donald Braman and others, 'Some Realism About Punishment Naturalism' (2010) 77 U Chicago L Rev 1531, 1533 (asserting that human intuitions about wrongdoing are based on malleable social constructs); cf Nathan Hanna, 'Say What? A Critique of Expressive Retributivism' (2008) 27 L & Philosophy 123, 123 ('Retributive arguments often rely on controversial intuitions of questionable reliability and justificatory power.').

negotiated the definitions of international crimes made some attempts to incorporate notions of seriousness and the judges and prosecutors of international courts have discussed the concept of gravity in justifying their exercises of jurisdiction and discretion. There are some unifying themes in these efforts.

First, they generally combine quantitative and qualitative measures of the seriousness of the harm caused. While the quantity of harm is usually underscored as an important factor, no specificity is given regarding appropriate or necessary quantities of harm. In particular, there seems to be almost uniform agreement that gravity is not merely a matter of counting victims. The qualitative aspect is articulated by listing relevant factors such as the nature of the crimes, the manner of their commission, and the impact of the crimes on victims and beyond.[58]

Second, definitions of gravity for purposes of justifying authority often encompass the culpability of the accused. For instance, the jurisdiction of two of the tribunals that apply international criminal law to particular country situations is limited to persons who bear greatest responsibility for the crimes committed in those countries.[59] Here it is important to note that culpability is usually framed not as a component of gravity itself but rather as a related but separate consideration. Nonetheless, the distinction is largely semantic because the decision about whether or not the crime is bad enough to legitimate international authority often depends on who committed it. Questions of culpability generally

[58] See eg International Criminal Court, 'Policy Paper on Preliminary Examinations' (4 October 2010) 13-14 <http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf> accessed 10 April 2014; *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr, para 188 < http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf> accessed 10 April 2014.

[59] Statute of the Special Court for Sierra Leone, UN Doc S/2002/246 art 1; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) (Cambodia), as amended by NS/RKM/1004/006 (27 October 2004) art 1.

consider the position of the accused in the hierarchy of authority and their role in planning the crime, but can also include consideration of the quantity and quality of the crimes of which they are accused, thereby combining the two components of gravity.

For purposes of this thesis, therefore, the concept of gravity includes any aspect of a crime that makes – or is claimed to make – the crime sufficiently serious to justify the authority of international criminal law or a particular decision pursuant to that authority. Depending on the context in which gravity is discussed, the 'crime' in question can refer either to a particular incident of proscribed conduct by a particular offenders (also called a 'case') or to a set of related instances of such conduct – what the Rome Statute calls a 'situation'.[60]

3. How Gravity Legitimates

Legitimation is the process through which an institution or decision becomes legitimate or comes to be seen as legitimate. While the term is generally used to denote the latter – the process of sociological legitimation[61] – it applies equally to the process of developing legal or moral norms to legitimate an institution or its decisions. In arguing that gravity seeks to legitimate international criminal law, this thesis employs both senses of the term. The concept of gravity both serves as a legal and moral norm to support international criminal law's normative claims to authority, and is deployed rhetorically to convince people of those claims.

Indeed, because the normative and sociological aspects of legitimacy are closely interconnected as discussed above, some of this thesis's claims about

[60] Statute of the Special Court of Sierra Leone (n 59) art 13.
[61] See eg Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2003) 14 (defining legitimation as 'the process by which authority comes to seem valid and appropriate'); Charlotte Peevers, *The Politics of Justifying Force: The Suez Crisis, The Iraq War, and International Law* (OUP 2013) 11 (advancing an argument about how international legal discourse is used to justify the use of force).

gravity's legitimating role do not distinguish between them. Thus, when the terms 'legitimacy' and 'legitimation' are used herein without an accompanying adjective, they include the normative – legal and moral – as well as sociological aspects. Much of the thesis's analysis, however, employs the distinctions between normative and sociological legitimacy, and some of it differentiates between legal and moral forms of normative claims. Such distinctions permit more fine-tuned insights about the ways that the concept of gravity affects the legitimacy of international criminal law, which in turn promote more concrete suggestions regarding institutional reform.[62]

This thesis addresses the legitimacy of the international criminal law regime as a whole, with a particular emphasis on the authority of the international community to prescribe conduct by attaching the label 'international crime' and the authority of international courts to adjudicate such conduct. Prescribing norms of conduct and adjudicating violations of those norms are among the most important tasks of the regime. As such, the legitimacy of regime decisions regarding these tasks greatly affects the overall legitimacy of the regime. Another function of the international criminal law regime is to determine when crimes are sufficiently serious to be adjudicated in national courts with no connections to the crimes under the doctrine of universal jurisdiction. This issue is therefore included in Chapter 4's discussion of the legitimacy of the exercise of adjudicative jurisdiction over international crimes.

While this thesis seeks to expose the role of gravity in legitimating the international criminal law regime, it does not contend that gravity is the only factor determining such legitimacy. Indeed, although it is a very important factor, it is not necessarily the most significant factor affecting legitimacy determinations in particular contexts. So many factors affect legitimacy determinations that a

[62] Cf Bodansky, 'Legitimacy in International Law and International Relations' (n 4).

single theory is unlikely to capture them all, let alone provide a hierarchy among them. Factors unrelated to the gravity of crimes that can be very important to the legitimacy of the international criminal law regime include the qualifications and integrity of the judges, the charisma of the prosecutors, and even the nature and extent of involvement of external actors, such as non-governmental organizations.

In evaluating gravity's effect on the sociological legitimacy of the international criminal law regime, this thesis relies on the idea, contained in many of the theories discussed above, that perceptions of legitimacy depend significantly on whether a regime's norms are seen to be coherent and consistently implemented.[63] Chapter 3 argues that both the moral and legal norms underlying international crimes suffer from incoherence and inconsistent implementation because they rely heavily on the ambiguous notion of gravity. This incoherence and inconsistency increasingly promotes challenges to the legitimacy of international criminal law.

In assessing gravity's role in determining the moral legitimacy of decisions to exercise international and universal jurisdiction, the thesis relies heavily on the 'complex theory' of institutional legitimacy that Buchanan and Keohane propounded. I do not adopt the theory whole sale, however, but instead heed Daniel Bodansky's admonition to avoid the tendency in the scholarship to 'assume a single normative theory of legitimacy'.[64] In adapting the complex approach to legitimacy to the context of international adjudicative authority (as opposed to the overall institutional legitimacy, the subject of Buchanan and Keohane's analysis), I propose a framework that takes account of the following criteria: (1) the extent to which the exercise of international or universal jurisdiction provides a comparative benefit relative to the alternative, (2) the effectiveness of international or universal adjudication in achieving appropriate

[63] See text to nn 48-50.
[64] Bodansky, 'Legitimacy in International Law and International Relations' (n 4) 332.

goals, (3) the degree of 'consent' of relevant states to the adjudication, (4) the extent to which the court in question treats defendants fairly, and (5) the amount of accountability and transparency the relevant court provides.

In applying this framework, I find that most assessments of the legitimacy of international and universal adjudication in the literature are flawed in two ways: First, they place undue reliance on one or a small number of purportedly legitimating factors rather than taking a comprehensive approach. Second, they treat gravity as a threshold requirement, rather than as an integral part of the broader legitimacy analysis. My framework instead highlights the role of gravity as a component of the first two factors – comparative benefit and effectiveness. Moreover, it treats gravity as a relative consideration – the greater the gravity, the less important some of the other legitimating factors become.

The thesis's central contention is that the concept of gravity serves to mediate between the authority of the international community to act through international institutions and the authority of sovereign states in matters of criminal law. As Buchanan and Keohane note, a critical question for the legitimacy of global governance institutions is how the responsibility for justice should be allocated between such institutions and states.[65] Claims about the gravity of international crimes provide the most important answer to this question for international criminal law.

By asserting that certain crimes concern the international community as a whole, international criminal law claims for the international community the authority to prescribe, adjudicate, and enforce norms related to such crimes. This claim stands in tension with the traditional allocation of authority over criminal law to states. Since the state system came into existence, authority over criminal

[65] Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions' (n 31) 418.

law has been considered a central attribute of state sovereignty.[66] The legitimacy of this allocation of authority rests on the assumption that state governments implement the values and norms of their constituent communities. Criminal law norms are considered especially important community norms, the violation of which legitimates the use of government force against individual constituents.

The concept of gravity serves as a fulcrum that seeks to mediate between state and global authority over criminal law.[67] International criminal law is an outgrowth of the human rights movement that has sought to reshape the global order since the Universal Declaration of Human Rights was adopted. As Louis Henkin writes, '[t]he tension between "domestic jurisdiction" and "international concern' … permeates all the law and all of the politics of international human rights"'.[68] Paul Kahn broadens the claim to all of international law, arguing that: 'Contemporary international law is caught between these two quite different value schemes: one reflecting the international order as a system of sovereign nation-states and one reflecting transnational norms independent of those states.'[69] The concept of gravity is invoked to address this tension, purporting to explain which crimes are of sufficient international concern to legitimate global authority's incursion on state sovereignty.

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[66] Massimo Fichera, 'Criminal Law Beyond the State: The European Model' (2013) 19 ELJ 174, 175.

[67] Cf Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2003) 42-43 ('By marking the point at which sovereignty gives way to the prerogatives of the international community, international criminal law's affirmation of the underlying interests of that community confirmed respect for these interests as a minimum condition of membership in international society.').

[68] Louis Henkin and others, *Human Rights* (Foundation Press 1999). See also Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006).

[69] Paul W Kahn, 'Nuclear Weapons and the Rule of Law' (1999) 31 NYU J Intl L & Pol 349, 374.

CHAPTER 2: A BRIEF HISTORY OF GRAVITY

The idea that some crimes are so serious as to concern the entire world is relatively recent. The first official use of the term 'crimes against humanity' was in 1915 when the governments of Great Britain, France, and Russia jointly declared the Turkish atrocities against Turkish Armenians to be 'crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible … '.[1] Moreover, the idea that the seriousness of certain crimes serves to legitimize the authority of international courts[2] is even newer. When the ICC was being negotiated in the 1990s, it was far from clear that the institution's authority would come to rest so significantly on the concept of gravity. Indeed, the process was not initiated by a call for justice for genocide and crimes against humanity, but rather by a plea from Trinidad and Tobago for international assistance in dealing with the devastating effects of international drug trafficking on that country.[3] Over time, however, gravity gained importance as a justification for international criminal jurisdiction, and such 'treaty crimes' were ultimately excluded from the ICC's jurisdiction.[4]

This Chapter recounts the history of gravity's emergence as the central justifying concept in international criminal law in order to set the stage for the analysis that follows. The story begins with natural law theory, which eventually

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[1] Egon Schwelb, 'Crimes Against Humanity' (1946) 23 Brit YB Intl L 178, 181 (quoting Armenian Memorandum Presented by the Greek Delegation to the Commission of Fifteen on 14 March 1919).

[2] The definition of 'international court' is contested, particularly in light of the existence of so-called 'hybrid courts' that mix international and national elements but are nonetheless often categorized as 'international'. I use the term here to denote courts that not only adjudicate international crimes (which also occurs in national courts) but are also created under international law and supported and run by a significant number of states.

[3] UNGA Res 44/39 (4 December 1989) UN Doc A/RES/44/39 para 1.

[4] See UNGA 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Official Records, 50th Sess, Supp No 22' (6 September 1995) UN Doc A/50/22 para 81; see also Herman von Hebel and Darryl Robinson, 'Crimes Within the Jurisdiction of the Court' in Roy SK Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Martinus Nijhoff 1999) 79, 86.

came to undergird international criminal law, and with the emergence of universal jurisdiction over piracy, which provides the backdrop for the development of international jurisdiction. Next, the Chapter explores the important developments surrounding the two World Wars and the subsequent work of the International Law Commission (ILC). Lastly, it explains the importance of the concept of gravity in the creation and work of the *ad hoc* international criminal tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) and, finally, the ICC.

As this Chapter shows, the importance of gravity as a justification for international criminal law grew over time until the concept eventually came to play the central role that it does today. This development can be attributed largely to three factors: (1) the fact that the first four international tribunals were established in response to crimes that were universally acknowledged to be extremely grave; (2) the emergence of an international movement promoting accountability for serious human rights violations; and (3) gravity's use in the ICC negotiations to reassure states concerned about potential infringements on their sovereign prerogatives in the area of criminal law. These factors worked together to promote the idea that the international community has the authority to prescribe and adjudicate especially grave crimes.

1. Natural Law Roots and Universal Jurisdiction over Piracy

For much of history, law was thought to derive from divine mandate, and, more recently, from universal principles that can be ascertained through the use of reason. Such natural law theories came under increasing attack with the rise of secularism and ethical pluralism and have largely been eclipsed by positivist theories of law. Nonetheless, natural law theories remain very influential in some

areas of international law, in particular human rights law, humanitarian law, and their offspring: international criminal law.[5]

Out of natural law came the ideas that form the foundation of human rights law: that people have natural rights and that rulers have duties to uphold those rights. Likewise, natural law gave birth to the laws of war – the ideas that some wars are just and that all wars should be conducted in ways that respect certain natural rights.[6] International criminal law draws on both of these bodies of law and, as such, on the natural law tradition.

The natural law tradition gave rise to the view central to international criminal law that some crimes are so serious that they must be punished. Hugo Grotius for instance declared: '*crimen grave non potest non esse punibile*'.[7] Grotius further asserted that certain crimes give rise to a duty for states to either prosecute or extradite their perpetrators.[8] Indeed, Grotius went so far as to declare that any ruler was authorized to punish injuries that 'excessively violate the law of nature or of nations'.[9]

Despite such early invocations of the concept of gravity, however, the historical justification for universal jurisdiction – the right to punish without regard to any connection between the crime and the punishing authority – did not rely heavily on claims about the gravity of crimes. Until quite recently, the crime

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[5] See eg M Cherif Bassiouni, 'Accountability for Violations of International Humanitarian Law' in *Post-Conflict Justice* (M Cherif Bassiouni ed, Transnational Publishers 2002) 4 (touting 'universal humanistic values' as the driving force behind the evolution of international norms on accountability); Antonio Cassese, *International Criminal Law* (OUP 2003) 315 ('[Because] international crimes constitute attacks on universal values, no single State should arrogate to itself the right to decide to cancel such crimes, or to set aside their legal consequences…').

[6] M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (2nd edn, CUP 2011) 96-111 (describing the evolution of humanitarian law).

[7] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1646, FW Kelsey tr, OUP 1925), bk 3, ch XX, sect II 3, as cited in Bassiouni, *Crimes Against Humanity* (n 6) 108 fn 71.

[8] Ibid bk 2, ch XXI, s IV(1) (arguing that a general obligation to extradite or punish – *aut dedere aut puniere* – exists with respect to all offenses by which another state is particularly injured). See also M Cherif Bassiouni and Edward Martin Vise, *Aut Dedere Aut Judicare: The Duty to Extradite Or Prosecute in International Law* (Martinus Nijhoff 1995) 4-5.

[9] Grotius, *De Jure Belli* (n 7) bk 2, ch XX, s XL.

over which universal jurisdiction was most widely recognized was piracy.[10] Although pirates have long been labeled *hostes humani generis*, the enemies of all mankind,[11] gravity is not a central justification for universal jurisdiction over piracy.[12] Indeed, piracy, which is essentially maritime robbery, has never been considered one of the most heinous offenses.[13] As such, the pervasive analogies between piracy and the core international crimes by those seeking to justify gravity-based jurisdiction over the latter[14] must be regarded with caution.[15]

Nonetheless, despite their dubious historical roots, claims about the special gravity of piracy as a justification for universal jurisdiction have played an important role in popularizing the idea that war crimes, crimes against humanity, and genocide should also be subject to universal jurisdiction based on their gravity.[16] If pirates are the 'enemies of all mankind', surely the perpetrators of war crimes, crimes against humanity, and genocide also deserve the label. This

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[10] Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 Harvard Intl LJ 183, 190. But see Ziv Bohrer, 'War Criminals as Medieval Outlaws: A Millennium of Forgotten History and Its Effects on Current International Criminal Law' (draft on file with author) (arguing that universal jurisdiction was applied to violations of the laws of war much earlier than it is commonly assumed). Some states also asserted universal jurisdiction over slave trading, but this was more controversial. See Roger Clark, 'Steven Spielberg's *Amistad* and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery' (1998) 30 Rutgers LJ 371, 390 fn 55.

[11] See M Cherif Bassiouni, *International Criminal Law*, vol II (3rd edn, Martinus Nijhoff 2008) 170 (stating that Cicero is credited with the notion that pirates were *hostes humani generis*).

[12] Kontorovich, 'The Piracy Analogy' (n 10) 235.

[13] Ibid 236.

[14] See eg Kenneth C Randall, 'Universal Jurisdiction under International Law' (1988) 66 Texas L Rev 785, 803-04 (explaining the reliance of claims concerning universal jurisdiction over international crimes on the piracy analogy).

[15] Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale LJ 2537, 2557 n 78 (noting that 'the analogy of human rights criminals to pirates should not be overdrawn' because traditional bases for jurisdiction over the latter exist that are not present for the former).

[16] Kontorovich, 'The Piracy Analogy' (n 10) 203; Randall, 'Universal Jurisdiction under International Law' (n 14) 803-4.

idea in turn has promoted the notion that international courts should have jurisdiction over such crimes.[17]

2. Reacting to World War

While the roots of gravity's importance in international criminal law lie in natural law theory and the concept of universal jurisdiction, it was the world's reactions to the horrors of two world wars that gave birth to the idea of *international* jurisdiction based on the heinousness of crimes. However, the story of gravity's rise during this period is one of slow and unsteady progress because, for most of the twentieth century, the nascent idea of international jurisdiction over serious crimes encountered mighty resistance from traditional conceptions of state sovereignty.

The atrocities of World War I prompted interest in criminal accountability for violations of the positive laws of war but also of natural law. Writing in 1950, diplomat and international lawyer Ricardo Alfaro observed:

> After the termination of the First World War, the conviction crystallized in the minds of thinking people that the horrors of war must be spared to men, that war is a crime against humankind and that such a crime must be prevented and punished. Great was the clamour against the atrocities perpetrated in violation of the laws and customs of war, as embodied in the unwritten law of humanity and civilization as well as in the positive provisions of The Hague and Geneva conventions and other international agreements. [18]

At the Paris Peace Conference, the Allies considered creating an international military tribunal to try the Germans for both 'acts which provoked the World War'

[17] Kontorovich, 'The Piracy Analogy' (n 10).
[18] ILC, 'Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur' (3 March 1950) UN Doc A/CN.4/15 2, para 6.

and 'violations of the law and customs of war and the laws of humanity'.[19] These efforts foundered largely because of objections based on sovereignty and concerns about *ex post facto* prosecution.[20] The Treaty of Versailles included a provision to try Kaiser Wilhelm II for 'a supreme offence against international morality and the sanctity of treaties'[21] but the trial never took place because the Dutch government refused to extradite the Kaiser. The Allies also considered trying the Ottoman Turks for 'crimes against humanity and civilization' for their massacres of Armenians but these trials likewise failed to materialize, in part due to concerns about the principle of legality.[22]

Nonetheless, the events after World War I laid the seeds for the eventual prosecution of 'crimes against humanity' and for the creation of an international jurisdiction. In fact, there were discussions at the League of Nations, the precursor to the United Nations, on establishing a 'High Court of Justice … competent to try crimes constituting a breach of international public order or against the universal law of nations'.[23] The effort was short-lived, however, because states objected, as they had to the proposed post-war trials, that no international crimes or jurisdiction existed. Nonetheless, the committee working on the issue foreshadowed the development of international criminal law, noting: 'If crimes of this kind should in future be brought within the scope of

[19] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference' (1920) 14 AJIL 95, 118.
[20] Steven D Roper and Lillian A Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (Ashgate 2006) 5-6.
[21] Treaty of Versailles (adopted 28 June 1919, entered into force 10 January 1920) 2 Bevans 43, 136 art 227.
[22] Schwelb, 'Crimes Against Humanity' (n 1) 181; Carnegie Endowment for International Peace, Pamphlet No 32, 'Violations of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities For the Conference of Paris 1919'.
[23] ILC, 'Report on the Question of International Criminal Jurisdiction' (n 18) 3, para 15.

international penal law, a criminal department might be set up in the Court of International Justice.'[24]

Most authorities agree that the founding moment of international criminal law came with the establishment after World War II of the international military tribunals at Nuremberg (IMT) and for the Far East (IMTFE).[25] While little progress had been made in the inter-war years due to the prominence of state sovereignty in international affairs,[26] the scale of the Nazi crimes seems to have catalyzed a shift in world opinion around issues of human rights. Indeed, some have argued that those crimes caused a turn back toward the natural law tradition. Already in 1950, Joseph Keenan and Brendan Brown wrote:

> It is the authors' contention that the Tokyo and Nurnberg war crimes trials were a manifestation of an intellectual and moral revolution which will have a profound and far-reaching influence upon the future of world society…. They maintain that the international moral order must be regarded as the cause, not the effect, of positive law; that such law does not derive its essence from physical power, and that any attempt to isolate such law from morals is a symptom of juridical schizophrenia caused by the separation of the brain of the lawyer from that of the human being.[27]

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[24] Ibid 3-4, para 16.

[25] See eg Roper and Barria, *Designing Criminal Tribunals* (n 20) 6; Steven R Ratner, 'The Schizophrenias of International Criminal Law' (1998) 33 Texas Intl LJ 243.

[26] Leila Nadya Sadat, *The International Criminal Court and Transformation of International Law: Justice for the New Millennium* (Transnational Publishers 2002) 25 (During the interwar years, the question of sovereignty still predominated: The idea of 'an international court that could try and sentence individuals was incompatible with the notion that international law governs only inter-State relations'.).

[27] Joseph B Keenan and Brendan F Brown, *Crimes Against International Law* (Public Affairs Press 1950) v-vi.

Such claims have had many echoes since that time.[28]

While the IMT and IMTFE have historical antecedents,[29] they represent the first modern international criminal tribunals. The existence of these tribunals was often justified by invoking the seriousness of the crimes at issue. For instance, Robert Jackson, the Chief Prosecutor for the United States at Nuremberg, famously began his opening statement as follows:

> 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.[30]

Yet for these early international criminal tribunals, gravity was more important to promoting the institutions' sociological and moral legitimacy than their legal legitimacy; efforts were made to find legal justifications for the tribunals' adjudicative and subject matter jurisdictions that did not rely on gravity, at least not explicitly.

As victors, the Allies claimed the authority to adjudicate the crimes in the place of the defeated governments. As such, the IMT and IMTFE are sometimes

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[28] See eg Robert J Beck, Anthony Clark Arend, and Robert D Vander Lugt (eds), *International Rules: Approaches from International Law and International Relations* (OUP 1996) 36 ('Moreover, many scholars have viewed the Nuremberg War Crimes Trials, which condemned "crimes against humanity" and "crimes against peace," as demonstrating Naturalism's longevity. To be sure, many of the more recent approaches to international rules – the New Haven School, the New Stream, and Elements of Feminist scholarship – have reflected Natural Law's legacy.').

[29] Authorities often cite the trial of Peter von Hagenbach in 1474 as the first 'international' trial. *See* Edoardo Greppi, 'The evolution of individual criminal responsibility under international law,' 30-09-1999 Article, *International Review of the Red Cross*, No 835 <https://www.icrc.org/eng/resources/documents/article/other/57jq2x.htm> accessed 13 October 2014.

[30] Robert H Jackson, 'Opening Statement at the Nuremberg Trials' (21 November 1945) <http://avalon.law.yale.edu/imt/11-21-45.asp> accessed 13 October 2014.

labeled 'an assertion of sovereignty'.[31] Moreover, the subject matter jurisdiction of the post-World War II tribunals was not delimited in terms of gravity. The tribunals had jurisdiction over war crimes, crimes against humanity, and crimes against peace without regard to the scale or nature of harm they caused.[32] War crimes had never required harm that was especially serious in terms of scale or scope, but were instead designed to minimize suffering in war generally. Likewise, crimes against humanity as conceived for the Nuremberg Charter aimed to capture crimes committed by a government against its own people rather than crimes of particular gravity. Crimes against peace were perhaps most obviously associated with gravity, but those were, and remain, poorly defined.

Thus, while the post-World War II tribunals are widely viewed as '[r]epresent[ing] a first effort by the international community to create a judicial mechanism for addressing *atrocities* committed during war', [33] the legal justification for such a mechanism was not clearly based on gravity. In fact, the most immediate legacies of the tribunals' work were not the creation of the ICC or other international courts but rather the development of the human rights and humanitarian law regimes, which seek to prevent all violations, not merely particularly serious ones.[34]

Nonetheless, the IMT and IMTFE were critical to laying the foundation for the international criminal law regime, including its reliance on gravity.[35] As

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[31] See Roper and Barria, *Designing Criminal Tribunals* (n 20) 6 (because the Allies viewed the German and Japanese governments as non-existent, they could 'in accordance with international custom' organize and conduct the tribunal themselves, a so-called 'assertion of sovereignty').

[32] 'Charter of the International Military Tribunal (IMT)', Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) 82 UNTS 280, 288; 'Charter for the International Military Tribunal for the Far East' (approved 26 April 1946) TIAS No 1589 art 5.

[33] Roper and Barria, *Designing Criminal Tribunals* (n 20) 9 (emphasis added).

[34] Diane F Orentlicher, 'The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale LJ 2537, 2559-60.

[35] Leila Nadya Sadat, 'The Evolution of the ICC' in Sarah B Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court: National Security and International Law*

Antonio Cassese writes: 'For the first time non-national, or multinational, institutions were established for the purpose of prosecuting and punishing crimes having an *international dimension and scope*'.[36] The particularities of that 'dimension and scope' remained unclear, but the scale of the World War II atrocities at least introduced the idea of gravity into most discussions of international crimes.

The crimes of World War II also inspired efforts to further codify war crimes. In 1949, the four Geneva Conventions were adopted that criminalized 'grave breaches' of the laws of war.[37] Gravity plays an explicit role in defining these crimes, but not as a requirement of scale or scope of harm beyond a single victim. The willful killing, torture, or inhumane treatment of a person protected by the Geneva Conventions subjects the perpetrator to conviction of a 'grave breach'.[38] The Geneva Conventions create universal jurisdiction over grave breaches and require parties to the conventions to prosecute or extradite people suspected of committing such crimes. Universal jurisdiction under the Geneva Conventions therefore is not premised on gravity – at least in a quantitative sense – but on a broader notion of the global interest in punishing all war crimes that cause qualitatively serious harm.

(Rowman & Littlefield 2000) 36 ('Nuremberg helped overcome objections to an international criminal court based on sovereignty.').

[36] Antonio Cassese, *Cassese's International Criminal Law* (OUP 2013) 258 (emphasis added).

[37] Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War arts. 13-16 (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention).

[38] See First Geneva Convention (n 37) art 50; Second Geneva Convention (n 37) art 50; Third Geneva Convention (n 37) art 130; Fourth Geneva Convention (n 37) art 147.

The crimes of World War II also catalyzed Rafael Lemkin's campaign to create the crime of genocide. The negotiations surrounding the Genocide Convention are an important and complex part of the story of gravity's rise to prominence in international criminal law. Reacting to the Holocaust, which had decimated his family, Lemkin sought to define a crime that would be subject to international jurisdiction because it would concern all of humanity. Lemkin had a particular vision of *why* genocide concerns humanity: For Lemkin, the harm of genocide lay not in the number of people harmed or the severity of their suffering, but in the impoverishment of humanity's diversity when a defined group of people is partly or completely eliminated.[39]

The negotiating history of the Genocide Convention reveals resistance from states concerned about protecting their sovereignty.[40] Ultimately, however, most states agreed that when a person commits specific acts with intent to destroy a national, ethnic, racial, or religious group in whole or in part they have committed an international crime. Moreover, although the Genocide Convention does not provide for universal jurisdiction, it does require prosecution by the state where the crime was committed and grants jurisdiction to 'such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.[41]

The Convention thus anticipates the creation of an international court without itself establishing one. Gravity's role in conceptualizing genocide as a crime subject to international jurisdiction, like its role in justifying the jurisdiction of the post-war tribunals, differs depending on whether one focuses on the social or legal aspect. The widespread and horrific nature of the Holocaust provided the

[39] William Schabas, *Genocide in International Law: The Crimes of Crimes* (2nd edn, CUP 2000) 29-34.
[40] Ibid 65.
[41] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, 281-2 art VI.

inspiration for the crime, but the legal elements ultimately adopted do not rely on any particular scale or scope of harm. Instead, at least as a legal matter, the gravity of genocide hinges on the intent of the perpetrator.

3. Work of the International Law Commission[42]

Although Cold War politics inhibited the establishment of the international criminal law regime for several decades after World War II, important conceptual work took place in the interim, particularly at the ILC.[43] When it adopted the Genocide Convention, the United Nations General Assembly simultaneously tasked the ILC with studying the desirability of creating an international criminal court to adjudicate genocide and 'other crimes over which jurisdiction will be conferred upon that organ by international conventions'.[44] The General Assembly had already assigned to the ILC two related projects: (1) to formulate the principles established by the Nuremberg tribunal; and (2) to draft a Code of Offenses against the Peace and Security of Mankind ('Draft Code').[45] As the ILC worked on these tasks over the course of several decades, gravity took on an increasingly important role in justifying international jurisdiction and in defining the crimes that would be subject to it.

Initially, the focus was more on defining crimes against peace than on crimes that were otherwise grave, but the relationship between the two concepts was never clear. The idea of formulating the Nuremberg Principles and developing a Draft Code originated in correspondence between Nuremberg

[42] The International Law Commission was established by the General Assembly with the purpose of promoting the 'progressive development of international law and its codification'. UNGA Res 174(II) art I (21 November 1947) UN Doc A/RES/174(II).
[43] Before the ILC began work on this issue, various other efforts to develop the notion of an international criminal jurisdiction had taken place in both official and unofficial fora. For an overview, see ILC, 'Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur' (3 March 1950) UN Doc A/CN.4/15 1, 7.
[44] UNGA Res 260(III)B (9 December 1948) UN Doc A/RES/3/260 B.
[45] UNGA Res 177(II) (21 November 1947) UN Doc A/RES/177(II).

Justice Francis Biddle and U.S. President Truman. Justice Biddle wrote a report recommending codification of offenses against the peace and security of mankind in order to both reaffirm the principle against aggression as the supreme crime *and 'afford an opportunity to strengthen the sanctions against lesser violations of international law*'.[46] Truman's response focused more narrowly on the crime of aggression. He wrote that a 'code of international criminal law *to deal with all who wage aggressive war* … deserves to be studied and weighed by the best legal minds the world over' and expressed the hope that the United Nations would pursue this endeavor.[47]

Ricardo Alfaro, Special Rapporteur on the Question of International Jurisdiction, unlike Truman, envisioned international jurisdiction as including both crimes against peace and other kinds of serious crimes. In his 1950 Report to the ILC he wrote:

> The essential question before the Commission is whether it is desirable and feasible to institute an international criminal jurisdiction for the prevention and punishment of international crimes. My answer to that question is unhesitatingly in the affirmative. The community of States is entitled to prevent *crimes against the peace and security of mankind and crimes against the dictates of the human conscience*, including therein the hideous crime of genocide.[48]

Alfaro thus distinguished between 'crimes against the peace and security of mankind' and 'crimes against the dictates of the human conscience', although he did not specify the difference. Moreover, he did not make clear what role gravity

[46] 'Correspondence between Justice Biddle and President Truman' as cited in ILC, 'Draft Code of Offences Against the Peace and Security of Mankind - Report by J. Spiropoulos, Special Rapporteur' (26 April 1950) UN Doc A/CN.4/25 253, 255-256 paras 8-9.
[47] Ibid 256 para 10.
[48] ILC, 'Report on the Question of International Criminal Jurisdiction' (n 43) 17 (emphasis added).

should play in defining 'crimes against the dictates of the human conscience'. His report does reveal that he believed 'crimes against humanity' to extend beyond 'atrocities', because he defined such crimes as '*atrocities and other inhumane acts* committed against a civilian population…'.[49]

The ILC's first Draft Statute for an International Criminal Court did not specify the crimes that would be within the court's jurisdiction, but simply gave the court jurisdiction over 'crimes under international law, as may be provided in conventions or special agreements among States parties to the present Statute'.[50] However, the Report of the Committee on International Criminal Jurisdiction states that a proposal to include crimes such as drug trafficking and damage to submarine cables was defeated on the grounds that such crimes 'are of minor importance compared to international crimes proper'.[51]

The ILC's parallel efforts to define 'offences against the peace and security of mankind' initially focused on the political aspect of such crimes. In its 1950 Report, the ILC stated that 'the meaning of this term should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security'.[52] While it did not clarify the meaning of 'political element', it excluded such international crimes as piracy and drug trafficking from the Draft Code.[53] In the view of the Special Rapporteur on the Draft Code, Jean Spiropoulis, 'political element' meant 'offences which, on account of their specific character, normally would affect international relations in

[49] Ibid 7 para 37 (Alfaro's definition also includes persecutions on political, racial or religious grounds in execution of, or in connection with, any crime within the jurisdiction of the tribunal.).
[50] 'Draft Statute for an International Criminal Court', Annex to 'Report of the Committee on International Criminal Jurisdiction' (31 August 1951) 7 UN GAOR Supp No 11, UN Doc A/2136 (1952) para 33.
[51] Report on International Criminal Jurisdiction, 1951 (n 50) para 33.
[52] ILC, 'Draft Code of Offences, 1950' (n 46) 380 para 149.
[53] Ibid.

a way dangerous for the *maintenance of peace*'.[54] In other words, 'political' and 'peace and security' were essentially the same thing.

This emphasis on peace and security reflected the Nuremberg Charter's approach to international jurisdiction. Although crimes against humanity were included in the Charter, they had to be committed in connection with war crimes or crimes against peace.[55] In adopting the Nuremberg Principles, the ILC, as well as the UN General Assembly, endorsed the definitions of crimes in the Nuremberg Charter.[56]

However, the law used to prosecute the 'lesser' war criminals after World War II, Control Council Law Number 10, omitted the so-called 'war nexus' from the definition of crimes against humanity.[57] By 1951, some ILC delegates were expressing the view that crimes against humanity need not be associated with crimes against peace or war crimes, calling into question the peace and security rationale, at least for those crimes.[58] Others, however, continued to prefer a restrictive definition of crimes against humanity.[59] The Draft Code that the ILC submitted to governments that year for their consideration expanded the definition of crimes against humanity somewhat by, for instance, allowing that such crimes could be committed in connection with state-sponsored terrorism, but maintained the focus on crimes that threaten peace.[60]

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[54] Ibid 259 para 35.
[55] Charter of the International Military Tribunal — Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) 82 UNTS 280 art 6(c).
[56] UNGA Res 95, 'Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal' (11 December 1946) UN Doc A/64/Add.1 188.
[57] Control Council Law No. 10, 'Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity' (20 December 1945) 3 Official Gazette Control Council for Germany (31 January 1946) 50-55 art II.
[58] See ILC, 'Second Report on a Draft Code of Offences Against the Peace and Security of Mankind by Mr. J. Spiropoulos, Special Rapporteur' (12 April 1951) UN Doc A/CN.4/44 para 118 (describing debate).
[59] Ibid.
[60] Ibid 59 para 9.

Interestingly, with regard to war crimes, the Commission expressed the view that a 'violation of the laws and customs of war' does not affect the peace and security of mankind, implying that they are not sufficiently serious.[61] The Commission justified including war crimes in the Draft Code simply on the basis that they were listed in the Nuremberg Charter.[62] At the same time, the Commission also considered and rejected the idea of limiting war crimes to 'acts of a certain gravity', asserting that '*every* violation of the laws or customs of war [should] be considered as a crime under the code'.[63]

By 1954, the idea had emerged that for some international crimes the 'political element' was not the connection to war but the involvement of state actors. The 1954 Draft Code defined crimes against humanity as: 'Inhuman acts … committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities'.[64] In its commentary, the Commission noted: 'In order not to characterize any inhuman act committed by a private individual as an international crime, it was found necessary to provide that such an act constitutes an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State.'[65]

Meanwhile, the ILC's Committee on International Criminal Jurisdiction was debating the feasibility of establishing an ICC. The Committee's 1953 Report reveals that some members were opposed to the idea, arguing that:

> An international criminal court presupposes an international community with the power necessary to operate the court, and such power did not exist. A surrender of some present State sovereignty

[61] Ibid para 10(b).
[62] Ibid.
[63] Ibid para 10(c).
[64] ILC, 'Report of the International Law Commission covering the work of its sixth session' (3 June-28 July 1954) UN Doc A/CN.4/SER.A/1954/Add.1 112 para 50.
[65] Ibid 150 art 2 para 11.

would be the condition of the establishment of the court, and such surrender was highly unlikely.[66]

The objection was also raised that international criminal law was not sufficiently defined in conventions for a court to have jurisdiction over it. Other members countered that international law was beginning to recognize the rights of individuals and that states' unanimous affirmation of the Nuremberg Principles testified to the existence of common norms for a court to apply.[67] The ILC's 1954 Draft Statute, like the 1951 version, did not specify which crimes would be within the court's jurisdiction but, interestingly, this revision allowed for the adjudication of crimes under national law 'where appropriate'.[68] At this early stage, therefore, it was far from clear that gravity would play an important role in justifying the authority of an international criminal court.

When the ILC resumed work on the Draft Code in 1983, after a long hiatus, the Commission began to rely more directly on gravity as a justification. By this time, the human rights regime was firmly established and the idea that violations of human rights concern those outside a state's borders was less controversial. The new Special Rapporteur, Doudou Thiam, can be credited with instigating this shift toward gravity in the Commission's work. In his first report, Thiam addressed the question of what makes a crime international. He lamented the lack of clarity on this issue, noting that 'it is clear that the distinction between crimes under internal law and crimes under international law is relative and at times arbitrary'.[69] He also disagreed with the 1954 Draft Code's focus on a political element, arguing instead that gravity should be the decisive factor:

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[66] 'Report of the 1953 Committee on International Criminal Jurisdiction to the Sixth Committee' (20 August 1953) 9 UN GAOR Supp No 12 23, UN Doc A/22645 para 17.
[67] Ibid para 18.
[68] Ibid Annex art 1.
[69] 'First Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur' UN Doc A/CN.4/364 para 35.

> It is nevertheless an offence against the peace and security of mankind if its seriousness and scope are such as to impair fundamental interest of the international community. It may be that the authors of the Charter of the Nurnberg Tribunal were struck not so much by the political content of the crimes with which they were concerned as by their gravity, their atrociousness, their scale and their effects on the international community.[70]

Thiam considered crimes 'international by their nature', when they 'assail sacred values or principles of civilization – for example, human rights or peaceful coexistence of nations – which are protected as such'.[71] He asserted that gravity involves an objective criterion – 'the fundamental interest of the international community' – and a subjective criterion – 'the evaluation of the offence by the international community itself'.[72] According to Thiam: 'It is the subjective element – the evaluation of the offence by the international community and the way in which the offence is perceived by that community – which determines whether the offence is to be transposed from the internal to the international level and made a crime under international law.'[73] He did not, however, explain how the presence of either the objective or subjective components of gravity might be ascertained.

The ILC agreed with Thiam's suggestion that the offences in the Draft Code should be identified according to their seriousness rather than by any political aspect. Indeed, the Commission asserted that such offenses are not only more serious than national crimes but also relative to other international crimes. The ILC's 1983 Report states:

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[70] Ibid para 37.
[71] Ibid para 35.
[72] Ibid para 40.
[73] Ibid.

> From the standpoint of *seriousness*, there is … a kind of hierarchy of these international crimes. Offences against the peace and security of mankind are at the top of the hierarchy. They are in a sense *the most serious of the most serious offences*.[74]

The Commission thus decided unanimously to include in the Code only 'those crimes which are at the top of the scale because of their especial seriousness'. Such crimes are 'characterized by the particular horror which they evoke in the universal conscience'.[75]

Having made gravity central to identifying the subject matter of international jurisdiction, the ILC spent many years trying to ascertain what seriousness entails. In his second Report, Thiam noted the complexity of this endeavor, explaining that gravity is 'highly subjective' and 'is bound up with the state on the international conscience at a given moment'.[76] This subjectivity made it difficult to define international crimes. For example, Thiam opined that the distinction between crimes against humanity and other human rights violations is a matter of degrees of seriousness, but gave no indication of how a line between the two might be drawn.[77]

In its 1984 Report, the ILC asserted the importance of establishing more precise criteria for identifying offences against the peace and security of mankind[78] but, like Thiam, it had great difficulty doing so. The Report noted that the Commission had discussed several possible distinguishing criteria including:

> the inspiration of the criminal act (for example an act based on racial, religious or political conviction); the status of the victim of

[74] ILC, 'Report of the International Law Commission on the Work of its Thirty-Fifth Session' (3 May-22 July 1983) UN Doc A/39/10 (F) para 47.
[75] Ibid para 59.
[76] 'Second Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur' UN Doc A/CN.4/377 and Corr.1 para 8.
[77] Ibid para 40.
[78] ILC, 'Report of the International Law Commission on the Work of its Thirty-Sixth Session' (7 May-27 July 1984) UN Doc A/39/10 para 47.

> the criminal act (for example, a State or a private individual); the nature of the law or interest infringed (the interest of security appearing more important than a purely material interest); or lastly, the motive, etc.[79]

However, none of these criteria were considered sufficient because:

> The seriousness of an act was judged sometimes according to the motive, sometimes according to the end pursued, sometimes according to the particular nature of the offence (the horror and reprobation it arouses), sometimes according to the physical extent of the disaster caused. Furthermore, these elements seemed difficult to separate and were often combined in the same act.[80]

Despite its inability to define seriousness with any precision, the Commission excluded several crimes such as forging passports from the Draft Code on the on the basis of insufficient seriousness. In justifying this move, the ILC continued to employ very general gravity language:

> The code ought to retain its particularly serious character as an instrument dealing solely with offences distinguished by their especially horrible, cruel, savage and barbarous nature. These are essentially offences which threaten the very foundations of modern civilization and the values it embodies. It is these particular characteristics which set apart offences against the peace and security of mankind and justify their separate codification.[81]

[79] Ibid para 34.
[80] Ibid para 63.
[81] Ibid.

Crimes that the Commission favored adding to the Draft Code, again without providing specifics regarding their seriousness, included 'colonialism, apartheid and possibly serious damage to environment and economic aggression'.[82]

In its 1987 Report, the ILC again sought to explain what seriousness means for purposes of identifying crimes against the peace and security of mankind:

> These are crimes which affect the very foundations of human society. Seriousness can be deduced either from the nature of the act in question (cruelty, monstrousness, barbarity, etc.) or from the extent of its effects (massiveness, the victims being peoples, populations or ethnic groups), or from the motive of the perpetrator (for example, genocide), or from several of these elements. Whichever factor makes it possible to determine the seriousness of the act, it is this seriousness which constitutes the essential element of a crime against the peace and security of mankind – a crime characterized by its degree of horror and barbarity – and which undermines the foundations of human society.[83]

Like the earlier statements, this adds little in the way of specific criteria to distinguish the crimes that should be subject to international jurisdiction. However, the emphasis on gravity eventually led to changes in the elements of the crimes included in the Draft Code. The 1991 Draft Code replaced crimes against humanity with 'systematic or mass violations of human rights'.[84] The Commentary noted that since the acts in question must be extremely serious, only

[82] Ibid para 65.
[83] ILC, 'Report of the International Law Commission on the Work of its Thirty-Ninth Session' (4 May-17 July 1987) UN Doc A/CN.4/404 para 66.
[84] ILC, 'Report of the International Law Commission on the Work of its Forty-Third Session' (29 April-19 July 1991) UN Doc A/46/10 103.

systematic or mass violations of human rights should qualify.[85] It stated that 'systematic' relates to a 'constant practice or methodical plan to carry out such violations,' while '[t]he mass scale element relates to the number of people affected'.[86] Likewise, the Draft Code included only 'exceptionally serious' war crimes. This change was made in an effort to be 'faithful to the criterion that the draft Code should cover only the most serious among the most serious crimes'.[87]

Around the same time, the ILC resumed consideration of the related question of establishing an international criminal court.[88] In this context, the role of gravity became more controversial. As noted above, the impetus for the request to reopen discussion of an ICC was a plea by Trinidad and Tobago for international assistance in addressing its serious drug trafficking problem.[89] As such, while some members of the Commission felt the jurisdiction of an ICC should be restricted to a small category of extremely grave crimes, others wanted to expand its reach to crimes with transnational components – crimes that came to be known as 'treaty crimes' in the Rome Statute negotiations.[90] Others took a middle position that linked the question of subject matter jurisdiction of the ICC to its adjudicative jurisdiction. They suggested that the ICC's jurisdiction should be compulsory for exceptionally serious crimes and optional for other crimes of international character, such as the seizure of aircraft.[91] Others noted that the Court could have exclusive jurisdiction over some crimes and concurrent jurisdiction over others.[92]

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[85] Ibid.
[86] Ibid.
[87] Ibid 104-5.
[88] UNGA Res 46/54 (9 December 1991) UN Doc A/RES/46/54 286.
[89] Text to n 3.
[90] ILC Report, 1991 (n 84) paras 119-121.
[91] ILC, 'Report of the International Law Commission on the work of its forty-fourth session' (4 May-24 July 1992) UN Doc A/47/10 para 37.
[92] Ibid para 41.

When the ILC proposed a Draft ICC Statute in 1994, it included both 'crimes of an international character' and treaty crimes such as those concerning trafficking. However, it accorded the Court jurisdiction over the latter only in cases that 'constitute exceptionally serious crimes of international concern'.[93] The 1994 Draft Statute also limited war crimes to 'serious violations' although it dropped the Draft Statute's qualifier of 'exceptional' seriousness.[94] The term 'crimes against humanity' was reintroduced in place of 'systematic and mass violation of human rights,' but the Commission noted that 'the hallmarks of such crimes lie in their widespread and systematic nature'.[95]

The 1994 Draft Statute also reflected a discretionary version of what would become the mandatory gravity threshold for admissibility in the Rome Statute. The Court would be permitted to find inadmissible any case that 'is not of such gravity to justify further action by the Court'.[96] In this regard, the ILC Report noted:

> There were also suggestions that the court should have discretion to decline to exercise its jurisdiction if the case was not of sufficient gravity or could be adequately handled by a national court. This suggestion was explained in terms of ensuring that the court would deal solely with the most serious crimes, it would not encroach on the functions of national courts, and it would adapt its caseload to the resources available.[97]

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[93] 'Draft Statute for an International Criminal Court', in *Yearbook of the International Law Commission, 1994*, vol II (22 July 1994) UN Doc A/CN.4/SER.A/1994/Add.l 37.
[94] Ibid 38.
[95] Ibid 40.
[96] Rome Statute of the International Criminal Court (adopted 17 July 1998, as corrected by *procés-verbaux* of 10 November 1998, 12 July 1999, 20 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, entered into force 1 July 2002) UN Doc A/CONF.183/9 art 35.
[97] 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 23 para 50.

Some members of the Commission felt the admissibility provision was unnecessary because the relevant considerations could be taken into account in determining jurisdiction, but others asserted 'that the circumstances of particular cases could vary widely and could anyway be substantially clarified after the court assumed jurisdiction so that a power such as that contained in article 35 was necessary if the purposes indicated in the preamble were to be fulfilled'.[98]

By the time it adopted its final Draft Code in 1996, the ILC seems to have largely given up on elaborating a general conceptual definition of international crimes. In 1995, the Commissioners had tried again to come up with gravity criteria to no avail.[99] When renowned international jurist Allain Pellet deplored the absence of a conceptual definition in the Draft Code, Thiam responded simply that the criterion for inclusion in the Code was 'extreme gravity'.[100] The ILC's 1996 Report states:

> The Commission decided not to propose a general definition of crimes against the peace and security of mankind. It took the view that it should be left to practice to define the exact contours of the concept of crimes against peace, war crimes, and crimes against humanity.[101]

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[98] Ibid 52.

[99] ILC, 'Report of the International Law Commission on the work of its forty-seventh session' (2 May-21 July 1995) UN Doc. A/50/10, 19 para 57 ('There were various suggestions concerning other relevant criteria that might be considered by the Commission in determining the list of crimes, including: acts committed by individuals which posed a serious and immediate threat to the peace and security of mankind, drawing upon the general definition contained in article 1; the highest threshold of gravity and the public interest; the gravity of the act itself, its consequences or both and the designation of the act as a crime by the international community as a whole, notwithstanding an element of ambiguity in the motion of consensus reflected in the second criterion; and the effect of the crime on the international community as a whole.').

[100] ILC, 'Summary records of the meetings of the forty-eighth session' in *Yearbook of the International Law Commission 1996*, UN Doc A/CN.4/SER.A/1996 34.

[101] ILC, 'Report of the International Law Commission on the work of its forty-eighth session' (6 May-26 July 1996) UN Doc A/51/10 17 para 50.

In other words, the Commission essentially punted the task of explaining the gravity component of international crimes to the judges.

The 1996 Draft Code reflects a consensus that aggression, genocide, crimes against humanity, and war crimes are sufficiently serious for international jurisdiction, but other crimes, such as drug trafficking and harm to the environment, remained controversial.[102] Moreover, the core crimes had acquired some new gravity elements. Although the war crimes provision was no longer titled 'serious war crimes', the definition was restricted to war crimes 'committed in a systematic manner or on a large scale'.[103] Crimes against humanity had the same limitation but also had to be 'instigated or directed by a Government or by any organization or group'.[104] The commentary noted: 'The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State'.[105] The 'political element' had thus made its way back into the definition alongside – or as part of – the gravity requirement.

Thus, by the end of the ILC's work on the Draft Code and Draft Statute, gravity had taken center stage in discussions about international prescriptive and adjudicative authority, but it remained unclear what made particular crimes sufficiently grave to justify such authority.

4. International Criminal Tribunals for Former Yugoslavia and Rwanda

While the work of the ILC helped to develop the conceptual framework of international criminal law, the most important post-Nuremberg chapter in the evolution of the regime began with the establishment of the ICTY in 1993 and the

[102] ILC Report, 1995 (n 99) paras 112, 119.
[103] ILC Report, 1996 (n 101) art 20.
[104] Ibid.
[105] Ibid.

ICTR one year later. The Cold War had ended making it possible for the major powers on the Security Council to agree that the tribunals were necessary for international peace and security under Chapter VII of the U.N. Charter. The belief that accountability for human rights violations promotes international peace and security was also encouraged by the significant development that had taken place in the human rights regime as well as accountability efforts in post-dictatorial regimes.[106]

The Security Council resolutions establishing the ICTY and ICTR rely on the gravity of the offences in those situations to justify establishing the international tribunals.[107] Concerns about sovereignty received relatively little attention because the former Yugoslavia was now a failed state, and the new Rwandan government at first supported establishment of the ICTR and, even after it changed its mind, put up little resistance.[108] Indeed, the tribunals were given primary jurisdiction over crimes in their statutes, rather than complementing national courts – the approach that would later be adopted for the ICC.

Perhaps as a result of this lack of concern for sovereignty, gravity, which was important in justifying the establishment of the tribunals, was less central to

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[106] See eg Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (OUP 2001) 8 (discussing the transition made by numerous countries from dictatorial rule to some form of democracy as one development contributing towards a recent advancement towards individual accountability for human rights abuses); Diane F Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale LJ 2537-614.

[107] See UNSC Res 827 (25 May 1993) UN Doc S/RES/827 (ICTY Statute) (expressing 'grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law' and establishing ICTY); UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (ICTR Statute) (expressing 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda' and establishing ICTR).

[108] The Rwandan government disagreed with the decision to omit the death penalty from the punishments the ICTR could inflict. See Jens David Ohlin, 'Applying the Death Penalty to Crimes of Genocide' (2005) 99 AJIL 747, 748 ('Rwandan diplomats were incensed [at the exclusion of the death penalty from the ICTR] because the West's failure to prevent the genocide was now being compounded by a judicial system that would allow the perpetrators to escape with their lives.').

the elaboration of their subject matter jurisdictions. The drafters of the ICTY statute, apparently wishing to preclude objections based on the principle of legality, relied largely on the IMT Charter and Geneva and Genocide Conventions in defining the crimes. The definitions therefore omitted some of the gravity requirements that the ILC had adopted in its 1991 Draft Code. War crimes had to be 'serious' but not 'exceptionally serious' and crimes against humanity were not limited to 'systematic or mass violations of human rights'. The ICTR Statute expanded the importance of gravity somewhat by adding the requirement that crimes against humanity be part of a widespread or systematic attack. It also required that the widespread or systematic attack be committed 'on national, political, ethnic, racial or religious grounds',[109] introducing a discrimination element not present in the Nuremberg Charter.

The ICTY Statute maintained the IMT Charter's war nexus for crimes against humanity, implying that this was at least part of the basis for the international community's concern over such crimes. However, the ICTR Statute omitted this requirement and the ICTY judges held in their first case that criminal liability for war crimes is not restricted to *international* armed conflict, as most authorities had previously believed, but can also arise in internal armed conflict. In rendering this decision, the judges relied heavily on natural law and gravity, asserting that 'principles and rules of humanitarian law reflect elementary considerations of humanity widely recognized as the mandatory minimum for conduct in armed conflicts of any kind' and that 'no one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition'.[110] The ICTR had no need for such a ruling since its Statute included crimes under Article 3 Common to the Geneva Conventions, which applies to

[109] ICTR Statute (n 107) 44 art 3.
[110] *Tadic Case* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 October 1995) ss 128-130.

non-international armed conflicts.[111]

In their jurisprudence, the tribunals have relied on gravity to justify their jurisdiction, but have not substantially explained what the term means. For instance, in response to a defense argument that the ICTY should not have primacy over national courts, the ICTY Appeals chamber stated that without such jurisdiction there would be a danger that international crimes would be treated as 'ordinary crimes'.[112] This distinction between 'ordinary crimes' and 'crimes which are so horrific as to warrant universal jurisdiction' appears in the tribunals' jurisprudence to justify various decisions, without a clear explanation of what makes crimes adequately 'horrific'.[113]

The ICTY and ICTR have also used vague language to explain the meaning of 'serious' in the context of their jurisdiction over war crimes. They have held that this limitation does not restrict the tribunals' jurisdiction to people in positions of authority;[114] rather, the crime must 'constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'.[115] The substance of these values and consequences is left unexplained. Instead, the tribunals use such ambiguous descriptive phrases as: 'shocking to the conscience of mankind', 'fundamental human values deliberately negated', and 'crimes [that] threaten not only the foundations of the society in which they are perpetrated but also those of the international community as a whole'.[116] Neither the ICTY nor the ICTR Statute contains a gravity threshold for admissibility. Indeed, the ICTY initially prosecuted defendants whose crimes

[111] ICTR Statute (n 107) 45 art 4.
[112] *Tadic Case*, Decision on Interlocutory Appeal (n 110) para 58.
[113] *See, eg, Tadic Case* (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) ICTY-94-I (10 August 1995) paras 26-28.
[114] *Prosecutor v Erdemovic* (Sentencing Judgment) ICTY-96-22 (29 November 1996) para 83.
[115] *Tadic Case*, Decision on Interlocutory Appeal (n 110) para 94(iii).
[116] *Prosecutor v Gérard Ntakirutimana* (Judgment and Sentence) ICTR-96-10 (21 February 2003) para 881.

were at the lower end of the gravity spectrum.[117]

5. Negotiating the Rome Statute

Unlike the previous international tribunals, which were established to respond to situations that the international community had already judged to be extremely grave, the ICC was to have the power to respond to future situations. As such, any gravity-based limitations to the Court's jurisdiction had to be written into its Statute. The question of gravity's role in delimiting international jurisdiction was thus an important aspect of the treaty negotiations.

The Statute's preamble leaves little doubt that gravity is the most important justification for the Court's jurisdiction. The preamble notes 'that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'; it recognizes 'that such grave crimes threaten the peace, security and well-being of the world'; it affirms 'that the most serious crimes of concern to the international community as a whole must not go unpunished'; and it asserts the drafters' determination therefore to establish an ICC 'with jurisdiction over the most serious crimes of concern to the international community as a whole'.[118] This strong commitment to gravity as the principle justification for ICC jurisdiction, however, masked deep underlying divisions about the role of the Court in the global legal order.

States can be very roughly divided into two categories in terms of the approach they took to the negotiations. Some states viewed the proposed Court as an important tool for promoting human rights norms through criminal accountability. These states eventually adopted the label 'like-minded' and

[117] Antonio Cassese, 'The ICTY: A Living and Vital Reality' (2004) 2 J Intl Crim Just 585, 586-87.
[118] Rome Statute (n 96) preamble.

generally promoted a broad approach to the Court's subject matter and adjudicative jurisdictions. Others, in contrast, approached the project with greater trepidation, fearing its potential impact on their sovereign prerogatives. Such states tended to endorse positions that would limit the jurisdiction of the Court. There was, of course, substantial overlap between the categories, and many states took some positions that demonstrated a commitment to creating a strong court and other positions more protective of sovereignty.[119]

Gravity played an important role at the Rome Conference in mediating between the values of accountability and sovereignty, and the negotiating positions associated with them. With regard to subject matter jurisdiction, states decided to limit the ICC's jurisdiction to the core crimes, excluding 'treaty crimes' largely on the basis of insufficient gravity.[120] Although a small number of states insisted that the Rome Conference's Final Act recommend future consideration of the inclusion of crimes of terrorism and drug crimes,[121] there has been little momentum to expand the ICC's jurisdiction to such crimes. Limiting the crimes to those considered most grave enabled states to agree that the Court would have inherent jurisdiction rather than insisting on a right to accept the Court's jurisdiction with regard to particular situations.[122]

The concept of gravity also played an important role in obtaining consensus on the definitions of crimes within the Court's jurisdiction. For war crimes, a number of states concerned about sovereignty, including the United States and Russia, favored a mandatory gravity threshold.[123] In fact, such states

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[119] See Lawrence Weschler, 'Exceptional Cases in Rome: The United States and the Struggle for an ICC' in Sewall and Kaysen (eds), *The United States and the International Criminal Court* (n 35) 85, 88 (describing 'double vision' in Rome where delegates seemed at the same time to be striving to end impunity for mass crimes and 'zealously husbanding … righteous sovereignty').
[120] 'Report of the Ad Hoc Committee' (n 4) para 81.
[121] See 'Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc A/CONF.183/10 7-8.
[122] See Lee (ed), *The International Criminal Court* (n 4) 80-81.
[123] Ibid 105-8; author's notes from negotiations 7-8-1998 (on file with author).

had proposed that war crimes be excluded from the Court's mandatory jurisdiction entirely and instead made subject to *ad hoc* acceptances, but that idea was short-lived.[124] Many states preferred to include broad jurisdiction over war crimes, a position endorsed by the International Committee of the Red Cross. The compromise ultimately adopted is rather awkward in that it is phrased as an optional limit to the Court's jurisdiction – an oxymoron. Article 8 of the Rome Statute states: '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'.[125]

With regard to crimes against humanity, there were heated debates about three gravity-related issues: (1) whether to require a widespread *and* systematic 'attack against a civilian population' or make the qualifiers alternatives, (2) whether there should be a nexus to armed conflict and, if so, whether it should be limited to international armed conflict, and (3) whether there should be a discrimination requirement. States advocating broader jurisdiction prevailed on the last two issues and with regard to the first another compromise emerged. The attack could be widespread *or* systematic, but would be limited to 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.[126] As discussed below, this 'policy element' remains controversial.

The negotiations surrounding the crime of aggression also highlighted the importance of gravity in mediating between accountability and sovereignty considerations. Because aggression is essentially a crime of state, a charge that a state's leader has committed the crime of aggression amounts to a call for regime

[124] Author's notes from negotiations regarding jurisdiction 6/22 (on file with author).
[125] Rome Statute (n 96) art 8 para 1.
[126] Ibid art 7 para 1(a).

change – a direct attack on a state's sovereignty. Participants in the negotiations were reasonably united in believing that the concept of gravity, which is highlighted in the definition and in the 'understandings' appended to the definition, would ensure that accountability for aggression was privileged over state sovereignty only in appropriate cases.

Further evidence of the important role that gravity played in obtaining the consensus necessary to create the ICC can be found in Article 17's gravity threshold for admissibility. As already mentioned, this threshold was first included in the ILC's 1994 Draft Statute as a way of ensuring that the Court would be able to make appropriate use of its limited resources. Its inclusion seems to have been motivated at least in part by concerns that some of the 'treaty crimes' in the 1994 Draft Statute would not always be sufficiently serious to warrant international adjudication.[127] Even after the 'treaty crimes' were omitted from the Statute, however, the gravity threshold remained. Indeed, it was quite uncontroversial. Although some delegations expressed a preference that the provision be deleted or placed elsewhere in the Statute, no one seems to have felt strongly about it.[128] Likewise, a plea from the Chilean delegation that 'there was a need to explain more clearly the vague reference … to sufficient gravity in regard to the justification to the Court's further action' fell on deaf ears.[129] The only important change from the original formulation of the threshold is that it is

[127] In supporting inclusion of the threshold, the US member of the Commission noted that it would help alleviate concerns about the inclusion of such crimes as drug trafficking and terrorism in the Draft Statute. ILC, 'Summary Record of the 2332nd Meeting' (5 May 1994) UN Doc A/CN.4/SR.2332 paras 20, 59.
[128] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) (14 April 1998) UN Doc A/CONF.183/2/Add.1.
[129] 'Committee of the Whole, Summary Record of the 11th Meeting' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 75 June-17 July 1998) (20 November 1998) UN Doc A/CONF.183/C.1/SR. 11 para 29.

now mandatory: The Court is required to deem inadmissible a case of insufficient gravity.

The broad support for the gravity threshold as well as the lack of interest in elaborating the concept either with respect to the threshold or the definitions of crimes suggest that gravity's ambiguity was useful in generating support for the creation of the ICC.[130] States committed to broad accountability for human rights could argue to their constituents that the Court had the ability to achieve such accountability. At the same time, states concerned about preserving their sovereign prerogatives could find reassurance in a more robust interpretation of gravity as a bar to the Court's jurisdiction.

6. 'Hybrid' International Criminal Tribunals

Discussion of gravity's role in legitimating international criminal jurisdiction is complicated by the existence of a number of 'hybrid' tribunals, several of which were created after the adoption of the Rome Statute. These tribunals combine elements of national and international criminal law in different ways. For instance, the Special Court for Sierra Leone applies international and national law, the government of Sierra Leone appoints a minority of the judges, and the UN Secretary General appoints the majority of the judges and the prosecutor.[131] The Extraordinary Chambers in the Courts of Cambodia also apply national and international laws; however, unlike at the SCSL, national judges and prosecutors retain significant control over the proceedings.[132] The Special Tribunal for Lebanon employs international and Lebanese personnel but applies

[130] See eg ibid 346 para 32 (citing the statement of a participant who opined that broad jurisdiction over war crimes would be mediated by the *gravity threshold* in article 17).
[131] 'Statute of the Special Court of Sierra Leone', annexed to 'Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone' (signed 16 January 2002) 2178 UNTS 138, 145 arts 2-5; 12(1)(a)-(b); 15(3)-(4).
[132] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments (adopted 27 October 2004) NS/RKM/1004/006 (ECCC Statute).

only Lebanese law.[133] Some of the tribunals labeled 'hybrid' were established by agreement with the concerned state, while others were set up under the auspices of a United Nations governing authority.[134] The extent to which each of these courts is 'international' is thus a matter of debate.[135]

Because the hybrid courts in various ways account for the sovereignty of the concerned states, gravity's role might be presumed to be less central to legitimating their jurisdictions. Indeed, the jurisdiction of these courts is not always limited to the most serious international crimes.[136] Although several of them restrict prosecutions to those most responsible for the crimes at issue,[137] that restriction stemmed more from concerns about resource constraints than legitimate jurisdiction.

In sum, the history of the development of international criminal law shows a slow but steady rise in the importance of the concept of gravity as a justification for international prescriptive and adjudicative authority. Natural law theory and the recognition of universal jurisdiction over piracy provided the foundation for the idea that international jurisdiction over certain crimes is appropriate, and the

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[133] 'Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon', annexed to UNSC Res 1757 (adopted 30 May 2007) UN Doc S/RES/1757 art 2, attachment s 1 art 2.

[134] For example, the Special Court for Sierra Leone was established by agreement between the United Nations and the Government of Sierra Leone (SCSL Statute (n 131)), and the Special Panels for Serious Crimes in East Timor were established by the United Nations transitional authority. United Nations Transitional Administration in East Timor Regulation No. 2001/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offenses (6 June 2000) UNTAET/REG/2000/15.

[135] See eg Herbert D Bowman, 'Not Worth the Wait: Hun Sen, The UN, and the Khmer Rouge Tribunal' (2006) 24 UCL Pac Basin LJ 51, 68 (asserting that 'the ECCC is *not* an international tribunal, but a Cambodian court in which some international personnel work'); cf Anees Ahmed and Robert Petit, 'A Review of the Jurisprudence of the Khmer Rouge Tribunal' (2010) 8 Nw J Intl Hum Rts 165, 185 para 68 ('The Co-Investigating Judges found that the application of customary international law [embodying JCE] at the ECCC is a corollary to the finding that the ECCC holds indicia of an international court applying international law.').

[136] For example, the SCSL, ECCC, and Special Court for Lebanon have jurisdiction of the domestic crimes of murder and rape. See SCSL Statute (n 131) art 2; ECCC Statute (n 132) art 5; Lebanon Statute (n 133) art 2(a).

[137] See SCSL Statute (n 131) art 1(1); ECCC Statute (n 132) ch 1 art 1.

reactions to the World Wars, in particular the Second World War, made such jurisdiction a reality. The fact that the IMT and IMTFE were established in response to crimes of undeniable gravity helped to popularize the idea that the gravity of crimes can justify international adjudication, but the law of those tribunals did not depend on gravity. The work of those early international tribunals thus helped to promote gravity as a component of the sociological legitimacy of international criminal law, but did not make gravity an important factor in its legal legitimacy.

The work of the ILC, particularly in the 1980s and 1990s, further promoted gravity's importance as a legitimizing factor for international criminal law, although the Commission struggled, largely unsuccessfully, to identify the content of the concept. The establishment of the ICTY and ICTR likewise helped to further popularize the idea of international adjudication of particularly heinous crimes, and the law of those tribunals was somewhat more dependent on gravity than that of the IMT and IMTFE.

With the Rome Statute, the concept of gravity reached center stage as a determinant of the legitimacy of the international criminal law regime. The Court's subject matter jurisdiction and its authority to exercise that jurisdiction are directly linked to the concept of gravity. When the Rome Statute was negotiated, gravity was deployed to mediate between calls for international authority and concerns about limiting national authority. While gravity has been less central to the work of the 'hybrid' tribunals, this makes sense since they derive some of their legitimacy from their affiliation with national legal systems.

While the importance of gravity in seeking to legitimate international criminal law is now well established, its impact on that legitimacy is less clear. The next two chapters explore the extent to which the concept of gravity lends normative and sociological legitimacy to international prescriptive and adjudicative authority, respectively.

CHAPTER 3: INTERNATIONAL PRESCRIPTIVE AUTHORITY

For the international community's authority to prescribe conduct to be normatively legitimate, it must rest on moral and legal norms broadly shared by that community. Evidence that such norms exist can be found in the almost universal acceptance of the notion that some crimes concern the international community and thus deserve the label 'international crimes'. The broad social acceptance of the existence of international crimes tends to suggest that the international community shares some values that can undergird the category. However, as this Chapter seeks to demonstrate, the normative basis for international crimes remains uncertain and contested. This uncertainty is due in significant part to the ambiguous role that the concept of gravity plays in determining which crimes should be labeled 'international'. This normative uncertainty in turn promotes challenges to the sociological legitimacy of the regime tasked with enforcing the prohibitions on international crimes.

This Chapter begins by examining the major normative theories of international crimes to demonstrate the ambiguities inherent in each. In particular, it shows that none of the theories explains adequately either the meaning of gravity or the relationship between gravity and 'international concern'. The Chapter then shows how the failure to develop a consistent normative theory of international crimes has resulted in confusion and conflict in the law. Finally, the Chapter argues that the weakness of the normative foundation of international crimes increasingly presents a challenge to the regime's sociological legitimacy.

1. Which Crimes Concern the International Community?

The fundamental justification for the authority of the international community to prescribe conduct by labeling it 'an international crime' is that certain especially serious crimes concern the entire world. Just as national crimes

injure the national public 'in its sense of security and well-being',[1] international crimes injure the global public. The related ideas of seriousness and international concern are invoked to explain both the moral and legal legitimacy of international prescriptive authority. The gravity of the conduct and the international community's interest in preventing it make international prescription morally appropriate; and gravity and international concern are said to find legal expression in the definitions of international crimes.

To evaluate the legitimacy of the international community's prescriptive authority, it is thus critical to understand what it means for crimes to be serious and to concern the international community. This task is complicated by the uncertain relationship between the concepts of seriousness and international concern. In justifying the creation of the ICC, the Rome Statute's preamble declares that 'the most serious crimes of concern to the international community as a whole must not go unpunished'.[2] The meaning of this phrase is unclear: Is it the seriousness of the crimes that causes them to concern the international community or do only certain serious crimes concern the international community? The latter option implies that in addition to seriousness there must be some other basis for the international community's concern.

The rest of the preamble does little to resolve this question. Earlier paragraphs state that 'during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity' and that 'such grave crimes threaten the peace, security and well-being of the world'.[3] Apart from the reference to a large number of victims, there is no

[1] George P Fletcher, *Basic Concepts of Criminal Law* (OUP 1998) 77.
[2] Rome Statute of the International Criminal Court (adopted 17 July 1998, as corrected by *procés-verbaux* of 10 November 1998, 12 July 1999, 20 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, entered into force 1 July 2002) UN Doc A/CONF.183/9 preamble.
[3] Ibid.

indication of what constitutes an 'unimaginable atrocity' or of what it takes to 'deeply shock the conscience of humanity'.

The relationship between seriousness and international concern has hardly been addressed, let alone resolved, in the literature. Scholars and practitioners seek to explain the legitimacy of international prescriptive authority by reference to various features that they claim international crimes exhibit, including, in particular, that they threaten peace and security, shock humanity's conscience, are perpetrated by states or similar groups, victimize groups, or some combination of these features. However, the theories rarely address whether the particular features of international crimes render them especially serious or whether some other form of seriousness, such as a particular quantitative level of harm, is necessary.[4] The following discussion highlights the confusion regarding the role of gravity in each of the dominant theories of international crimes.

i. Threats to International Peace and Security

A central justification for international crimes has always been, in the words of the Rome Statute's preamble, that 'such grave crimes threaten the peace, security and well-being of the world'.[5] This idea is obviously related to that of 'international concern' – presumably crimes that threaten the peace and security of the world can be said to concern the world. Yet here again, the relationship between the gravity and international concern (in the form of a threat to peace and security) is unclear. There are at least two possibilities. First, the threat a crime poses to peace and security may be what renders it sufficiently grave to be labeled

[4] A typical effort to explain what makes crimes 'international' is Frédéric Megret's statement that: 'The emphasis today is on the sheer gravity of international crimes, their cosmopolitan nature, and the extent to which they may "shock the conscience of mankind", rather than the relatively anecdotic question of whether their commission involved some straddling of borders.' Frédéric Mégret, 'A Special Tribunal for Lebanon: The Council and the Emancipation of International Criminal Justice' (2007) 21 Leiden J Intl L 485, 506.

[5] Rome Statue (n 2) Preamble.

'international'. This implies the existence of a literal threat to peace and security – the sovereignty of state borders must be directly under attack. Alternatively, it may be the gravity of international crimes that causes them to 'threaten the peace, security and well-being of the world'. This interpretation implies a more metaphysical threat to peace and security whereby a threat is created whenever sufficiently serious harms occur anywhere in the world. This interpretation comports with the inclusion of 'well-being' in addition to peace and security in formulations such as the Rome Statute's. Even if the world's peace is not directly threatened, surely very serious crimes affect the well-being of all humans in some sense.

Early justifications for international crimes relied on the idea that such crimes threaten international peace and security in a literal sense; in particular, they threaten or relate to war. The IMT and IMTFE had jurisdiction only over war crimes committed in international armed conflict and over crimes against humanity connected to such conflict. Aggression was considered the supreme international crime since it posed the most direct threat to state sovereignty.[6]

Yet the literal peace and security rationale quickly gave way to a more expansive approach. Control Council Law No. 10, used to prosecute lesser criminals after World War II, dropped the war nexus, and the Genocide Convention defined that crime without reference to international armed conflict. Indeed, even the IMT judges seemed unhappy with this limitation on their jurisdiction. In declining to assert jurisdiction over crimes committed before 1939, the judges stated that: 'revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in

[6] 'Judgment of the Nuremberg International Military Tribunal 1946' (1947) 41 AJIL 172, 186 (Nuremberg Tribunal) (calling aggression 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.).

connection with, [war crimes or crimes against peace]'.[7] In highlighting the 'revolting and horrible' nature of the crimes, the judges foreshadowed the increasingly significant role that gravity, unconnected to literal threats to peace, would play in justifying international crimes.

In response to the inclusion of the war nexus in the ICTY Statute, the judges of that tribunal asserted that customary international law no longer includes such a requirement.[8] The ICTY judges have therefore not treated the link to armed conflict as an important part of the normative basis for crimes against humanity. Instead, they have added a gravity-related element not found in the tribunal's statute: the requirement of a widespread or systematic attack on a civilian population.[9] Since not all widespread or systematic attacks have effects beyond borders, this change suggests either that peace and security is not an important part of the normative basis for crimes against humanity or that the metaphysical interpretation has supplanted the literal one.

While the literal interpretation of the peace and security rationale thus faded as a justification for crimes against humanity, it remains important with regard to aggression and, to a lesser extent, war crimes. Infringement on sovereignty has traditionally been the primary normative basis for the crime of aggression.[10] However, not all such infringements constitute aggression – gravity is therefore also central to the normative justification for the crime of aggression.[11] Indeed, one of the biggest impediments to reaching consensus on a definition of aggression has been the international community's inability to agree on what sorts of actions sufficiently infringe sovereignty. States were unable to

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[7] Ibid 249.
[8] *Tadic Case* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995) paras 140-141.
[9] *Tadic Case* (Judgment) ICTY-94-1 (15 July 1999) para 248.
[10] Larry May, *Aggression and Crimes Against Peace* (CUP 2008) 3.
[11] Ibid (arguing for additional emphasis on gravity as a normative basis for the crime of aggression).

answer this question in Rome and instead left the matter of defining aggression to a future Review Conference. The definition adopted at the Review Conference, which took place in Kampala in 2010, resolves this difficulty principally be reference to gravity:

> For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[12]

The definition provides no explanation of 'gravity'. Indeed, it seems to complicate the task of defining the concept by distinguishing it from 'character' and 'scale' – two elements that are generally considered aspects of the gravity analysis.[13]

Aggression therefore seems to 'concern the international community' not simply because it threatens borders and thus peace and security, but also because it does so in a grave way. Gravity in this context is additive: It is not merely the threat to peace and security that makes aggression sufficiently serious to concern the international community. Rather, only certain threats to peace and security are sufficiently serious to concern that community and thus to constitute aggression.

The extent to which the normative basis for aggression rests on a literal threat to peace and security as opposed to some other type of gravity remains unclear. In Kampala, delegations were divided on this question, with some

[12] 'The Crime of Aggression' (11 June 2010) ICC Doc RC/Res.6.
[13] See eg *Prosecutor v Bahar Idriss Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010) paras 31-32 ('the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case'.).

arguing that any act of aggression should be considered an international crime and others calling for the threshold that was ultimately adopted.[14] Furthermore, the world's limited experience prosecuting aggression indicates that it is considered less serious than some other international crimes. Despite calling crimes against peace 'the supreme international crime', the IMT judges sentenced defendants convicted of that crime to life in prison, while some of those convicted of crimes against humanity were put to death.[15]

The peace and security rationale, including the literal interpretation, also remains central to understanding the normative legitimacy of war crimes. Crimes committed in international armed conflict have long been viewed as concerning the international community on the grounds that they threaten the world's peace and security. Such crimes affect peace and security directly since the harms associated with them cross borders.

Indeed, until the 1990s, the literal peace and security rationale was sufficient justification for war crimes because such crimes were limited to international armed conflicts. The crimes listed as 'grave breaches' in the Geneva Conventions all relate to international armed conflict. There was therefore no need for a metaphysical interpretation of the threat to peace and security or for some other understanding of what makes such crimes grave.

However, this changed in 1995 with the revolutionary *Tadic* judgement of the ICTY. In *Tadic*, the judges declared that individual responsibility for war crimes also extends to crimes committed in internal armed conflict.[16] The judges justified this ruling by invoking the gravity of such crimes without, however, explaining what makes crimes committed in internal armed conflicts sufficiently

[14] Roger S Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010' (2010) 2 Goettingen J Intl L 689, 694 (Amendments to the Rome Statute).
[15] 'International Military Tribunal Judgment and Sentence, 1 October 1946', 41 AJIL 172, 186, 333.
[16] *Tadic Case* (Judgment) (n 9) para 78.

serious to concern the international community.[17] The decision seems to have been catalyzed by the increasingly popular view that there should be no impunity for 'atrocities'. According to scholar and international judge Theodore Meron: 'This advance can be explained by the pressure, in the face of atrocities, for a rapid adjustment of law, process and institutions.'[18]

The issue of whether to extend war crimes to internal armed conflict was again controversial at the Rome Conference. A significant minority of states, including India and China, preferred to hew to the literal peace and security rationale and limit war crimes to international armed conflict.[19] The optional gravity 'threshold' for war crimes was in part an effort to reassure such states that their sovereignty would be adequately protected. Indeed, the provision originated with the U.S. delegation, which had proposed that the Court's jurisdiction over war crimes be strictly limited to those that were part of a policy or were committed on a large scale.[20] U.S. President Clinton's statement upon signing the Rome Statute inaccurately, but perhaps not inadvertently, declares:

> Under the Rome Treaty, the International Criminal Court (ICC) will come into being with the ratification of 60 governments, and will have jurisdiction over the most heinous abuses that result from

[17] Ibid para 129 ('Applying the foregoing criteria to the issues here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts.... No one can doubt the gravity of the acts at issue, not the interest of the international community in their prohibition.').
[18] Theodor Meron, *The Humanization of International Law* (Leiden 2006) 94.
[19] 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Vol II) UN Doc A/CONF.183/13 (UN Conference on the Establishment of an ICC) 146, 270, 232.
[20] Bartram Brown, 'The Statute of the ICC: Past, Present, and Future' in Sarah B Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court* (Roman & Littlefield Publishers 2000) 69 (discussing U.S. proposal).

international armed conflict, such as war crimes, crimes against humanity and genocide.[21]

The optional gravity threshold did not satisfy all of the states' sovereignty concerns. One result is that the ICC has jurisdiction over a more limited list of war crimes in internal armed conflict than in international armed conflict. For instance, the Statute criminalizes the use of certain weapons only in international armed conflict. The differences between the acts prohibited in internal and international armed conflicts demonstrate that the literal peace and security rationale retains some salience in the Rome Statute's justification for war crimes.

Larry May, one of the few philosophers to address the normative legitimacy of international crimes, asserts that there is little controversy over the justification for war crimes because they 'often cross borders'.[22] In his view, crimes against humanity and genocide are harder to justify because they raise more significant sovereignty concerns.[23] While this may have been true when war crimes were limited to international conflicts, it is not accurate today. Often the direct effects of crimes committed in internal armed conflicts are contained within borders, such as when they are committed on a small scale or in a short-lived conflict. Such crimes do not literally threaten the world's peace.

An argument is sometimes made that war crimes committed within state borders threaten peace and security because they have the potential to cause instability outside those borders, but that approach fails to distinguish war crimes

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[21] Bill Clinton, 'Statement by President Bill Clinton, Authorizing the US Signing of the Rome Statute of the International Criminal Court' (31 December 2000) <www.iccnow.org/documents/USClintonSigning31Dec00.pdf> accessed 16 October 2014 (emphasis added).

[22] Larry May, *Crimes Against Humanity: A Normative Account* (CUP 2005) 8. Alejandro Chehtman makes a similar argument: that '[w]ar creates specific risks for participants and bystanders' that help to justify extraterritorial jurisdiction even when crimes are less serious than would otherwise be required. Unlike May's statement, however, Chehtman's claim applies equally to threats from internal armed conflict. Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (OUP 2010) 109.

[23] Ibid.

from other kinds of harms. Large-scale human rights abuses in 'peacetime'[24] may have greater potential to cause international instability than small-scale abuses in small-scale armed conflicts. In justifying Security Council action against the racist Rhodesian regime, for instance, Myres McDougal and Michael Reisman argued:

> [I]n the contemporary world, international peace and security and the protection of human rights are inescapably interdependent and … the impact of the flagrant deprivation of the most basic human rights of the great mass of the people of a community cannot possibly stop short within the territorial boundaries in which the physical manifestations of such deprivations first occur.[25]

Perhaps the existence of any armed conflict within a state in some sense threatens peace outside the state's borders, but such a threat comes closer to the metaphysical than to the literal interpretation of the peace and security rationale. Extending international subject matter jurisdiction to crimes in internal armed conflict thus requires either a metaphysical approach to peace and security or an alternative conception of the international community's interest.

Some authors have adopted the metaphysical version of the peace and security rationale. This rationale is also sometimes framed in terms of unspecified 'harm to humanity'.[26] Robert Sloane interprets the ICC preamble's language quoted above as implying the metaphysical approach. According to

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[24] See Mary L Dudziak, *War Time: An Idea, Its History, Its Consequences* (OUP 2012) (argument that problematizes dividing 'time' into 'peacetime' and 'wartime').

[25] Myres S McDougal and W Michael Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern' (1968) AJIL 1, 18. But see Dean Acheson, 'The Arrogance of the International Lawyer' (1968) 2 Intl Lawyer 591, 592 ('Those of whom I complain are not the peddlers of spurious panaceas for peace, not those who are over impressed with the role of international law, but those who would impose upon states in the name of law their own subjective conceptions of justice.').

[26] Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (n 22) 99; Christopher Macleod, 'Towards a Philosophical Account of Crimes Against Humanity' (2010) 21 Eur J Intl L 281, 287.

Sloane, international crimes do not necessarily threaten state interests in a traditional Westphalian sense; rather, they threaten 'certain paramount values of mankind (a concept redolent of natural law and identified with the modern international human rights movement)'.[27]

Although Sloane's interpretation of the Rome Statute preamble is plausible, it is not evident from the text. In fact, it may well be that the text is deliberately ambiguous about the extent to which the seriousness of international crimes stems from the threat they pose to human rights (the metaphysical interpretation) versus state sovereignty (the literal interpretation). As explained below, leaving this question unresolved in Rome helped to generate support for the regime by enabling broad and restrictive visions of the scope of international criminal law to coexist. Over time, however, invocations of the 'peace and security' rationale have increasingly shifted from claims about literal threats to borders to assertions about metaphysical threats to well-being.

ii. Shocking Humanity's Conscience

The most frequently invoked justification for international crimes is probably that they 'shock the conscience of humanity'.[28] Often this rationale is tied to the peace and security justification. That is to say, the reason for humanity's shock is at least in part the threat to peace and security that the crimes pose. This linkage was evident at the IMT and IMTFE where the definitions of crimes against humanity, usually considered among the most shocking crimes, required a nexus to war. A link between the justifications is also found in many Security Council resolutions taking action regarding international crimes. These

[27] Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 Stan J Intl L 39, 53.

[28] See eg Diane Orentlicher, 'Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles' (2003) 92 Geo LJ 1059, 1116 (citing a post-World War II case, United States v Otto Ohlendorf, stating that '[h]umanity can assert itself by law').

often invoke both the idea that the offenses being committed shock the world's conscience and that they threaten peace and security, without clarifying the relationship between the two ideas.[29] Since many of these resolutions concern internal armed conflicts, they give the impression that the peace and security rationale is being used in the metaphysical rather than literal sense.

For some authors, however, the peace and security and conscience-shocking rationales are distinct. For instance, Egon Schwelb asserts that a crime against humanity is an offense that concerns the international community either because 'it has repercussions reaching across international frontiers' or because 'it passes in magnitude or savagery any limits of what is tolerable by modern civilisations'.[30]

The idea that the world shares a collective conscience is rooted in natural law and has a long historical pedigree. The Martens Clause of the 1899 Hague Convention on the Laws and Customs of War on Land states:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[31]

The notion that certain crimes so shock the world's conscience as to be considered international was an important justification for the creation of the

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[29] Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2003) 46 fn 80 (listing examples of resolution that use language similar to 'shock the conscience of humanity').

[30] Egon Schwelb, 'Crimes against Humanity' (1946) 23 Brit YB Intl L 195 (citing Justice Jackson's opening).

[31] Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War (adopted 29 July 1899, entered into force 4 September 1900) (1899) 187 CTS 429 (emphasis added).

category 'crimes against humanity' and for the work of the IMT and IMTFE trials. Justice Jackson famously made reference to this rationale in his opening statement before the IMT.[32] The *ad hoc* tribunals have also invoked the shock-the-conscience rationale and the related notion that international crimes are 'Universally Condemned Offences'.[33] According to William Schabas, the tribunals use this term to mean 'offences that are a matter of concern to the international community as a whole'.[34]

Cherif Bassiouni argues that a crime is a universal norm if it both shocks the conscience of humanity and threatens the peace and security of mankind. Interestingly, he views these notions as importantly distinct since he asserts that '[t]he argument [for universality] is less compelling, though still strong enough, if only one of these elements is present'.[35] Many commentators invoke the conscience of humanity rationale without specifying what aspects of international crimes shock the conscience. For instance, in discussing the relative competencies of national and international courts, Alain Pellet asserts that:

> [I]t must be kept in mind that only crimes which 'deeply shock the conscience of humanity' can justify an internationalization of their prosecution, which involves a far-reaching blow to the competence of domestic courts on an issue which otherwise would come under

[32] See eg Robert H Jackson, 'Opening Statement at the Nuremberg Trials' (21 November 1945) <http://avalon.law.yale.edu/imt/11-21-45.asp> accessed 16 October 2014.
[33] See eg *Dragan Nikolic* (Decision on Interlocutory Appeal Concerning Legality of Arrest) IT-94-2-AR73 (5 June 2003) paras 24-25.
[34] William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 151 (citing Rosalyn Higgins, *Problems and Process (International Law and How we Use it)* (Oxford: Clarendon Press 1995) 72, as cited in *Dragan Nikolic* (Decision on Interlocutory Appeal Concerning Legality of Arrest) (n 33) paras 24-25).
[35] M Cherif Bassiouni (ed), *International Criminal Law Vol 1: Sources, Subjects and Content* (Brill 2008) 176.

> 'matters which are essentially within the domestic jurisdiction of States.'[36]

Pellet does not explain how such shocking crimes can be identified. Like Pellet, scholar and international judge Antonio Cassese believes that international courts are the best forum for adjudicating international crimes because such crimes 'infringe values that are transnational and of concern for the whole world community'.[37] The content of these values and this concern are left unexplored.

A related trend in the literature is to lump international crimes under a heading that emphasizes their 'shockingness'. David Scheffer has led an effort to refer to international crimes as 'atrocity crimes'. He writes:

> There also is a critical need for a new term—'atrocity crimes'—and a new field of international law—atrocity law—to . . . enable public and academic discourse to describe genocide, crimes against humanity (including ethnic cleansing), and war crimes with a single term that is easily understood by the public and accurately reflects the magnitude and character of the crimes adjudicated before international and hybrid criminal tribunals and of the law being applied by such tribunals, governments, and international organizations. The purpose would be to simplify and yet render more accurate both public dialogue and legal terminology describing genocide and other atrocity crimes.[38]

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[36] Allain Pellet, 'International Courts: Better than Nothing…' in Cesare PR Romano and others (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004) 437-438.

[37] Antonio Cassese, 'The Rationale for International Criminal Justice' in Cassese and others (eds), *The Oxford Companion to International Criminal Justice* (OUP 2009) 123, 127.

[38] David Scheffer, 'Genocide and Atrocity Crimes' (2006) 1 Genocide Studies and Prevention 229, 238; David Scheffer, 'Atrocity Crimes Framing the Responsibility to Protect' (2008) 40 Case West J Intl L 111, 128-29; see also Maria Paula Saffon, 'Problematic Selection and Lack of Clear Prioritization: The Colombian Experience' in Morten Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher 2010) 127, n 1

Other writers group all international crimes, including war crimes, under the heading 'crimes against humanity'.[39] The term 'genocide' is also sometimes used as an umbrella.[40]

Bruce Broomhall is one of the few authors to have addressed directly the meaning of what he calls the '"collective conscience" rationale'.[41] He asserts that this rationale 'aims to affirm principles and enforce minimum standards of conduct within the international community'.[42] Interestingly, he argues that this, rather than the peace and security rationale, is the primary justification for war crimes, because the main purpose of such crimes is to ameliorate rather than to prevent armed conflict. He also asserts that this became the principal justification for crimes against humanity after the elimination of the war nexus. According to Broomhall, the abandonment of the war nexus 'affirm[ed] that individual responsibility under international law may justifiably rest not on the stability of the international order alone, but on the power of such acts to shock the conscience of humanity'.[43] He notes the fluidity of the concept of shocking humanity, and argues that it will 'evolve with the values of the international community'.[44]

An important question that Broomhall leaves unresolved is whether a certain scale or magnitude of crimes is required to shock the conscience of

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(defining 'atrocious crimes as short for serious violations of international human rights law and … violations of international humanitarian law').

[39] See eg Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2006) viii (explaining that the term 'crimes against humanity' in their title is intended to capture 'genocide, torture, crimes against humanity, war crimes and other serious violations of international law attracting criminal liability').

[40] See eg Albright-Cohen Genocide Prevention Task Force, 'Preventing Genocide: A Blueprint for U.S. Policymakers' (2008) x <http://media.usip.org/reports/genocide_taskforce_report.pdf> accessed 16 October 2014 (using the term 'genocide' to also capture 'mass atrocities').

[41] This paragraph is drawn from Broomhall, *International Justice and the International Criminal Court* (n 29) 46-49.

[42] Ibid 48.

[43] Ibid.

[44] Ibid 45-46.

humanity. Broomhall seems to imply that such scale is not required when he talks about 'principles' and 'minimum standards' and uses the rationale to justify internationalizing even small-scale war crimes. Later in his analysis, however, Broomhall appears to endorse the more common view that it takes some amount of harm to shock humanity's conscience, noting that only some 'atrocities [are] of a magnitude capable of being labeled crimes against humanity, genocide, or violations of the laws and customs applicable in non-international armed conflict'.[45]

Many commentators use similarly quantitative language in talking about the shock-the-conscience rationale. For instance, authors sometimes talk about international crimes being hierarchically superior to non-international crimes. Cherif Bassiouni has stated that the commission of certain crimes 'rises to the level of being "shocking to the conscience of humanity"',[46] implying that other transgressions are of a lesser nature. Likewise, Bassiouni identifies a hierarchy among international crimes based on the 'the nature of the conduct and the harmful potential for results'.[47]

The claim that the 'core' international crimes such as genocide and crimes against humanity are hierarchically superior to other crimes, while commonly asserted, is not uncontroversial. For instance, Prosper Weil rejects the distinction in international law 'between norms creating obligations essential for the preservation of fundamental interests and norms creating obligations of a less essential kind….'[48] For positivists like Weil, there is no adequate basis on which

[45] Ibid 50 (emphasis added).
[46] Bassiouni (ed), *International Criminal Law Vol 1* (n 35) 34.
[47] Bassiouni, *Introduction to International Criminal Law* (2nd revised edn, Martinus Nijhoff 2013) 148.
[48] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, 421.

to make such relative judgments, making what he calls 'relative normativity' harmful to the international system.[49]

Whether or not they espouse a hierarchical relationship between national and international crimes, or among international crimes, many commentators consider scale an important – sometimes the most important – distinguishing feature of international crimes. For instance, Dinah PoKempner states: 'By their nature, international crimes involve large-scale harm, careful planning and coordination, and a knowledge of their scope or potential scope by participants.'[50] Theodore Meron argues that crimes against humanity differ from other serious human rights violations by virtue of their 'egregiousness and systematic nature as well as criminal intent'.[51]

Even Larry May's complex moral theory of international crimes implicitly relies on a notion of scale. May argues that to be truly international, crimes must fulfill what he calls the 'harm principle' and the 'security principle'.[52] The latter concept, discussed again in the next section, upholds the value of state sovereignty by requiring that the state where the crimes were committed be complicit, unwilling or unable to prosecute the crimes.[53] The 'harm principle' requires that the crime harm humanity either by harming an individual 'because of that person's group membership or other non-individualized characteristic' or

[49] Ibid 441-42. For a natural law critique of Weil's argument, see John Tasioulas, 'In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 OJLS 85, 119. For a response to Tasioulas, see Jason A Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 Eur J Intl L 627.
[50] Dinah PoKempner, 'The Tribunal and Cambodia's Transition to a Culture of Accountability' in Jaya Ramji and Beth Van Schaack (eds), *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence Before the Cambodian Courts* (E Mellen Press 2005) 340. International criminal law jurisprudence frequently references scale in the context of adjudicating crimes against humanity. See eg *Prosecutor v Akayesu* (Judgment) ITCR-96-4-T, T Ch I,(2 September 1998) s 6.4.
[51] Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006) 99.
[52] See May, *Crimes Against Humanity* (n 22) 63-95.
[53] Ibid 68.

because the harm is caused by a group such as the state'.[54] According to May, such group-based harms affect the international community because they are likely to be widespread or systematic, they 'assault the common humanity of the victims', and they 'risk crossing borders'.[55] While this theory combines several of the rationales for international crimes found in the literature, May limits its reach by asserting a gravity requirement. He claims that humanity must not merely be offended but rather assaulted, and that '[a]ssaults on humanity are a class of offenses that are especially egregious and deserving of sanction'. While May does not elaborate on what makes assaults 'egregious', he states that harming individuals is not sufficient, implying that some kind of scale is required.[56]

This explicit or implicit reliance on scale as a critical aspect of what causes international crimes to harm humanity is typical of the scholarly engagement with the question. Even authors who reject the notion that international crimes must harm humanity retain a focus on scale. Andrew Altman and Christopher Wellman dismiss the idea that international crimes harm humanity as an 'unpersuasive fiction'.[57] Instead, their theory of international crimes depends on 'whether the state is adequately performing the requisite political functions'.[58] When it is failing in this regard, international jurisdiction is appropriate. Nonetheless, Altman and Wellman restrict the appropriate reach of international criminal law to situations where 'basic human rights violations are

[54] Ibid 83.
[55] Ibid.
[56] Ibid 86.
[57] Andrew Altman and Christopher Heath Wellman, 'A Defense of International Criminal Law' (2004) 115 Ethics 35, 42. Alejandro Chehtman likewise rejects the idea that international crimes must 'harm humanity', but nonetheless retains the requirement that they be sufficiently serious, large-scale, or part of a plan or policy. Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (n 22) 99-100.
[58] Altman and Wellman, 'A Defense of International Criminal Law' (n 57) 63.

widespread or systematic'.[59] Moreover, unlike many authors, Altman and Well include a notion of scale even in the 'systematic' alternative. For them, the 'systematic' requirement does not necessarily entail the involvement of a government or government-like organization in perpetrating the crimes – a popular interpretation of the term. Rather, it is 'a partly quantitative notion, referring to acts that are part of some plan whose execution would result in *many* rights violations', but also a qualitative idea because 'there is some aim or objective that cannot be specified solely in numerical terms'.[60] Since their understanding of 'systematic' is quantitative, it appears that their theory of international crimes is especially focused on the element of scale, even if it also includes some other notion of aims or objectives.

Notably, although Altman and Wellman claim that their theory does not rest on a distinction between international and domestic crimes, their emphasis on scale effectively creates such a distinction. Indeed, they seem to admit as much when they state:

> In order to be normatively plausible, any standard dictating when international criminal jurisdiction is triggered must point to the kinds of considerations that we have discussed in cashing out 'widespread or systematic', that is, those regarding the scope and severity of violations of basic rights.[61]

Although they assert that international crimes are not 'supercrimes' and that even 'generic' murders and rapes are eligible for international prosecution when the state is not operating properly,[62] their theory seems to rest international criminality significantly on an evaluation of the quantity of harm caused.

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[59] Ibid.
[60] Ibid 48(emphasis added).
[61] Ibid 50, fn 24.
[62] Ibid 65.

Most authors who emphasize scale as a critical distinguishing feature of international crimes refrain from identifying a particular quantitative threshold. For instance, in discussing this issue, Altman and Wellman write:

> 'Widespread' is a purely quantitative notion referring mainly to the number of violations: it takes account of the number of people victimized, weighted by the relative importance of the rights violated. In some cases, the total population size will be relevant, but above a certain threshold number of victims, it probably does not matter what proportion of the total population the victims represent. For example, the Serbian massacre of 7,000 Muslim males at Srebrenica counted as widespread, no matter what fraction it was of the total Bosnian population.[63]

We can glean from this passage that the scale required can be a matter of absolute victim numbers or population percentages, and that 7,000 deaths certainly qualifies. Most of the literature is similarly vague about the quantitative aspect of 'shocking humanity's conscience'.[64]

In sum, one of the most common justifications for international crimes is that they shock the conscience of humanity, often because of the large-scale harm they cause. Moreover, even commentators who reject the notion of shocking humanity's conscience often endorse a quantitative requirement for international criminality. In other words, under this rationale, the gravity of international crimes tends to be articulated largely in terms of quantities of harm. Nonetheless, most commentators make little or no attempt to explain what level of quantitative harm is required to shock humanity's conscience.

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[63] Ibid 48.

[64] See eg David Scheffer, 'Genocide and Atrocity Crimes' (2006) 1 Genocide Studies and Prevention 229, 238 (defining 'atrocity crimes' as 'of significant magnitude' and involving 'a relatively large number of victims').

iii. State or Organizational Action

For some authors, an essential characteristic of international crimes is that they are perpetrated by, or with the acquiescence of, states. For instance, Lorenzo Picotti argues that international crimes involve a 'politico-military dimension' and occur 'when a conflict arises with collective or political interests, and not only with the rights and interests of individual victims, taken individually'.[65] Commentators who take this view sometimes extend the criteria to organizations with state-like characteristics, in particular, control over territory. For purposes of this discussion, such arguments are included under the heading 'state action rationale'.

The state action rationale is sometimes envisioned as distinct from the question of gravity and sometimes linked with it. In its early efforts to define international crimes, the ILC considered the two rationales to be separate. As explained above, the ILC at first decided that international crimes were distinguished by a 'political' element, and only later determined that seriousness was the key to international criminality.[66] Scholars have also sometimes distinguished the two rationales. For instance, William Schabas has suggested that state action and gravity operate as 'competing justifications for the exercise of international jurisdiction'.[67]

Often, however, scholars treat the gravity of international crimes as deriving, at least in part, from the involvement of a state.[68] Kirsten Fisher adopts

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[65] Lorenzo Picotti, 'Criminally Protected Legal Interests at the International Level after the Rome Statute' in Mauro Politi and Giuseppe Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate 2001) 255, 267.
[66] For discussion, see Chapter 2, above.
[67] William A Schabas, *An Introduction to the International Criminal Court* (CUP 2007) 82-83.
[68] Kirsten Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (Routledge 2013); Mark J Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 HRQ 118 ('The harm wrought by state sponsors of mass

this view, stating: 'The travesty of political organization is what makes international crimes so atrocious as to require the explicit condemnation of the international community.'[69] Fisher asserts that the normative legitimacy of international crimes requires them to meet what she calls the 'associative threshold', whereby a state or other organization has perpetrated serious harms or failed to protect people from such harms. Although she also posits that a 'seriousness threshold' must be met, this does not require a certain quantity of harm but rather describes the quality of harm – it must violate the right to physical security.[70]

Other commentators imply that state action is part of what makes international crimes grave by linking the state action rationale with the peace and security and shock the conscience rationales. For instance, Bassiouni asserts that a 'state-action or state-favoring policy' is implicit in the peace and security rationale and sometimes also in the shock-the-conscience rationale.[71] Since Bassiouni believes that international crimes are hierarchically superior to national crimes, it appears that for him the additional gravity derives significantly, if not entirely, from the state action requirement.

Jan Klabbers agrees that 'what makes [international crimes] special is precisely the link between individuals and their states'.[72] He rejects the idea that the gravity of international crimes derives from their perpetrators being more evil than other criminals, noting that those who committed the Mai Lai massacre shared their lunch with survivors. William Schabas likewise endorses the

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atrocity is so colossal that even skeptics of the criminal law's coherence and defensibility find themselves longing for their doubts to be allayed, at least for perpetrators such as these.').

[69] Fisher, *Moral Accountability and International Criminal Law* (n 68) 23.

[70] Ibid.

[71] M Cherif Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework' in Bassiouni (ed), *International Criminal Law Vol 1* (n 35) 50.

[72] Jan Klabbers, 'The Spectre of International Criminal Justice: Third States and the ICC' in Andreas Zimmerman (ed), *International Criminal Law and the Current Development of Public International Law* (Duncker & Humblot 2003) 49, 60.

organizational policy requirement, although he expands it to include organizations with state-like characteristics.[73] George Fletcher frames the requirement as one of 'collective perpetration' and asserts: '[w]hatever the pretense of liberal international lawyers, the crimes of concern to the international community are collective crimes'.[74]

For some authors, the requirement of state action is less a description of the particular gravity of international crimes than a practical consideration: States are unlikely to prosecute crimes their agents commit, making international jurisdiction necessary.[75] Win-chiat Lee takes this argument to its logical extreme. According to Lee, 'international crimes proper' include only those that a state perpetrates against its own citizens and crimes a state is unable or unwilling to prevent or punish.[76] When crimes cross borders, the state on whose territory the crimes are committed has an incentive to prosecute, making international jurisdiction less essential. According to Lee, therefore, genocide or war crimes committed by the agents of one state against the citizens of another are not international crimes in the strict sense.[77] Such acts are crimes against the other state, rather than crimes against the international community. Although he uses the term 'serious crimes', Lee's account of international crimes does not rely on gravity, implying instead that even small-scale crimes by state actors are international.[78] Indeed, he asserts that 'neither the egregiousness of the crimes

[73] See generally William A Schabas, 'State Policy as an Element of International Crimes' (2007) 98 J Crim L and Criminology 953, 972.
[74] George P Fletcher, 'The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt' (2002) 111 Yale LJ 1499, 1514-25. But see Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 Stan J Intl L 39, 56-7 (disagreeing with the categorical nature of this claim).
[75] See eg Schabas, 'State Policy as an Element of International Crimes' (n 73) 982.
[76] Win-chiat Lee, 'International Law and Universal Jurisdiction' in Larry May (ed), *International Criminal Law and Philosophy* (CUP 2010) 21.
[77] Ibid 40.
[78] Ibid 37.

nor the universality of the values protected' is sufficient to distinguish international and national crimes. For Lee, the distinction only makes sense if it rests on the state's abdication of its duty to adjudicate crimes.

Some scholars, on the other hand, reject the state action requirement. Bruce Broomhall has criticized Cherif Bassiouni's insistence on state action, asserting that state action is an element of aggression and sometimes of crimes against humanity, but is not always an aspect of war crimes or genocide.[79] Unlike Bassiouni, Broomhall does not believe that the peace and security or shock-the-conscience rationales require state action. On the contrary, Broomhall asserts that requiring state action would undermine the international community's ability to prevent crimes that threaten the peace or shock the conscience. In rejecting the state action requirement, Broomhall writes:

> The fundamental international interest in peace and security and the ability of international law to respond appropriately to affronts to the public conscience are important enough that the possibility of flexible future development should not be closed off in the name of conceptually neat but restrictive doctrinal arrangement.[80]

Otto Triffterer has similarly criticized Herbert Jager's claim that 'genocide, war crimes and crimes against humanity can only be committed when the political framework in a State would permit such behavior'.[81] According to Triffterer, this approach is misguided because the mission of international criminal law is 'to protect the highest values of the international community as a whole against grave violations'.[82] Although Triffterer does not define 'grave violations', this statement implies that state action is not a necessary component of gravity.

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[79] Broomhall, *International Justice and the International Criminal Court* (n 29) 51.
[80] Ibid.
[81] Otto Triffterer, 'The Preventive and Repressive Function of the International Criminal Court' in Politi and Nesi (eds), *The Rome Statute of the International Criminal Court* (n 65) 137, 147.
[82] Ibid.

Larry May takes a position in the middle: State action is not required for international criminality but it is one way of justifying international crimes. Recall that for May, international crimes must fulfill both a 'security principle' and a 'harm principle'.[83] The 'security principle' requires that the state is either perpetrating the crimes or is unwilling or unable to prevent or punish them.[84] The first option therefore represents state action. But even when a state is simply unable to prevent or punish, May's theory injects the possibility of state action under the 'harm principle'. The 'harm principle' is met either when a state or organization perpetrates crimes or when the crimes are targeted at a defined group. According to May, the normative basis for international criminality is strongest when both of these conditions are met.[85] Thus, under May's theory of international crimes, state action can satisfy either the 'security principle' or the 'harm principle' or both, but is not required to satisfy either.

The state action rationale is most commonly advanced not as a justification for all international crimes, but solely for crimes against humanity. Philosophers David Luban and Richard Vernon have elaborated this 'political' view of crimes against humanity. Luban begins by noting that the term 'humanity' is subject to two interpretations: it can refer either to 'the quality of being human' or to humans as a group.[86] Unlike many commentators, Luban emphasizes the former, arguing that it is not the scale of the crimes that makes them special but the particular human quality they violate: our nature as political beings.[87] Crimes against humanity are 'politics gone cancerous'.[88] Vernon makes a similar argument, hinging the distinctiveness of crimes against humanity on the state's

[83] May, *Crimes Against Humanity* (n 22) 63; text to nn 22, 52.
[84] May, *Crimes Against Humanity* (n 22) 68.
[85] Ibid 83.
[86] David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 Yale J Intl L 85, 86-87.
[87] Ibid 90.
[88] Ibid.

violation of its sovereign obligation to protect people.[89] Both authors also argue that crimes against humanity must be targeted at groups rather than individuals, the rationale address below.

ICC Judge Hans Peter Kaul likewise adopted the state policy vision of crimes against humanity in a decision in the Kenya situation. Kaul's review of the law and scholarship on crimes against humanity led him to conclude that:

> Crimes of this nature and magnitude were made possible only by virtue of an existing State policy followed in a planned and concerted fashion by various segments of public power targeting parts of the civilian population who were deprived totally and radically of their basic fundamental rights. It was not (only) the fact that crimes had been committed on a large scale but the fact that they were committed in furtherance of a particular (in-humane) policy. Consequently, it was felt that the threat emanating from such State policy is so fundamentally different in nature and scale that it concerned the entire international community. In other words, the presence of a policy element elevated those crimes to the international level.[90]

Like Kaul, many of the authors who adopt the state action rationale for crimes against humanity seem to be motivated at least in part by a desire to avoid a definition that relies too heavily on the scale of the crimes. According to Vernon, his model of crimes against humanity 'may help to deal with the troubling

[89] See Richard Vernon, 'What is Crime Against Humanity' (2003) 10 J Pol Phil 231; Richard Vernon, 'Crimes Against Humanity: A Defense of the "Subsidiarity" View' (2003) 26 Can J L & Jurisprudence 229.

[90] ICC Decision Pursuant to Article 15 of the Rome Statue on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19 (31 March 2010) PT Ch II, Hans-Peter Kaul Dissent, para 60 (Kaul Dissent).

question of the scale of atrocity'.[91] He notes that on the one hand 'the greatness of evil owes something to its extent', while on the other, 'moral sense rebels at the thought that numbers count in this way….'[92] Vernon claims to solve this problem by suggesting that it is the power of the state to harm that matters, as opposed to the number of victims actually harmed.[93] Adil Haque agrees, stating: 'International law makes group perpetration and group victimization—not numbers of victims—the central features of crimes against humanity.'[94] Luban takes the point further, asserting that crimes against humanity include even individual incidents of government abuses. To Luban, the idea that 'small-scale, government-inflicted atrocities remain the business of national sovereigns' is a 'profoundly cynical conclusion'.[95]

Bassiouni has also argued that the state action and group targeting requirements avoid the problems of uncertainty and subjectivity inherent in a definition of crimes against humanity that relies on their scale.[96] Unlike Luban and Vernon, however, Bassiouni believes that some notion of scale is required in addition to state action and group targeting.[97] Likewise, Geoffrey Robertson has argued that: 'The individuals responsible for any *widespread* pattern of barbarity, imposed or supported by the State (through its politicians or police or military) or by armed organizations fighting to attain some (or more) power, should be indictable' for crimes against humanity.[98]

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[91] Richard Vernon, *Cosmopolitan Regard: Political Membership and Global Justice* (CUP 2010) 162.
[92] Ibid.
[93] Ibid 162-163.
[94] Adil Ahmad Haque, 'Group Violence and Group Vengeance: Toward A Retributivist Theory of International Criminal Law' (2005) 9 Buff Crim L Rev 273, 298.
[95] Luban, 'A Theory of Crimes Against Humanity' (n 86) 107.
[96] M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd revised edn, Kluwer Law International 1999) 243, 246.
[97] Ibid.
[98] Geoffrey Roberston, *Crimes Against Humanity: The Struggle for Global Justice* (3rd edn, The New Press 2006) 429 (emphasis added).

In sum, the involvement of states or state-like organizations is frequently cited as critical to the normative legitimacy of international criminality. The state action rationale is often asserted for crimes against humanity and sometimes extended to all international crimes. Commentators sometimes treat this rationale as an explanation for, or component of, the gravity of international crimes and sometimes view the two questions as separate. Many of those who endorse the state action rationale also view international crimes as requiring group victimization.

iv. Group Victimization

As noted above, Larry May makes group victimization – targeting people because of their membership in a group – one of the possible normative justifications for international crimes. Either group victimization or group perpetration (in the form of state or organizational action) must be present for the international community to have an interest in the crimes that warrants international prosecution.[99]

Luban and Vernon place more importance on group victimization than May does, making it a requirement, at least for crimes against humanity. Luban asserts that crimes against humanity are committed by states or organizations and 'inflicted on victims because of their membership in a population or group rather than their individual characteristics'.[100] It is this group on group violence that generates the 'political infernos' that crimes against humanity are designed to address.

Vernon provides a slightly different justification for the group victimization requirement. He argues that groups are the natural locus of protection for individuals and that the state supplants that status by purporting to

[99] May, *Crimes Against Humanity* (n 22) 89.
[100] Luban, 'A Theory of Crimes Against Humanity' (n 86) 103.

provide the required protection.[101] When states attack groups instead of protecting them, they 'invite charges of travesty'.[102] According to Allison Marston Danner, crimes against humanity are more serious then war crimes because the former involve 'both group perpetration and group victimization'.[103]

While group victimization is inherent in the definition of genocide, many commentators reject the idea that it is required for other international crimes.[104] For Altman and Wellman, for example, what matters most is whether the relevant government is willing and able to prosecute the crimes. Thus, in a failed state, large-scale murders and rapes that are not committed by or against a group can be international crimes.[105] However, as already noted, Altman and Wellman qualify this claim with a scale-based gravity threshold: Only when a significant number of important perpetrators are left unprosecuted is international criminal jurisdiction triggered.[106]

Massimo Renzo takes the argument further, asserting that international crimes should be defined to encompass all serious human rights violations.[107] Renzo not only rejects the group-based harm requirement, he also denies that international crimes are characterized by scale more broadly. For Renzo, international crimes concern the international community not because of their collective nature or scope, but rather because they constitute 'serious attacks on

[101] Vernon, 'Crimes Against Humanity: A Defense of the "Subsidiarity" View' (n 89) 236.
[102] Ibid.
[103] Allison Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 Va L Rev 415, 474.
[104] See eg M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (n 96) 247 (asserting that crimes against humanity do not require group targeting); Alexander RJ Murray, 'Does International Criminal Law Still Require a "Crime of Crimes"? A Comparative Review of Genocide and Crimes Against Humanity' (2011) 3 Goettingen J Intl L 589, 591 ('Crimes against humanity present a broader range of offences and there is no requirement for a specific group to be targeted.').
[105] Altman and Wellman, 'A Defense of International Criminal Law' (n 57) 48.
[106] Ibid 49.
[107] Massimo Renzo, 'Crimes Against Humanity and the Limits of International Criminal Law' (2012) Law and Philosophy 448.

the human dignity of the victims'.[108] In his view, those who perpetrate such serious crimes as murder and rape are answerable to the international community as well as to the national political community to which they belong.[109]

This brief survey of the theories of international crimes reveals the depth of conflict that exists concerning the moral justification for labeling crimes 'international'. While most commentators agree that international crimes are particularly grave and in some sense concern the international community, there is significant disagreement about the relationship between gravity and international concern and about the features of crimes that fulfill these criteria.

Much of this normative uncertainty stems from the way the international criminal law regime evolved. As Chapter 2 demonstrated, the regime was not created through a purposive process of identifying the values the international community wished to uphold and establishing the priorities among them. Instead, the regime's early institutions, in particular the post-WWII and *ad hoc* tribunals, were created in reaction to particular situations that many people felt demanded international action. Since the crimes those institutions were to adjudicate had already been committed, there was no time to craft theoretically optimal international crimes. Instead, the institutions had to rely, and be seen to rely, on pre-existing law to comply with the principle of legality and to maximize their sociological legitimacy. They thus employed war crimes law, which had a long history, although it was not originally intended for international prosecution. Because crimes against humanity were linked with war crimes in their first iterations, little effort was made to develop an independent normative underpinning for them. Thus, until the Rome Conference, the only crime that had been defined through a process of international negotiation was genocide, and the

[108] Ibid 449.
[109] Ibid 460.

politics surrounding those negotiations had left important normative questions unresolved.

By the time of the Rome Conference, there was too much historical baggage for a true engagement with normative principles in crafting the definitions of crimes. Those who suggested revisiting the definition of genocide, for instance, were quickly shut down – the Genocide Convention was widely ratified and the idea of reopening the difficult issues surrounding the crime struck few participants as a good idea.[110] Normative coherence with regard to war crimes and crimes against humanity was inhibited by the political compromises necessary to reach agreement.[111]

The normative uncertainty surrounding international crimes cannot be entirely attributed to their historical evolution, however. As the scholarly debates and years of discussion at the ILC make clear, it is very difficult to identify clear, consistent normative rationales for international criminality. In particular, while it is easy for most people to agree in theory that especially grave crimes concern the international community, determining the content of the idea of gravity has proven extremely challenging. The difficulty of identifying the moral norms that undergird international crimes is reflected in the instability that continues to characterize their legal definitions.

2. Unstable Legal Norms

The legitimacy of international prescriptive authority is weakened by the instability of the regime's legal norms. This is especially problematic with regard to crimes against humanity. Even the ILC, which spent years considering the matter, had a great deal of difficulty defining these crimes. By 1995, after several decades of discussion, commission members were still divided on such issues as

[110] UN Conference on the Establishment of an ICC (n 19) 146-47.
[111] For discussion, see text to n 140 below.

whether a nexus to war should be required, whether state action is essential, and whether the crimes must always involve massive harm.[112]

The definitions of crimes against humanity at the various international courts and tribunals contain important differences reflecting divergent perspectives on their normative justification. For instance, the ICTY definition contains the now defunct war nexus, the ICTR's definition includes a discrimination element, and the ICC version requires a state or organizational policy. The ICTY and Special Court for Sierra Leone have rejected the state plan or policy element.[113] The definitions thus reflect differing commitments to the peace and security, group victimization, and group perpetration rationales.

Even within institutions, opinions are divided as to the values that animate crimes against humanity. For instance, at the ICC, judges disagree as to whether the organizational policy element requires a high degree of institutional organization – a 'state-like' organization – or a looser requirement of group perpetration.[114] The ICC judges have also reached different conclusions about the degree of formalization the policy element requires.[115] Likewise, judgments of

[112] ILC, 'Report of the International Law Commission on the work of its forty-seventh session, 2 May-21 July 1995' A/CN.4/SER.A/1995/Add.1 (ILC Report, 1995) pt 2 paras 88-90. .

[113] *Prosecutor v Fofana* (Judgment) SCSL-04-14-T (2 August 2007) paras 112-113; *Tadic Case* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) (n 8).

[114] Compare ICC Decision Pursuant to Article 15 of the Rome Statue on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19 (31 March 2010) PT Ch II, paras 83-93 with Kaul Dissent (n 90) para 51.

[115] Compare *Prosecutor v Gbagbo* (Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11-432 (3 June 2013) para 44 (requiring evidence of formalization) with *Prosecutor v Gbagbo* (Judgment on the Appeal of the Prosecutor Against the Decision of Pre-trial Chamber I of 3 June 2013 entitled 'Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute') ICC-2/11-01/11 (16 Dec 2013) para 215 (asserting that 'an attack which is planned, directed or organised – as opposed to spontaneous or isolated acts of violence – will satisfy the policy criterion, and that there is no requirement that the policy be formally adopted').

the ICTY reflect different perspectives about whether crimes against humanity encompass crimes harming a limited number of victims.[116]

The same divides are reflected in the scholarship on crimes against humanity. In particular, scholars disagree about whether crimes against humanity should require a state or organizational policy and, if so, what the attributes of such a policy should be.[117] Opinions are also divided about such issues as whether crimes against humanity should include terrorist acts[118] or government failures to act to alleviate suffering after natural disasters.[119] When the Lebanon Tribunal was established to prosecute those responsible for killing Prime Minister Hariri and a few others, the U.N. Secretary General felt that the crimes could be

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[116] Compare *Prosecutor v Krstic* (Judgment) IT-98-33-T (2 August 2001) para 501 ('while extermination generally involves a large number of victims, it may be constituted even where the number of victims is limited') with Prosecutor v Limaj (Judgment) ICTY-03-66-T (30 November 2005) para 187 (asserting that the 'population' element of crimes against humanity cannot be satisfy by 'a limited and randomly selected number of individuals').

[117] Compare, for example, M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 50 (arguing for a narrowly construed policy requirement) and Schabas, 'State Policy as an Element of International Crimes' (n 73) 953 (making a similar argument) with Charles Chernor Jalloh, '(Re)defining Crimes Against Humanity' in Larry May and Elizabeth Edenberg (eds), *Just Post Bellum and Transitional Justice* (CUP 2013) 118 (arguing against the policy requirement); Matt Halling, 'Push the Envelope – Watch it Bend: Removing the Policy Requirement – Extending Crimes Against Humanity' (2010) 23 LJIL 827, 827 (same); Guénaël Mettraux, 'The Definition of Crimes Against Humanity and the Question of a "Policy" Element' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (CUP 2011) 152 (same); and Darryl Robinson, 'Crimes Against Humanity: A Better Policy on "Policy"' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2014) 2-3 (asserting that 'there is ample customary law authority for a policy element, if it is understood as a modest threshold'); Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107 AJIL 334, 376 (suggesting that the policy element should be interpreted as a minimal threshold); Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (CUP 2010) 240 ('For those jurisdictions that apply a policy element, the policy element must be interpreted in accordance with the previous jurisprudence as a modest threshold that excludes random action.').

[118] Compare Johan D van der Vyver, 'Prosecuting Terrorism in International Tribunals' (2010) 24 Emory Intl L Rev 527, 539 (arguing that terrorism constitutes a crime against humanity under the Rome Statute) with William A Schabas, 'The International Criminal Court: The Secret of Its Success' (2001) 12 Crim L F 415, 426-27 (arguing that terrorism does not constitute a crime against humanity under the Rome Statute).

[119] Stuart Ford, 'Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity?' (2010) 38 Denv J Intl L & Policy 227 (discussing whether the acts in Myanmar after Cyclone Nargis constitute crimes against humanity).

charged as crimes against humanity despite the small number of victims, but there was insufficient support for the idea on the Security Council.[120]

In addition to uncertainty about the contextual elements of crimes against humanity, the requirements of the individual constitutive acts are unclear. International courts have struggled to determine what acts can constitute 'persecution'[121] and 'other inhumane acts',[122] both of which are required to match the gravity of the other constitutive acts of crimes against humanity.[123] Thus, while most law is subject to some normative contestation, the law of crimes against humanity is particularly unsettled.

Likewise, genocide, despite being defined in a widely accepted convention, remains the subject of a significant degree of normative debate. Scholars, judges and advocates continue to disagree about what makes genocide a particularly serious crime – a crime of concern to the international community. The legal definition implies that genocide's gravity stems entirely from the mental element – the intent to destroy a group – but many commentators argue that more is required. William Schabas, a prominent expert on genocide, argues that genocide, like other crimes against humanity, can only be committed as part of a state or organizational policy.[124] Schabas finds support for this position in some of the

[120] Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, (2006) UN Doc S/2006/893 paras 24-25 ('For the crime of murder, as part of a systematic attack against a civilian popultion, to qualify as a "crime against humanity", its massive scale is not an indispensable element.').
[121] See eg *Prosecutor v Blagojević* (Judgment) ICTY-02-60-T (17 January 2005) paras 588-602 (discussing whether various crimes, including destruction of personal property, forcible transfer of population, and terrorizing the civilian population, are grave enough to constitute persecution as a crimes against humanity).
[122] See eg *Vasilijevic Case* (Judgment) IT-98-32-T, T Ch II (29 November 2002) paras 234-7 (discussing meaning of 'other inhumane acts').
[123] 'Elements of Crimes', Official Journal of the International Criminal Court ICC-ASP/1/3 (pt II-B) (9 September 2002) art 7(1)(k)(2) (Elements of Crimes).
[124] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, CUP 2009) 111-112; but see Jordan J Paust, 'The International Criminal Court Does Not Have Complete Jurisdiction Over Customary Crimes Against Humanity and War Crimes' (2010) 43 J Marshall L Rev 681, 696-97 (arguing that genocide has no plan or policy requirement).

jurisprudence.[125] Moreover, the ICC Statute's Elements for genocide require that '[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction'.[126]

On the other hand, the ICTY famously declared that, at least in theory, a lone madman operating in isolation could be guilty of genocide.[127] Some scholars agree that the intent to destroy a group is all that is necessary to make genocide a crime of concern to the global community.[128] Other scholarship and jurisprudence seems to imply that what makes genocide concern the world is the quantity of harm it inflicts.[129] For instance, in the International Court of Justice's Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons, Judge Weeramantry wrote: 'If the killing of human beings, in numbers ranging from a million to a billion, does not fall within the definition of genocide, one may well ask what will.'[130]

Another unresolved legal issue concerning the gravity of genocide is what 'part' of a group the perpetrator must intend to destroy.[131] The case law generally requires the intent to destroy a 'substantial' part of the group. 'Substantial' has

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[125] Schabas, *Genocide in International Law* (n 124) 343-44.
[126] Elements of Crimes (n 123) art 6.
[127] *Jelisic Case* (Judgment) ICTY 95-10-T (14 December 1999) para 100.
[128] David Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 Chi J Intl L 303, 319-20; Otto Triffterer, 'The Preventive and the Repressive Function of the International Criminal Court' (n 81) 149 (arguing that intent alone makes genocide a crime of concern to the international community).
[129] Daphne Anayiotos, 'The Cultural Genocide Debate: Should the UN Genocide Convention Include a Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in a Separate International Treaty?' (2009) 22 NY Intl L Rev 99, 114 (arguing that cultural protection is less important than mass physical extermination); *Kambanda Case* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) para 16 (stating that 'genocide has inflicted great losses on humanity' and reiterating the need for international cooperation to liberate humanity from this scourge).
[130] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep 1996 226 para 61.
[131] David Alonzo-Maizlish, 'In Whole or in Part: Group Rights, The Intent Element of Genocide, and the "Quantitative Criterion"' (2002) 77 NYU L Rev 1369.

been interpreted to mean either a large number of people in absolute terms or a significant proportion of the group, even if that means only a small number of people are harmed.[132] Such pronouncements do little to clarify the issue. How many deaths in a group are 'significant'? If only two members of an ethnic group remain on earth, is killing one of them genocide? One commentator worries that the substantiality criteria could become an 'insurmountable obstacle'[133] to prosecutions for genocide, but the opposite conclusion – that it will be relatively easy to prove – is equally plausible. The meaning of 'in part' will remain unclear unless consensus emerges on what quantity of harm, if any, is required for the crime of genocide to concern the world.

A similar problem arises with regard to the crime of incitement to genocide. Since incitement requires no actual harm, the question becomes how much harm must be threatened and how serious the threat must be. Susan Benesch has argued for a 'reasonable possible consequences' test[134] and others have taken different approaches.[135]

The definition of aggression also remains unstable, in particular with regard to the role of gravity. Aggression is essentially a crime of state – it is committed by leaders of one state against the sovereignty of another. However, not all acts of aggression are criminal. Rather, it is the gravity of an act, along with its 'character' and 'scale' that determines whether it is a 'manifest' violation of the UN Charter and thus a crime.[136] Despite the 'understanding' appended to the definition declaring that gravity, character, and scale must each be significant

[132] David Scheffer, 'Genocide and Atrocity Crimes' (2008) 1 Genocide Studies and Prevention 229, 240 (discussing cases).
[133] Alonzo-Maizlish, 'In Whole or in Part' (n 131) 1396.
[134] Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48 Va J Intl L 485, 494.
[135] See eg Justin La Mort, 'The Soundtrack to Genocide: Using Incitement to Genocide in the Bikindi Trial' (2009-2010) 4 Interdisc J Hum Rts L 49 (proposing a test for incitement to genocide).
[136] Amendments to the Rome Statute (n 14).

for aggression to take place,[137] most definitions of gravity encompass notions of character and scale. As such, the moral and legal legitimacy of aggression depends on what is meant by gravity. As for the other crimes, however, this issue has been left unresolved. It thus remains unclear when an act of aggression rises to the level of an international crime.

Although war crimes have the longest historical pedigree, the basis for their status as crimes subject to international adjudication remains unclear. The law of war crimes was developed for use in national courts, particularly the courts of the states most affected by the crimes. Indeed, jurisdiction over such crimes in national courts was not based in international law but required implementing legislation.[138] The basis for prosecuting war crimes before the post-WWII tribunals was less their seriousness or the concern of the world than the well-established right of the parties to a conflict to adjudicate crimes committed therein. Thus, in 1951, the ILC concluded that war crimes were not crimes against the peace and security of mankind, although it included them in its Draft Code nonetheless on the grounds that they were in the Nuremberg Charter. Later, the ILC added a requirement of 'exceptional' seriousness, and then just seriousness, in an effort to ensure that war crimes concerned the entire world. Eventually, the threshold was elaborated to include only war crimes 'committed in a systematic manner or on a large scale', and found its way into Rome Statute with the preface 'in particular'.[139]

The Rome Statute's 'optional gravity threshold' for war crimes demonstrates the lack of consensus on whether and when war crimes constitute 'serious crimes of concern to the international community as a whole'. While

[137] Ibid.
[138] Georges Abi-Saab, 'The Concept of "War Crimes"' in Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Heopei* (London: Routledge 2001) 100.
[139] These developments are discussed in detail in Chapter 2.

some negotiators wanted to give the ICC jurisdiction over even small-scale, isolated war crimes, others preferred to subject those crimes to a gravity threshold similar to that in the definition of crimes against humanity.[140] The compromise of the optional threshold leaves open the normative question of whether a gravity threshold is necessary to elicit global concern.

The scholarship and jurisprudence on war crimes largely overlooks the uncertain normative foundation of these crimes, generally assuming that all war crimes are matters of international concern. Some commentators, however, assert or imply that only war crimes that amount to 'atrocities' give rise to international concern.[141] For instance, in commenting on the optional threshold, Cassese asserts: 'It can be argued that isolated acts which do not correspond to a plan or scheme do not, at least not to the same extent, constitute a reason for concern to the international community as a whole.…'[142]

The normative uncertainty surrounding war crimes is particularly acute with respect to war crimes committed in internal armed conflict. For war crimes committed in international armed conflict, an argument can be made that international peace and security is threatened because war presents such a threat and crimes aggravate war. When crimes are committed in internal armed conflict that do not threaten borders, however, a different rationale may be necessary. This lacuna has likely encouraged the turn in the Rome Statute and some of the scholarship toward a quantitative (scale) or qualitative (systematic) gravity threshold for war crimes. Interestingly, Judge Theodor Meron has stated that it was the need for a legal response to 'atrocities' that caused the expansion of war

[140] For discussion, see Chapter 2, above. See also Bartram Brown, 'The Statute of the ICC: Past, Present, and Future' in Sewall and Kaysen (eds), *The United States and the International Criminal Court* (n 20) 69; 'Summary Records of the Second Session' (1950) *Yearbook of the International Law Commission,* Vol VII 257 paras 24-25.

[141] See eg David Scheffer, 'Genocide and Atrocity Crimes' (2008) 1 Genocide Studies and Prevention 229, 237.

[142] Antonia Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court* (Vol 1, OUP 2002) 280.

crimes to internal armed conflict.[143] He asserts that 'there is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflict more leniently than those engaged in international wars'.[144] Such statements suggest that war crimes in internal armed conflict should only be considered international crimes when they amount to 'atrocities'.

The uncertainty surrounding the basis for international concern with war crimes is especially problematic for war crimes that are not *malum in se* – inherently morally wrong. The Rome Statute recognizes that not all war crimes are *malum in se* in its provision concerning superior orders. The Statute provides for the defense of superior orders when the defendant did not know the order was unlawful and it was not 'manifestly unlawfully'.[145] According to the Statute, genocide and crimes against humanity are always manifestly unlawful. War crimes, on the other hand, may appear to be lawful. On what basis, if any, does a war crime that appeared lawful to the perpetrator concern the international community? Perhaps for international armed conflict, the international community has an interest in establishing and enforcing the rules, even if they do not involve moral wrongs; but is this also true for internal armed conflicts?

Even some of the war crimes that arguably involve moral wrongs may cause reasonably minor harm. For instance, the improper use of a flag of truce or the destruction of property not justified by military necessity may not be highly morally reprehensible.[146] Are such crimes 'atrocities' when committed on a small scale in isolation from other crimes?[147]

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[143] Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006) 94.
[144] Ibid 111.
[145] Rome Statute (n 2) art 8(2).
[146] Ibid art 30; Elements of Crimes (n 123) art. 8(2)(b)(viii)-1.
[147] Cf Ariel Zemach, 'The Limits of International Criminal Law: House Demolition in an Occupied Territory' (2004) 20 Conn J Intl L 65 (arguing that the extensive house demolition practice by Israel does not violate a moral norm and therefore should not be punished under the property provision of the Rome Statute); Ariel Zemach, 'Fairness and Moral Judgments in

The uncertainty about the role of gravity in the moral and legal norms underlying international crimes is evident in the debate about whether some international crimes are more serious than others. Some judges and commentators advocate a hierarchical approach to the crimes, usually placing genocide and crimes against humanity above war crimes and sometimes asserting that genocide is more serious than crimes against humanity.[148] This hierarchy is often based on the claim that crimes involving discriminatory targeting are more serious than non-discriminatory crimes.[149] Others reject the hierarchy.[150] For instance, the

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International Criminal Law: The Settlement Provision in the Rome Statute' (2003) 41 Colum J Transnatl L 895, 922 ('The international community's commitment to fairly treat an accused person necessarily qualifies the reach of international criminal law. This commitment requires that only conduct which violates fundamental, self-evident moral norms be subject to international criminal adjudication. The settlement provision is incompatible with this requirement.'). The ICC has held that the war crime of 'pillage' under the Rome Statute requires 'large-scale appropriation of all types of property'. 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 (15 June 2009) para 317.

[148] See eg Allison Marston Danner, 'Constructing A Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 Va L Rev 415, 420 (arguing 'that the chapeaux of the crimes under international law should be read to form a hierarchy of crimes, connoting increasing levels of harm caused by a defendant's actions'); *Prosecutor v Krstic* (Judgment) IT-98-33-T (2 August 2001) 700 (noting that it can be argued genocide is the most serious crime because of the elevated intent requirement, but the individual circumstances of each case must be considered in determining punishment); *Prosecutor v Tadic* (Judgment) IT-94-1-A & IT-94-1-Abis (Cassese, J, Separate Opinion) para 16 ('[W]henever an offence committed by an accused is deemed to be a "crime against humanity", it must be regarded as inherently of greater gravity, all else being equal (ceteris paribus), than if it is instead characterised as a "war crime."'); *Prosecutor v Serushago* (Sentence) ICTR-98-39-S (5 February 1999) para 15 ('[T]he Chamber is of the opinion that genocide constitutes the "crime of crimes", which must be taken into account when deciding the sentence.'); *Prosecutor v Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) para 14 ('The Chamber has no doubt that despite the gravity of the violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto, they are considered as lesser crimes than genocide or crimes against humanity. On the other hand, it seems more difficult for the Chamber to rank genocide and crimes against humanity in terms of their respective gravity.'); *Prosecutor v Erdemovic* (Appeals Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah) IT-96-22 (7 October 1997) para 20 ('[A]ll things being equal, a punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime.').

[149] See eg Allison Marston Danner, 'Constructing a Hierarchy of Crimes' (n 148) 474 ('Crimes against humanity, then, should be considered more serious than war crimes because of their characteristics of group penetration and group victimization.').

International Commission of in Inquiry on Darfur, in controversially concluding that genocide did not occur there, stated: '[G]enocide is not necessarily the most serious international crime. Depending upon the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide.'[151] Some commentators, including former ICTY Judge Patricia Wald, have even suggested that the distinction between genocide and crimes against humanity should be rethought in light of the extreme gravity of both crimes.[152]

3. Gravity as Constructive and Destructive of Sociological Legitimacy

The foregoing discussion demonstrates that serious challenges remain to the moral and legal legitimacy of international crimes. The moral norms that undergird the elevation of particular crimes to the status of 'international' remain unclear, and instability permeates the legal definitions. What does this mean for the sociological legitimacy of the international community's authority to prescribe 'international' crimes?

In the early years of the regime's development, the ambiguity of the concept of gravity and its uncertain role in defining international crimes was constructive: that is, it helped to generate support for efforts to define international crimes. It would likely have been impossible to reach agreement in Rome on the definitions of war crimes without the ambiguous 'optional' gravity

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[150] *Prosecutor v Tadic* (Judgment in Sentencing Appeals) IT-94-1-A & IT-94-1-Abis (26 January 2000) para 69 ('After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime.')

[151] 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004' (25 January 2005) para 522.

[152] Patricia M Wald, 'Genocide and Crimes Against Humanity' (2007) 6 Wash U Glob Stud L Rev 621, 633 ('Eventually the popular will may have to be accommodated and some term found that will satisfy the understandable yearning for the ultimate condemnation of mass killings, regardless of the identity of their victims.').

threshold. Likewise, the uncertainty about whether crimes against humanity cover a broad or narrow set of circumstances enabled states with different normative visions to reach agreement. The decision to rest the definition of the crime of aggression squarely on the undefined concepts of 'character, gravity, and scale' undoubtedly contributed to the success of the Review Conference in reaching a definition. In each case, participants could agree that the definition was acceptable in part because the definition was unclear. At least for some of the state actors involved in negotiating the establishment of the ICC, therefore, gravity's ambiguity contributed to perceptions of legitimacy.

However, as the regime becomes increasingly active in adjudicating international crimes, the destructive impact of gravity's ambiguity is likely to increase. State actors and the global public will raise challenges to the legitimacy of international crimes unless their normative foundations are strengthened. Some such challenges have already been raised. Examples include the debates about whether what occurred in Darfur constitutes genocide, whether the pope committed crimes against humanity in his handling of sexual abuse cases, whether mass terrorist killings are crimes against humanity, and whether drone strikes are war crimes.[153] Although aggression has yet to be charged in any case since the post-WWII trials, the legitimacy of the crime of aggression is already a subject of much discussion.[154]

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[153] David Luban, 'Calling Genocide by Its Rightful Name (n 128) 319-20; Kathleen Maloney-Dunn, 'Humanizing Terrorism Through International Criminal Law: Equal Justice for Victims, Fair Treatment of the Suspects, and Fundamental Human Rights at the ICC' (2010) 8 Santa Clara J Intl L 69; Dermot Groome, 'The Church Abuse Scandal: Were Crimes Against Humanity Committed?' (2011) 11 Chi J Intl L 439; Afsheen John Radsan and Richard Murphy, 'The Evolution of Law and Policy for CIA Targeted Killing' (2012) 5 J Natl Security L & Policy 439, 456.

[154] See eg Sean Murphy, 'Aggression, Legitimacy, and the International Criminal Court' (2009) 20 EJIL 1147; David Scheffer, 'The Complex Crime of Aggression Under the Rome Statute' (2010) 20 LJIL 897.

In order to promote the moral, legal, and sociological legitimacy of international prescriptive authority, supporters of international criminal law including state actors, judges, scholars, and advocates should seek to clarify the international values that gravity's ambiguity masks. The final chapter of this thesis suggests a framework for undertaking this task.

CHAPTER 4: INTERNATIONAL AND UNIVERSAL ADJUDICATIVE AUTHORITY

In addition to seeking to lend legitimacy to the concept of 'international crimes', gravity seeks to legitimate the exercise of jurisdiction over such crimes by international courts[1] and by national courts with no connection to the crimes under the doctrine of universal jurisdiction.[2] Discussions of the legitimacy of international criminal law sometimes conflate the legitimacy of international prescriptive and adjudicative authority. They assume that international adjudication is legitimate whenever conduct constitutes an international crime. For instance, Win-chiat Lee asserts that: 'Certain harm harms humanity . . . because it is the legitimate function and authority of the international community to suppress and adjudicate such harm done to the individual.'[3] This statement conflates distinct issues. That certain crimes concern the international community, whether because they harm humanity or for some other reason, serves to justify that community's prescriptive authority over them but not necessarily its adjudicative authority.

States continue to enjoy concurrent authority over crimes even when they amount to international crimes. It is well established that the state where a crime occurred and the state of which the offender is a national have jurisdiction to adjudicate the crime.[4] More controversially, states sometimes assert jurisdiction on the grounds that a crime harmed their nationals or had certain effects within their territories.[5] To determine whether the international community may

[1] For purposes of this analysis, jurisdiction will be considered 'international' when it pertains to institutions established entirely or partially under international law. The jurisdiction of hybrid or 'quasi-international' courts will therefore be considered 'international' herein.
[2] This analysis will not distinguish between situations of so-called 'pure' universal jurisdiction and those where the defendant is present in the state exercising jurisdiction.
[3] Win-chiat Lee, 'International Crimes and Universal Jurisdiction' in Larry May and Zachary Hoskins (eds) *International Criminal Law and Philosophy* (CUP 2010) 37.
[4] JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Sir Humphrey Waldock ed, 6th edn, OUP 1978) 299.
[5] Ibid 299-304.

legitimately exercise adjudicative authority therefore requires a more complex analysis than simply asserting that the crime is 'international'. Gravity is a component of that analysis.

Gravity thus lends legitimacy to the work of the international criminal law regime in two inter-related ways. First, it helps to explain what makes a crime 'international', and thus the legitimate subject of international prescriptive authority and possibly of international adjudicative authority. Second, it helps to justify particular exercises of international adjudicative authority in the face of competing state claims to adjudicative authority.

This Chapter begins by describing how gravity factors into the legal norms that govern the exercise of jurisdiction of international and hybrid or 'quasi-international' courts, as well as that of national courts applying the doctrine of universal jurisdiction. The Chapter shows that the legal norms concerning jurisdictional gravity are poorly defined and thus have limited potential to promote the legitimacy of international adjudication in a normative sense.

The Chapter then evaluates gravity's role in determining the moral legitimacy of international and 'universal' adjudication.[6] Drawing on Buchanan and Keohane's moral theory of institutional legitimacy elaborated in Chapter 1, this Chapter proposes a 'complex theory' of the moral legitimacy of international and universal adjudication. Most of the literature concerning the normative legitimacy of such adjudication fails to consider the full array of relevant factors captured in the complex theory. Instead, most authors claim that one or a few factors are determinative of the legitimacy of international and universal adjudication. Moreover, most authors treat gravity as a threshold requirement for legitimate adjudication. In contrast, this Chapter argues that gravity is a factor to be weighed along with others in the legitimacy assessment. To the extent gravity

[6] I use the term 'universal adjudication' as shorthand for national adjudication applying universal jurisdiction.

legitimates international and universal adjudication, it does so by decreasing the importance of one or more of the other legitimacy factors.

1. Legal Norms of Jurisdictional Gravity

As the international criminal law regime has developed, legal norms concerning gravity have come to play an increasingly significant role in justifying adjudication by international and hybrid or 'quasi-international' courts. While those who established the IMT and IMTFE used gravity rhetoric to justify their actions, they did not employ gravity as a legal requirement for adjudication. Likewise, while the Security Council resolution establishing the ICTY and ICTR referenced the seriousness of the crimes at issue in asserting that the tribunal would contribute to peace and security,[7] the statutes of those tribunals do not include a gravity requirement for adjudication.

The absence of gravity as a legal limit on the exercise of jurisdiction at these courts is due in significant part to the absence of strong competing claims on adjudicative authority. When the IMT, IMTFE, and ICTY were established, no legitimate government sought to exercise jurisdiction over the crimes at issue. Although the Rwandan government did object to the establishment of the ICTR, it was so new and its own authority so weak that its objection had little force.

Moreover, although gravity was not a legal limit on the exercise of jurisdiction at those courts -- except to the extent it was reflected in the definitions of crimes -- it is clear that the judges of those courts considered the gravity of the crimes they were adjudicating to be critical to the legitimacy of their work. For instance, when Dusko Tadić, the tribunal's first defendant, challenged the ICTY's jurisdiction as a violation of state sovereignty, the Appeals Chamber responded by appealing to the gravity of the crimes at issue. It held that because the crimes

[7] UNSC Res 827 (25 May 1993) UN Doc S/Res/827 (stating that the Tribunal has the authority to punish 'serious violations of international humanitarian law').

'affect the whole of mankind and shock the conscience of all nations of the world . . . [t]here can . . . be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community'.[8]

Later, gravity took on additional importance in determining the exercise of jurisdiction at the *ad hoc* tribunals, when the concept was given a central role in the tribunals' so-called 'completion strategies'. In order to facilitate the eventual closure of the tribunals, their rules of procedure were amended to permit the transfer of cases to national courts. In determining whether to transfer a case, the judges are to consider 'the gravity of the crimes charged and the level of responsibility of the accused'.[9] This provision is intended to effectuate the Security Council's determination that the *ad hoc* tribunals should focus on 'the most senior leaders suspected of being most responsible' for crimes within the tribunals' jurisdictions, leaving less serious cases to national courts.[10]

In implementing this rule, the *ad hoc* tribunals have developed a jurisprudence addressing the meaning of gravity for purposes of determining the legitimate reach of international tribunals in the final stages of operation.[11] As with jurisprudence seeking to elucidate the concept of gravity in other contexts, the rulings of the *ad hoc* tribunals concerning which cases merit transfer to national courts leave many open questions. For instance, the case law is unclear about whether the gravity of cases should be considered in absolute terms or in

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[8] *Prosecutor v Tadic* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) ICTY-95-1 (2 October 1995) para 59 (citing *Prosecutor v Tadic* (Decision on the Defense Motion on Jurisdiction) ICTY-94-1 (10 August 1995) para 42).

[9] ICTY Rules of Evidence and Procedure, UN Doc IT/32/Rev.44 (entered into force 29 June 1995, as amended on 10 April 2013) Rule 11 *bis*.

[10] UNSC Res 1534 (2004) UN Doc S/Res/1534 para 5.

[11] Olympia Bekou, 'Rule 11BIS: An Examination of the Process of Referrals to National Courts in ITCY Jurisprudence' (2010) 33 Fordham Intl LJ 723 (discussing the importance and limitations of Rule 11bis in the 'completion strategies' of the ad hoc tribunals); Mohamed El Zeidy, 'From Primacy and Complementarity and Backwards: (re)visiting Rule 11 bis of the ad hoc Tribunals' (2008) 57 ICLQ 403, 414 (stating that Rule 11 bis and complementarity 'ensure[] that only cases of extreme gravity are being dealt with at the international level, while those of lesser magnitude are the responsibility of domestic courts').

relation to other cases before the tribunals.[12] The relevance of various factors to gravity determinations is also unclear. For instance, the cases are inconclusive about whether the gravity of a case can depend in part on its usefulness in establishing a complete historical record.[13]

Importantly, since the *ad hoc* tribunals have primary rather than complementary jurisdiction, the inclusion of gravity criteria in the completion strategy rules can be seen more as a matter of convenience than of normative legitimacy. On the other hand, an argument can be made that once national courts capable of adjudicating the crimes became available, a moral imperative developed for the *ad hoc* tribunals to defer to those courts, at least in some cases.

With the Rome Statute of the ICC, gravity took on a central role in determining the legal legitimacy of international adjudication. As discussed in Chapter 3, the Rome Statute contains various gravity related limits on the Court's subject matter jurisdiction. ICC jurisdiction is limited to 'the most serious crimes of international concern',[14] and each of the crimes within the Court's jurisdiction is defined in part by reference to elements designed to reflect gravity.[15] The Court's jurisdiction over war crimes is to be exercised 'in particular' when such crimes are 'committed as part of a plan or policy or as part of a large-scale commission of such crimes'.[16]

In addition to these gravity-related limits on the Court's subject matter jurisdiction, the Rome Statute limits the ICC's exercise of jurisdiction based on gravity. Under Article 17 of the Rome Statute, the Court is to deem inadmissible

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[12] *Bekou*, Rule 11BIS (n 11) 742-43 (discussing cases).
[13] Ibid.
[14] Rome Statute of the International Criminal Court (adopted 17 July 1998, as corrected by *procés-verbaux* of 10 November 1998, 12 July 1999, 20 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, entered into force 1 July 2002) UN Doc A/CONF.183/9 art 1.
[15] For instance, the definition of crimes against humanity includes not only the element of a 'widespread or systematic attack' but also the requirement that the attack be pursuant to a state or organizational policy. See ibid art 7.
[16] Ibid art 8.

any case that 'is not of sufficient gravity to justify further action by the Court'. Some authors interpret the gravity threshold for admissibility as merely giving the judges discretion to reject a case on the basis of insufficient gravity.[17] This argument derives from the fact that while the Court is required to satisfy itself that it has jurisdiction in every case, it is merely permitted to consider the issue of admissibility on its own motion in the absence of an admissibility challenge by one of the parties.[18] The better view, however, is that the gravity requirement reflects the drafters' understanding of when the exercise of jurisdiction is legitimate. Therefore, as Leila Sadat has argued, it should be consideration 'quasi-jurisdictional'.[19]

Indeed, while the ICC judges may not be required to consider gravity in every case, the Prosecutor must be satisfied that the gravity threshold is met before initiating any investigation.[20] Consideration of the gravity threshold occurs at two stages: when determining whether a 'situation'[21] includes sufficiently grave cases to warrant investigation, and when deciding whether particular cases are grave enough for ICC adjudication. Situations come before the ICC either through a referral by the Security Council or a State Party or by the prosecutor acting *proprio motu.* In either case, the prosecutor must satisfy herself that there is a reasonable basis to investigate, which includes a determination that

[17] See eg Flavia Lattanzi, 'Concurrent Jurisdictions Between Primacy and Complementarity' in Roberto Bellelli (ed), *International Criminal Justice* (Ashgate Publishing 2010) 196 ('Given the primary responsibility of states to suppress crimes of international concern and in order not to overload the Court with too many proceedings, it was decided that the Court would enjoy discretion, on a case-by-case basis, in deciding to leave with national courts the competence for cases with lesser gravity.').
[18] Rome Statute (n 14) art 19.
[19] Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium* (Transnational Publishers 2002) 125.
[20] Rome Statute (n 14) art 53.
[21] A 'situation' is a geographic and sometimes temporal space in which crimes within the jurisdiction of the Court appear to have been committed.

the gravity threshold for admissibility is met.[22] When the prosecutor is acting *proprio motu*, the judges must decide whether to authorize the investigation in part by deciding whether the situation meets the gravity threshold.[23] Once the prosecutor files cases against particular individuals, the question of whether the case is sufficiently grave to merit adjudication may be raised either by the defendant, by a state with jurisdiction, or by the judges acting *proprio motu*.[24] These procedural requirements effectively make the threshold for admissibility a constraint on the exercise of the Court's jurisdiction rather than a discretionary consideration. Indeed, when the gravity threshold was first added to the ILC Draft Statute, it was described as a limit on the Court's 'ability to exercise its jurisdiction'.[25]

Further evidence of the essentially jurisdictional nature of the gravity threshold for admissibility is found in the remaining provisions of Article 17. These require the Court to find inadmissible cases that a state with jurisdiction is genuinely investigating and prosecuting – the so-called 'complementarity' principle – and cases that have already been tried such that ICC adjudication would violate the *ne bis in idem* principle. These principles, in particular the complementarity principle, are widely regarded as restrictions on the Court's adjudicative jurisdiction. The placement of the gravity threshold in the same provision therefore suggests that it serves as a similar restriction on adjudicative authority.

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[22] Rome Statute (n 14) art 53 (requiring the case to be admissible under Article 17 and of 'sufficient gravity to justify further action by the court').
[23] Ibid art 15.
[24] Ibid art 19.
[25] ILC, 'Report of the International Law Commission on the Work of Its 46th Session' (1994) UN Doc A/49/10 (ILC Report, 1994) para 91 (stating that 'at the outset, the court should deem cases inadmissible if they are "not of sufficient gravity to justify further action by the court." In deciding whether this is the case the court is directed to have regard to the purposes of the statute as set out in the preamble.').

The meaning of gravity as a legal threshold for the ICC's exercise of jurisdiction remains unclear. This ambiguity is apparent in the jurisprudence seeking to interpret the requirement. Early efforts to explain the gravity threshold have revealed the difficulty of endowing the provision with any content without effectively modifying the Court's subject matter and personal jurisdictions. In the ICC's first case, the Pre-Trial Chamber declined to issue an arrest warrant on the grounds that the case was insufficiently grave.[26] It held that the gravity threshold requires that the crimes at issue be large-scale or systematic and that the accused be among the senior leaders most responsible for the crimes.[27] The Chamber reasoned that interpreting the gravity threshold in this way would best promote the Court's central goal of deterring serious crimes.[28]

The Appeals Chamber overturned the decision, noting that interpreting the gravity threshold to require large-scale or systematic conduct is incompatible with the Court's broader subject matter jurisdiction over war crimes.[29] Likewise, restricting admissible cases to those involving the most responsible senior leaders would amount to a modification of the Court's personal jurisdiction, and would not necessarily contribute to deterrence.[30]

Having rejected the Pre-Trial Chambers interpretation of the gravity threshold, the Appeals Chamber declined to offer one of its own. However, Judge Pikis wrote separately to express the view that the threshold must be interpreted as excluding only cases that are 'insignificant in themselves; where the

[26] *Situation in the Democratic Republic of Congo* (Decision on the Prosecutor's Application for Warrants of Arrest) Case No. ICC-01/04-01/07 (10 February 2006) 66.
[27] Ibid paras 46-50.
[28] Ibid paras 53-54.
[29] See *Situation in the Democratic Republic of Congo* (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') ICC-01/04-169 (13 July 13 2006) paras 70– 71.
[30] Ibid paras 73-79.

criminality on the part of the culprit is wholly marginal; borderline cases'.[31] In his view, according additional content to the gravity threshold as the Pre-Trial Chamber did would amount to a rewriting of the Court's jurisdiction and would undermine the goal of ending impunity.[32] He concluded: 'Had it been the intention of the law-makers to limit justiciable crimes under the Statute to the most serious ones, they would have established the necessary criteria for their classification'.[33]

While Judge Pikis is right that giving content to the gravity threshold would result in limits on the Court's jurisdiction, his conclusion that the lawmakers would have defined gravity had they intended such limits is more questionable. As elaborated in Chapter 3, it seems more likely that the drafters took advantage of gravity's ambiguity, whether consciously or not, to promote consensus in the negotiations without the need to reach deep agreement on underlying values.

As a result of the Appeals Chamber decision, subsequent efforts to apply the gravity threshold to determine the admissibility of cases have failed to endow the provision with much substance.[34] The Court has consistently recognized that, as a matter of statutory interpretation, the gravity threshold for admissibility necessarily requires some gravity beyond that already required by the definitions of crimes within the Court's jurisdiction.[35] Nonetheless, the judges have

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[31] *Situation in the Democratic Republic of the Congo* (Decision on the Prosecutor's Application for Warrants of Arrest) (n 26), Separate and Partly Dissenting Opinion of Judge Georghios M Pikis para 40 (arguing that such cases should not be brought before the court even when national courts fail to prosecute).
[32] Ibid para 41.
[33] Ibid.
[34] See eg *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11 (23 January 2012) paras 46-47.
[35] See eg *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09 (31 March 2010) para 56 (stating that 'all crimes that fall within the subject-matter jurisdiction of

generally avoided specific pronouncements about what this entails by applying a flexible, factor-based test to determine when the threshold is met. The relevant factors are both quantitative – essentially, the number of victims – and qualitative – the 'nature, manner, and impact' of the crimes.[36] In elaborating on the qualitative factors, the judges look to the provision of the Court's Rules of Procedure and Evidence governing gravity for sentencing purposes. These require consideration of 'the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime'.[37]

The flexibility of this factor-based test has enabled the Court to conclude that most cases are sufficiently grave to meet the admissibility threshold. The Court found, for instance, that a case involving the killing of 12 peacekeepers was sufficiently grave in light of the consequences of the crime for the victims, their families, and peacekeeping operations in the area.[38] In sum, the gravity threshold appears unlikely to function as a serious constraint on the exercise of jurisdiction over cases the prosecutor brings before the Court.

There is some indication in the jurisprudence that the gravity threshold may play a slightly more significant role in excluding *situations* the prosecutor seeks to investigate. Recall that when the prosecutor proposes to open an investigation *proprio motu*, he or she must request authorization from the Court, which must be satisfied that the situation appears admissible. In this context, the Court must consider the gravity not of actual cases (particular crimes and suspects), but of the cases likely to be brought in the situation. The ICC made

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the court are serious, and thus, the reference to the insufficiency of gravity is actually an additional safeguard, which prevents the court from investigating, prosecuting and trying peripheral cases').

[36] See eg *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010) para 31; *Situation in the Republic of Kenya* (Decision on the Authorization of an Investigation) (n 35) para 62.

[37] Rules of Procedure & Evidence (2000) UN Doc ICC-ASP/1/3 s 145(1)(c).

[38] *Abu Garda* (Decision on the Confirmation of Charges) (n 36) paras 33-34.

such a determination in granting the prosecutor authorization to investigate the situation involving post-election violence in Kenya. A Pre-Trial Chamber held that in addition to evaluating the alleged crimes according to the quantitative and qualitative factors set forth above, the Court must be satisfied that the groups likely to be investigated include those who bear the greatest responsibility for the crimes alleged.[39]

While this holding revives the notion that the gravity threshold requires a certain type of defendant – one of the most responsible – it does not restrict the Court's personal jurisdiction. Instead, by requiring the prosecutor to at least investigate those most responsible, the holding limits the Prosecutor's discretion to shape the situations that come before the ICC. In practice, this requirement is unlikely to have much effect since the prosecutor has strong incentives to investigate those most responsible. However, in the event the prosecutor wishes to initiate an investigation that excludes those most responsible – perhaps to draw attention to a particular type of criminality – authorization may be denied on the basis of the gravity threshold.

Finally, the ICC prosecutor has once used the claim that a situation was insufficiently grave to justify declining to investigate and prosecute crimes within the Court's jurisdiction. When the Court's first prosecutor, Luis Moreno Ocampo, was urged to investigation war crimes committed by British soldiers in Iraq, he responded that, although there was a reasonable basis to believe British soldiers had committed war crimes, including four to twelve willful killings, the situation did not meet the gravity threshold for admissibility.[40] Moreno Ocampo reasoned

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[39] See eg *Situation in the Republic of Kenya*, (Decision on the Authorization of an Investigation) (n 35) para 60. For an analysis of this decision, see Charles Chernor Jalloh, 'International Decision: Situation in the Republic of Kenya No. ICC-01/09-19: Decision on the Authorization of an Investigation' (2011) 105 AJIL 540.

[40] ICC-OTP, Luis Moreno-Ocampo, 'Letter Concerning Situations in Iraq' (9 February 2006) 1, 8 <www.cara1933.org/userfiles/File/ICC%20Report%20%209February%202006.pdf> accessed 16 October 2014. The Prosecutor also found that the situation did not appear to meet the permissive

that the number of victims 'was of a different order' than that in other situations before the Court, which involve thousands of deaths.[41]

By applying the gravity threshold in this comparative manner, the prosecutor blurred the distinction between gravity as a limit on the Court's exercise of jurisdiction and gravity as a factor in the Prosecutor's discretionary decisions about how to allocate investigative and prosecutorial resources. The decision was heavily criticized[42] and neither Moreno Ocampo nor his successor has since publicly declined to investigate a situation based on insufficient gravity. In sum, although the concept of gravity functions as a legal limit on the exercise of the ICC's jurisdiction, it remains ambiguous in this context and has thus far played a fairly marginal role in determining the situations and cases the Court adjudicates.

The hybrid tribunals have no generalized gravity threshold for admissibility but, unlike the other international courts, they have a gravity-based limitation on their personal jurisdictions. The Statute of the SCSL limits the court's competence to:

> persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law . . . including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.[43]

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threshold of Article 8(1). Ibid 8-9.

[41] Ibid (stating that even if the acts did meet the permissive threshold of Article 8(1), the gravity requirement would not be met, as the killing of four to 12 people would be 'under a different order than the number of victims found in other situations under investigation or analysis by our office'.).

[42] See eg William A Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 J Intl Crim Just 731, 739.

[43] Statute of the Special Court for Sierra Leone (signed 16 January 2002) UN Doc S/2002/246 (SCSL Statute) art 1.

This language provoked debate at the SCSL regarding whether it (1) includes person who, although not political or military leaders, had committed particularly heinous acts; and (2) constitutes a restriction on the SCSL's subject matter jurisdiction or was merely intended as a guide to the prosecutor.[44] When the SCSL statute was drafted, the Security Council rejected an effort by the UN Secretary General to broaden the language to indicate more clearly that it included not only senior leaders, but also those responsible for the most serious crimes.[45] However, the SCSL had difficulty interpreting this provision in light of its vagueness.[46]

With regard to whether the provision limits the SCSL's jurisdiction or provides guidance to the prosecutor, the Court's trial chambers issued conflicting opinions.[47] The Appeals Chamber resolved the issue in favor of the latter interpretation.[48] As Charles Jalloh points out, however, this ruling is dubious as a matter of statutory interpretation,[49] particularly given that it is contained in a provision labeled 'competence of the Special Court'.[50]

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[44] For a detailed discussion of these controversies see Charles Chernor Jalloh, 'Prosecuting Those Bearing "Greatest Responsibility": Lessons from the Special Court for Sierra Leone' (2013) 96 Marq L Rev 863.

[45] Letter from the President of the Security Council to the Secretary General, UN Doc S/2000/1234 (22 December 2000) 1; see also Jalloh, 'Prosecuting Those Bearing "Greatest Responsibility"' (n 44) 890-891 (detailing the correspondence between the Secretary General and the Security Council on the meaning and scope of those 'who bear the greatest responsibility').

[46] Jalloh, 'Prosecuting Those Bearing "Greatest Responsibility"' (n 44) 890-891.

[47] Compare *Prosecutor v Fofana* (Judgment) SCSL-04-14-T (2 August 2007) paras 91–2 (stating that 'this requirement was not solely a matter of prosecutorial discretion, but was also a jurisdictional limitation upon the court, the determination of which is a judicial function') with *Prosecutor v Brima*, (Judgment) SCSL-04-16-T (2007) para 653 (finding 'greatest responsibility' personal jurisdiction language as 'solely purport[ing] to streamline the focus of prosecutorial strategy').

[48] See *Prosecutor v Brima, Kamara, and Kanu* (Appeals Judgment) SCSL-2004-16-A (22 February 2008) para 282 (reasoning 'that the only workable interpretation of Article 1(1) is that it guides the Prosecutor in the exercise of his prosecutorial discretion').

[49] Jalloh, 'Prosecuting Those Bearing "Greatest Responsibility"' (n 44) 892-93.

[50] SCSL Statute (n 43) art 1.

The personal jurisdiction of the Extraordinary Chambers in the Courts of Cambodia (ECCC) is also limited, although it more clearly extends to non-leaders. The ECCC's competence includes 'senior leaders of Democratic Kampuchea and those who were most responsible for the crimes' within the court's temporal jurisdiction.[51]

Neither of these courts' statutes indicates what criteria prosecutors and judges should consider in determining whether potential defendants meet the required level of responsibility. The issue has been particularly controversial at the ECCC where the international and Cambodian co-prosecutors have disagreed about which defendants should be charged,[52] and the international and Cambodian judges have likewise been split on the issue.[53] Thus, although the reach of the hybrid courts is limited according to the seriousness of the perpetrator's responsibility, no legal standard has emerged for judging such responsibility.

Gravity's role as a legal requirement for universal jurisdiction over international crimes is similarly unclear. On the one hand, many authorities assert that the legal, as well as moral, basis for such jurisdiction is the grave nature of the crimes at issue.[54] In particular, although the International Court of Justice has

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[51] See Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments (adopted 27 October 2004) NS/RKM/1004/006 (ECCC Statute) art 2 new.

[52] See ECCC Office of the Co-Prosecutors, 'Statement of the Co-Prosecutors' (5 January 2009) <http://www.cambodiatribunal.org/assets/pdf/reports/statement_of_the_coprosecutors_jan_5.pdf> accessed 18 October 2014; for a discussion of this disagreement see Seth Mydans, 'Cambodia Trial Dispute Runs Deeper' (2009) *The New York Times* (New York, 7 February 2009) <www.nytimes.com/2009/01/27/world/asia/27iht-cambo.1.19708207.html> accessed 3 October 2014.

[53] See 'Annex II: Excerpt of the Considerations of the Pre-trial Chamber Regarding the Disagreement of the Co-prosecutors Pursuant to Internal Rule 71' (18 August 2009) Disagreement No 001/18-11-2008-ECCC/PTC paras 44-45.

[54] UNGA Sixth Committee (67th Session) 'The Scope and Application of the Principle of Universal Jurisdiction' (9 November 2012) UN Doc A/C.6/67/L.16 (concerning the related question of crimes covered by the principle, several delegations noted that the principle covered the most serious or heinous crimes of concern to the international community); Leila Nadya Sadat, 'Exile, Amnesty, and International Law' (2006) Notre Dame L Rev 955, 975 ('Application of universal jurisdiction is predicated largely on the notion that some crimes are so heinous that they

yet to rule on the legality of universal jurisdiction for international crimes, in the *Arrest Warrant* case some of the judges expressed their support for such jurisdiction as well as their view that it is rooted in the gravity of the crimes.[55] On the other hand, universal jurisdiction is not limited to the crimes that are typically considered to offend humanity – genocide, crimes against humanity, and war crimes – but extends also to crimes like piracy that are not considered especially serious. As explained in Chapter 2, although pirates have been called *hostes humani generis*, the enemies of all mankind, the label is based more on the indiscriminate nature of their crimes than on their special gravity.[56]

Moreover, the treaties that include provisions requiring states to extradite or prosecute persons suspected of certain crimes on their territories do not limit prosecution to widespread or systematic instances of the crimes. The requirement of *aut dedere aut judicare* under the Convention Against Torture and Geneva Convention's grave breaches provisions, for instance, extend to single instances of such crimes.[57] In the famous case against Augusto Pinochet, the British House

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offend the interest of all humanity, and, indeed, imperil civilization itself.'); see also Princeton Project on Universal Jurisdiction, 'Princeton Principles on Universal Jurisdiction' (2001) 23 <https://lapa.princeton.edu/hosteddocs/unive_jur.pdf> accessed 18 October 2014 ('national courts may nevertheless exercise jurisdiction under international law over crimes of such exceptional gravity that they effect the fundamental interests of the international community as a whole'); *Attorney General of Israel v Adolf Eichmann* 36 ILR 18, 26 (1961) (Isr) (claiming that 'the abhorrent crimes defined in [Israeli] Law are not crimes under Israel [sic] law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself').

[55] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Judgment) [2002] ICJ Rep para 60 (stating that it is 'equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community'); ibid (Dissenting Opinion of *ad hoc* Judge Van den Wyngaert) para 46 ('[U]niversal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its raison d'etre is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third countries').

[56] For discussion, see Chapter 2, above.

[57] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984) 1465 UNTS 85, 23 ILM 1027 (1984), *as modified by* 24 ILM 535 (1985), *entered into force* 26 June 1987, art 1 (defining 'torture' as 'any *act* [emphasis added] by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

of Lords was split on whether universal jurisdiction over torture is limited to widespread or systematic instances of that crime.[58] Statutes adopting the doctrine of universal jurisdiction likewise reveal different views as to the importance of gravity. For instance, Swedish courts are permitted to prosecute any crime, wherever committed, that is punishable by more than four years' imprisonment under Swedish Law.[59] In contrast, the law of Germany limits universal jurisdiction to genocide, crimes against humanity, and serious war crimes.[60]

In sum, gravity plays a significant yet ambiguous role in the legal rules governing adjudication of crimes in international courts and in national courts exercising universal jurisdiction. As a consequence of this ambiguity, the legal norms concerning jurisdictional gravity are currently incapable of contributing greatly to the normative legitimacy of such adjudication.

2. A Complex Theory of Moral Legitimacy

The literature regarding the moral legitimacy of international and universal adjudication remains in its infancy. This section offers a new framework for making such legitimacy evaluations. It argues that the moral legitimacy of adjudication at international courts and in national courts exercising

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for such purposes as obtaining from him or a third person information or a confession…'); see also Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 (Fourth Geneva Convention) art 146.

[58] *Pinochet* (No 3) (n 54) 911-912 (Compare Lord Millett stating that universal jurisdiction is proper where the offense is 'so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offenses, even if committed by public officials, would not satisfy this criteria.') with ibid (Opinion of Lord Hutton) (stating that 'a single act of torture carried out or instigated by a public official or other person acting in an official capacity constitutes a crime against international law, and that torture does not become an international crime only when it is committed or instigated on a large scale.').

[59] See Swedish Penal Code, ch 2, s 3, art 7; see also Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (OUP 2004) 108.

[60] German Penal Code s 6; see also Amnesty International 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World' (2012) <www.amnesty.org/en/library/asset/IOR53/019/2012/en/2769ce03-16b7-4dd7-8ea3-95f4c64a522a/ior530192012en.pdf> accessed 17 October 2014.

universal jurisdiction depends on a comprehensive evaluation of the following factors: (1) the benefit that such adjudication offers compared to the alternative; (2) the effectiveness of such adjudication; (3) the fairness of the adjudicative process; (4) the degree to which relevant states have consented to such adjudication; and (5) the accountability and transparency of the institutions.[61]

In setting forth this framework, the Chapter offers two critiques of the literature on the moral legitimacy of international and universal adjudication. First, most of the literature seeks to identify one or a small number of factors affecting legitimacy rather than adopting the comprehensive approach advocated here. Second, the literature fails adequately to capture the role of gravity in the legitimacy analysis. Virtually all of the current theories treat gravity as a threshold requirement. I argue instead that gravity is a relevant consideration in determinations of the comparative benefit and effectiveness of adjudication by international courts and national courts exercising universal jurisdiction; but it must be weighed with other relevant considerations. Legitimacy is not an absolute attribute. Rather, an institution's claim to legitimate adjudication is stronger or weaker according to the extent to which it fulfills these criteria. Likewise, gravity is not a threshold but a consideration to be balanced with the other factors, decreasing their importance as gravity increases.

In arguing that gravity is an important factor in the moral legitimacy analysis, this Chapter assumes that the concept of gravity can be given morally meaningful content. Chapter 5 proposes a process for such identification.

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[61] These factors largely mirror those set forth in Allen Buchanan and Robert Keohane's article 'The Legitimacy of Global Governance Institutions' discussed in Chapter 1. However, because this Chapter proposes a framework for evaluating the legitimacy of adjudication rather than of institutions as a whole, the factors have been modified in important respects. For instance, I discuss the effectiveness of adjudication rather than the integrity of the adjudicating institutions and state consent to adjudication rather than to the regime as a whole.

i. Comparative benefit

Perhaps the most important factor in determinations of the moral legitimacy of international and universal adjudication is whether such adjudication provides a benefit compared to the alternative. Indeed, many commentators focus on this factor as the primary determinant of legitimacy. To determine comparative benefit, it is necessary to answer two sets of questions: First, what is the alternative to international adjudication and what, if any, are its benefits? And, second, what are the benefits of international and universal national adjudication? Theorists who seek to answer these questions tend to assume that a gravity threshold must be passed without examining how gravity affects comparative benefit.

With regard to the first question – what is the alternative – authors tend take one of three approaches. First, some commentators assert that international adjudication is morally legitimate even when the alternative is fair adjudication in a legitimate national system with primary jurisdiction.[62] According to this view, international courts are better suited to adjudicate certain crimes than are national courts. This claim usually rests on the idea that international courts are so grave that an international response is needed.[63] The late renowned international Judge Antonio Cassese was a proponent of this view, which was the basis for the primary jurisdiction of the *ad hoc* tribunals.[64] Today, however, most commentators agree that in some circumstances national adjudication of

[62] By 'primary jurisdiction' I mean jurisdiction based on one of the traditional bases of jurisdiction discussed above, in particular, territoriality or nationality.
[63] See Antonio Cassese, 'The Rationale for International Criminal Justice' in Antonio Cassese and others (eds), *The Oxford Companion to International Criminal Justice* (OUP 2009) 123, 127.
[64] Ibid; see also Stephano Bibas and William W Burke-White, 'International Idealism Meets Domestic Criminal Procedure Realism' (2007) 59 Duke L J 637, 647; Jenia Iontcheva Turner, 'Nationalizing International Criminal Law' (2005) 41 Stan J Intl L 1, 15-16 (asserting that the international system has more impartial judges and that 'the ICC is said to have an important symbolic, norm-reinforcing value').

international crimes by states with jurisdiction is preferable to international adjudication.

Second, some commentators argue that international and universal adjudication are only legitimate when no state with primary jurisdiction is willing and able to prosecute. In other words, international and universal adjudication provide a benefit compared to the alternative of impunity but not compared to national adjudication based on traditional bases of jurisdiction.

Commentators who adopt this view often build the inability or unwillingness to prosecute into their definition of international crimes. Thus, for Win-chiat Lee, 'core' international crimes are those that states commit or tolerate on their territories.[65] Altman and Wellman expand the category to include not only crimes that involve culpable state actors, but also any serious crimes committed on a 'widespread or systematic' basis that a state is unwilling or unable to prosecute, including 'ordinary' crimes like rape and murder.[66] Both of these theories locate moral legitimacy significantly in the state's failure to fulfill its protective and adjudicative responsibilities toward its citizens. According to such authors, only when a state has failed in these ways is it morally legitimate for international courts or national courts exercising universal jurisdiction to adjudicate. Although proponents of this approach sometimes deny that gravity plays a significant role in their theories,[67] they generally rely on gravity to explain why international jurisdiction should not extend to 'ordinary' crimes or, in the

[65] Lee, 'International Crimes and Universal Jurisdiction' (n 3) 32.
[66] Andrew Altman and Christopher Heath Wellman, 'A Defense of International Criminal Law' (2004) 115 Ethics 35, 35-36.
[67] Lee, 'International Crimes and Universal Jurisdiction' (n 3) 18 (the justification for universal jurisdiction 'is based on the nature of the crimes involved - not so much on the kind of harm they inflict (they all involve serious harm done to individuals), but more on how they pertain to the political authority of states'; Altman and Wellman, 'Defense of International Criminal Law' (n 66) 43 (arguing that 'a proper understanding of state sovereignty reveals that international jurisdiction over moral wrongs does not hinge on the perpetration of especially heinous "supercrimes"').

case of Altman and Wellman, they include such crimes but with the gravity-based caveat that they must be 'widespread or systematic'.[68]

These first two approaches to the question of comparative benefit are both excessively categorical and incorrectly assume that the concept of gravity is capable of providing a moral threshold to legitimate adjudication. According to these theories, international adjudication is either always appropriate when international crimes are committed or never appropriate unless national systems have failed. The first approach suggests that whenever crimes are sufficiently grave international adjudication is legitimate; the second treats gravity as a threshold requirement for the kinds of crimes eligible for international adjudication when states fail in their responsibilities.

A third approach – the one advocated here – is more nuanced. It posits that international and universal national adjudication are sometimes morally appropriate even when national courts with primary jurisdiction are willing and able to adjudicate. Moreover, it treats gravity as one component of the comparative benefit analysis but not as a threshold consideration. The grave nature of crimes sometimes helps to explain why the exercise of international or universal jurisdiction is more beneficial than national adjudication by a state with primary jurisdiction, but it is just one factor in that analysis.

The legitimacy assessment thus requires a comprehensive evaluation of the benefits of international and national adjudication. Many authors address the benefits of such adjudication by invoking particular interests of the international community. Some authors, like Larry May, frame the international community's interest as that of addressing harm that has been done to the community.[69] Others

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[68] Lee, 'International Crimes and Universal Jurisdiction' (n 3) 18; Altman and Wellman, 'Defense of International Criminal Law' (n 66) 35.

[69] See Larry May, *Crimes Against Humanity: A Normative Account* (CUP 2005) 83; see also Sadat, 'Exile, Amnesty, and International Law' (n 54) 975 ('Application of universal jurisdiction is predicated largely on the notion that some crimes are so heinous that they offend the interest of all

reject the idea that the international community is harmed by international crimes, but nonetheless assert that the international community has an interest in their prosecution.[70] In either case, commentators generally accept that the international community's interest does not arise until a gravity threshold is passed.[71]

Antony Duff, for instance, espouses a communicative theory of international criminal law that rests on the idea that the international community has an interest in expressing condemnation of particularly serious crimes.[72] In Duff's view, the moral legitimacy of all punishment lies in the need to communicate a message of condemnation to the offender.[73] Usually, it is the political community to which the offender belongs that has the right to engage in such communication. For international crimes, which he understands as particularly serious crimes committed by or with the acquiescence of state officials,[74] the offender's political community often fails to fulfill this task. In

humanity, and, indeed, imperil civilization itself'); *Pinochet* (No 3), Opinion of Lord Browne-Wilkinson (n 54) 589 ('International law provides that offences jus cogens may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution"').

[70] Lee, 'International Crimes and Universal Jurisdiction' (n 3) 46.

[71] Some state representatives have articulated the view that universal jurisdiction is legitimate in light of the gravity of the crimes. See UNGA 'Report of the Secretary-General on the Scope and Application of the Principle of Universal Jurisdiction' (29 July 2010) 56th Session UN Doc A/65/181, 10; see also Ariel Zemach, 'Limits of International Criminal Law: House Demolitions in an Occupied Territory' (2004) 20 Conn J Intl L 1, 16 ('The main interest underlying universal jurisdiction concerns the special moral gravity of the conduct. An especially egregious conduct offends the entire human society and thus offends all national societies.'); Steven R Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 AJIL 888, 895 ('Although morally any sort of impunity for atrocities is unacceptable, universal jurisdiction ought to be reserved for particularly heinous offenses, evidenced through exceptional cruelty or large numbers of victims.').

[72] Antony Duff, 'Authority and Responsibility in International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 594, 601-602; see also Massimo Renzo, 'Responsibility and Answerability in the Criminal Law' in RA Duff and others (eds), *The Constitution of the Criminal Law* (OUP 2013) 209.

[73] Duff, 'Authority and Responsibility in International Criminal Law' (n 72) 594.

[74] Ibid 592.

that case, another state or the international community represented by the ICC may step in because the crimes are of interest to all people.[75]

Duff emphasizes that the international community is not a political community but rather a moral one. Indeed, he argues that, in adjudicating international crimes, the ICC may help to constitute that community. He states:

> We can also see the creation of the ICC as one of the ways in which the moral ideal of a human community might be given more determinate and effective institutional form: the existence of a community is often a matter more of aspiration than of achieved fact, and a recognition of human community could be a recognition of what we should aspire to create.[76]

In some of his writing, Duff suggests that this moral community may call perpetrators to account through the exercise of international jurisdiction.[77] In a piece on universal jurisdiction, however, Duff asserts that punishment is only legitimate on behalf of political communities.[78] On this account, national courts applying universal jurisdiction act on behalf of national communities, both their own and those of the states where the crimes were committed, but only in cases where all humans have an interest in accountability.[79] In either case, for Duff the legitimacy of international and universal adjudication depends on the existence of a global interest in such adjudication. This interest exists only for sufficiently

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[75] Ibid 593; see also Adeno Addis, 'Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction' (2009) 31 Hum Rts Q 129, 159 (arguing that 'universal jurisdiction is communitarian. It is about protecting or cultivating the international community rather than simply protecting individuals who happen to be citizens or residents of other countries.').
[76] Duff, 'Authority and Responsibility in International Law' (n 72) 601.
[77] Ibid.
[78] Antony Duff, 'Aut Dedere Aut Judicare' (2014) Minnesota Legal Studies Research Paper No. 14-04 17 <http://ssrn.com/abstract=2387719> accessed 16 October 2014.
[79] Ibid.

serious crimes, although Duff does not explain what is required for a crime to qualify.[80]

James Bohman advances an even stronger version of the claim that international adjudication is morally appropriate because all of humanity has an interest in such adjudication. Unlike Duff, Bohman believes that 'the community of humanity is a *political* community' that has not just the right, but also the obligation to prosecute certain crimes.[81] The existence of the international political community 'demands the development of an international judicial and political system….'[82] The purpose of punishment in such a system is to grant victims the recognition that their offenders denied them.[83] As such, the ICC is not just a 'stopgap' for non-functioning national courts but a representative of the politically organized international community.[84]

Like Duff, Bohman relies on the idea that certain especially serious crimes – in particular crimes against humanity – concern the international community, but leaves the definition of such crimes, including the role of gravity, unclear. In fact, Bohman makes contradictory claims about the nature of such crimes. On the one hand, he states that the term 'crimes against humanity' 'expresses the depth of the violation at stake and the heinous character of the crime'.[85] On the other, he argues that 'such crimes are not distinguished from others due to their particularly horrifying nature, as heinous as they are', but rather by the fact that they violate

[80] Chehtman criticizes Duff on this score. Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Jurisdiction* (OUP 2010) 100, 128 (stating that 'the question subsists of how that makes it every state's business to punish someone for an act of genocide but not for a single homicide or rape committed extraterritorially. This, Duff does not explain, and it is precisely what he needs to explain.').
[81] James Bohman, 'Punishment as a Political Obligation: Crimes Against Humanity and the Enforceable Right to Membership' (2002) 5 Buff Crim L Rev 551, 567 (emphasis added). On the international community as a political community, see also Noah Feldman 'Cosmopolitan Law?' (2007) 116 Yale LJ 1022.
[82] Bohman, 'Punishment as a Political Obligation' (n 81) 567.
[83] Ibid 568-569.
[84] Ibid 565.
[85] Ibid 566.

the victim's humanity, 'defined politically as their membership in the international community'.[86] Thus, while Bohman makes a strong argument that international jurisdiction for some crimes is morally appropriate, he leaves the reader uncertain as to which crimes are included.

While authors such as May, Duff and Bohman explain the benefit of international and universal adjudication as fulfilling an interest of the international community, others find such benefit in generally applicable theories of criminal law. A good example of this approach can be found in Alejandro Chehtman's thoughtful book on the *Philosophical Foundations of Extraterritorial Jurisdiction*. Chehtman argues that the moral justification for any authority to punish is the interest that individuals subject to that authority have in there being a system of criminal law in force.[87] That interest inheres in the fact that the existence of a criminal law system contributes to the individuals' sense of dignity and security. Chehtman reasons that for certain crimes that states are unwilling or unable to prosecute, the prohibition cannot be considered to be in force absent universal jurisdiction. Thus, it is not the interests of the international community that render universal jurisdiction legitimate, but the interests of individuals in having the prohibitions against international crimes in force in their states.[88]

This general theory of crimes is not, however, sufficient to render international and universal adjudication legitimate under Chehtman's theory. This is because the individual's interest in having a system of criminal law in force must be balanced against the interest that states have in being 'self-governing entit[ies]'. This sovereignty interest, according to Chehtman, entitles

[86] Ibid 568.
[87] Chehtman, *The Philosophical Foundations of Extraterritorial Jurisdiction* (n 80) 40.
[88] Ibid 121.

states to immunity from extraterritorial punishment for most crimes committed on their territories.[89]

This is where the gravity threshold enters Chehtman's theory. The individual's interest in having criminal prohibitions in force only supersedes the state's sovereignty interest when violations of fundamental rights are committed on a widespread or systematic scale.[90] Chehtman implies that there may also be a limitation to certain kinds of perpetrators – the worst kinds – that would prohibit universal jurisdiction, for example, over a single individual's attempted genocide. According to Chehtman, extraterritorial adjudication is not necessary to ensure that the prohibition against such an act is in force in states.[91]

Chehtman's view – that the legitimacy of extraterritorial jurisdiction over international crimes rests on the interests of all individuals in having the prohibitions against such crimes in force – leads him to conclude that the ICC should exercise universal jurisdiction. He writes:

> [I]f we take seriously the interests of individuals worldwide and we admit that millions of individuals living in different parts of the globe share an interest in there being a criminal law system in force that prohibits, inter alia, genocide, war crimes, and crimes against humanity, then it must follow that the ICC should have the normative power to punish individuals responsible for any of these crimes irrespective of whether the Security Council refers the situation to the Prosecutor acting under Chapter VII of the UN Charter.[92]

Chehtman therefore implicitly rejects the idea that state consent may affect the legitimacy of international and universal adjudication. On the other hand, he

[89] Ibid 103.
[90] Ibid.
[91] Ibid.
[92] Ibid 134.

asserts that fairness is a necessary condition for such legitimacy, arguing that an unfair system will not be credible and will therefore not satisfy the interest of all individuals in having a system of criminal law in place.[93] For Chehtman, therefore, legitimate extraterritorial adjudication requires both a gravity threshold to be met and a degree of fairness to be assured.

Like Chehtman, Noah Feldman rejects the idea that the legitimacy of universal jurisdiction derives from norms associated with the international community. He notes that: 'not everyone thinks that the international community is sufficiently powerful in associational terms to promulgate justifiably binding law in the way a state does'.[94] Instead, Feldman proposes a theory of legitimacy grounded in 'a cosmopolitan conception of law that relies on a natural duty to comply with just laws'.[95] He begins by positing that to be morally legitimate a legal system must, among other things, punish people who commit 'heinous crimes' when it is capable of doing so at a reasonable cost.[96] From this premise he derives the conclusion that each legal system has 'the duty to apply its version of the set of universal laws to everyone with whom it comes into contact'.[97] Feldman does not explain how a legal system can determine what 'heinous crimes' are subjects of these 'universal laws'. He denies that the inquiry is based on natural law, but does not provide an alternative genesis.[98]

Feldman states that this theory of universal jurisdiction is likely to be both unpopular and impracticable because '[i]t could be used to expand universal

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[93] Chehtman, *The Philosophical Foundations of Extraterritorial Jurisdiction* (n 80) 150. Chehtman's analysis separates the questions of the justification to punish and the authority to do so, asserting that the former relates to whether there is a sufficiently important interest in inflicting punishment, while the latter pertains to whether an institution's decisions should be treated as binding. Ibid 152. Many other writers, including the present author, treat these questions as inseparable.
[94] Feldman, 'Cosmopolitan Law?' (n 81) 1062.
[95] Ibid 1061.
[96] Ibid 1063.
[97] Ibid 1064.
[98] Ibid 1065.

jurisdiction to cover a broad range of crimes on which there is no international consensus'.[99] He therefore also proposes 'a more modest version of a cosmopolitan conception of legal duty'.[100] This version, which he calls 'minimalist legal cosmopolitanism', rests not on the legitimacy of individual legal systems but on that of the totality of legal systems in the world. It suggests that the world's legal systems will be illegitimate if there are impunity gaps for serious crimes. For that reason, when a local legal system refuses to apply its laws to a '(serious) situation' other legal systems can fill the jurisdictional gap.[101] Feldman states that the ICC arguably reflects such an approach since it 'functions as a stopgap to fill legal vacuums that are treated as morally illegitimate'.[102]

Both Feldman's account of universal jurisdiction and his 'minimalist legal cosmopolitanism', like Chehtman's theory, rely on a gravity threshold to distinguish situations that warrant expanded jurisdiction without providing a location for that threshold. In doing so, they beg an important aspect of the inquiry into what makes international and universal adjudication morally legitimate. If accountability for certain crimes is essential either to ensuring that legal rules are in force or to securing the legitimacy of legal systems, it seems quite important to know which crimes cross the threshold. Yet neither these theorists nor the others discussed herein provide satisfactory answers to that question.

The complex theory advocated herein accepts the arguments of authors like May, Duff, and Bohman that international and universal adjudication provide a benefit to the international community as well as the claims of authors like Chehtman and Feldman that they help to ensure the legitimacy of the world's legal systems broadly. The primary benefit of such adjudication is that it helps to

[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid 1067.

prevent crimes, both by expressing legal norms regarding particular types of conduct and by assuring people of the existence of a system to enforce those norms. As Chapter 5 elaborates, pursuing these international benefits should be considered the main goals of international adjudication. In addition, international and universal adjudication can benefit the national communities most directly affected by crimes in various ways, including by promoting individual and general deterrence as well as truth telling and even reconciliation.

Such international and national benefits do not always militate in favor of international or universal adjudication, however. National proceedings that rank high in terms of the other legitimacy factors may be able to satisfy these interests as well. Moreover, such proceedings have additional benefits to national communities that must also be taken into account. National proceedings may be more effective at preventing crime at the local level since they communicate more directly to the local population. National prosecutions, or indeed, certain non-criminal justice mechanisms such as truth commissions, may be more effective in terms of such goals as establishing the truth, reconciling communities, and contributing to peace.

In order to determine whether the exercise of international or universal jurisdiction provides a benefit compared to the alternative, therefore, it is necessary to evaluate the likely benefits of each forum and to decide whether the benefits to the international community of international adjudication outweigh those to the national community of national adjudication. Gravity has a role to play in this evaluation, but it does not function as a threshold, as most authors state or imply. Instead, it is one of the many considerations to be taken into account in determining comparative benefit. The more serious a crime, all other things being equal, the greater the international interest in its adjudication and therefore the more likely it is that international or universal national adjudication will be legitimate.

ii. Effectiveness

Another important factor affecting the moral legitimacy of international and universal adjudication is whether the institutions engaging in such adjudication are effective.[103] Effectiveness in this context refers to the extent to which institutions are accomplishing the goals for which they were established or that were subsequently identified for them by relevant constituencies.[104] This goal-based approach to the effectiveness of international courts is not the dominant one in legal scholarship, which tends to look instead to the amount of compliance that courts generate through their judgments. However, as Yuval Shany has argued, goal attainment is a better measure of the effectiveness of international courts than compliance for at least two reasons. First, judgment compliance may be high for courts that aim low, avoiding controversy rather than maximizing impact. Second, compliance lacks a normative component – an institution that changes state behavior in undesirable ways should not be considered effective. As such, a better measure of effectiveness – indeed, the one that dominates the social science literature – is whether an organization accomplishes its goals within a reasonable time.[105]

Evaluating the effectiveness of international and universal adjudication is complicated by the ambiguity of the goals of such adjudication. As Shany points out, political realities often impede agreement on clear goals for international institutions.[106] The ICC provides an excellent example of this 'constructive

[103] Buchanan and Keohane call this 'institutional integrity' and discuss 'egregious' disparities between performance and proclaimed procedures and goals. Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics & Intl Affairs 423. However, they also consider under this factor whether an institution's 'practices or procedures predictably undermine the pursuit of the very goals in terms of which it justifies its existence'. Ibid 424. In my view, the term 'effectiveness' better captures this broader range of relevant issues.
[104] Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 14.
[105] Ibid 14.
[106] Ibid 20-21.

ambiguity'.[107] As explained in Chapter 3, the gravity threshold for admissibility seems to have been included in the Rome Statute in part to avoid having to reach detailed agreement about the institution's goals and priorities. As a result of this and other political compromises, the ICC suffers from a high degree of ambiguity regarding its overall mission, its operative goals, and its priorities. This ambiguity makes it very challenging to assess the ICC's effectiveness.

Nonetheless, Shany and two co-authors have undertaken to conduct an evaluation of the ICC's effectiveness using the goal-based framework.[108] Surprisingly, they do not address the issue of goal ambiguity in performing their assessment. This leads them to consider effectiveness in relation to a very long and ill-defined set of goals and to reach some questionable conclusions.

Shany's effectiveness framework focuses on goals adopted by 'mandate providers', in this case the states parties to the Rome Statute, and examines primarily four types of goals that Shany asserts are common to all international courts: supporting international norms, resolving international disputes, supporting the regime in which they are embedded, and legitimating themselves and the institutions that establish them.[109] Shany and his co-authors assert that the ICC is pursuing a host of goals in each of these categories. With regard to the goal of 'norm support' they identify the goals of the ICC as: ending impunity, generating deterrence, norm internalization, and norm development. In the category of 'dispute resolution and problem solving' they list: ending impunity, promoting peace and security, victim satisfaction, and establishing an historical record. Under 'supporting the ICL regime' they discuss 'encouraging domestic

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[107] Ibid.
[108] Sigall Horovitz, Gilad Noam, and Yuval Shany, The International Criminal Court in Shany, Effectiveness (n 104) 223.
[109] Ibid. Note that Shany considers legitimacy to be 'a key variable' in evaluations of effectiveness, while the present study treats effectiveness as a critical factor in determinations of legitimacy. While the relationship between these concepts requires further study, it is clear that they are intimately intertwined.

proceedings against ICL violators'; and under 'legitimizing the application of ICL' they address conveying a message of condemnation and projecting an image of procedural fairness.[110] They do not attempt to identify any priorities among these goals.

The authors discuss these many goals in general terms and conclude that: '[the study's] findings suggest that the Court has had some impact on states, which resulted in norm internalization, improved ICL compliance, and catering to victim needs'.[111] This conclusion is not very illuminating in terms of the ICC's effectiveness. While the authors are certainly correct that the ICC is having 'some impact', the ambiguity surrounding the institution's goals makes it very difficult to evaluate that impact normatively. In discussing the goal of ending impunity', for instance, the authors assume that this goal should be equated with punishment.[112] Punishment is not a goal, however, but rather a function of criminal courts that requires normative justification in terms of goals. The authors might respond that retribution justifies punishment, but it is far from clear that retribution is or should be a goal of the ICC. Likewise, whether the ICC's success in 'catering to victim needs' should be considered evidence of its effectiveness as the authors suggest is debatable because it is not clear that such needs are, or should be, a priority for the Court.[113]

In order to evaluate the effectiveness of international and universal adjudication it is necessary to identify clear goals and priorities for the institutions performing such adjudication, including reaching a better understanding of the role that gravity plays in determining those goals. Chapter 5 seeks to contribute

[110] Sigall Horovitz, Gilad Noam, and Yuval Shany, The International Criminal Court in Shany, Effectiveness (n 104) 226-229.
[111] Ibid 252.
[112] Ibid 245.
[113] Ibid 252.

to that process by proposing a goal-oriented approach to understanding gravity in international criminal law.

It is important to remember, however, that effectiveness is only one component of the legitimacy analysis. As such, even if international adjudication is relatively weak in terms of effectiveness, it may nonetheless be quite legitimate if it scores well in terms of the other factors. For that reason, two important effectiveness-based challenges to the legitimacy of international and universal national adjudication should be rejected.

First, some authors claim that international and universal jurisdiction are normatively illegitimate because the courts asserting such jurisdiction lack adequate enforcement powers and therefore cannot be effective. Guyora Binder asserts that the legitimacy of criminal punishment in any system 'depend[s] on its effectiveness in preventing much potential violence and punishing most actual violence'.[114] A criminal law system that lacks effective enforcement mechanisms thus lacks legitimacy. According to Binder, since neither the ICC nor states exercising universal jurisdiction have executive authority in states where crimes are committed they are incapable of being effective.[115]

Binder takes issue with Chehtman's conclusion that international criminal jurisdiction serves to ensure that the law prohibiting international crimes is 'in force', arguing that since such law is rarely enforced it does little to enhance the security or dignity of individuals around the world.[116] Nor does Binder believe that international criminal trials can achieve expressive goals without adequate enforcement.[117] According to Binder, only when a state or international body has

[114] Guyora Binder, 'Authority to Proscribe and Punish International Crimes' (2013) 63 UTLJ 278, 281.
[115] Ibid 298.
[116] Ibid 293 ('Chehtman does not convincingly exclude international criminal liability from his critique of extraterritorial criminal liability as incapable of producing the benefits of law "in force"').
[117] Ibid 300-309.

assumed executive authority in a state can it legitimately exercise international jurisdiction.[118] In his words: 'international criminal punishment is only justified in the rare circumstances that foreign forces have already intervened effectively in defence of human rights'.[119]

Binder's claim that international criminal law is incapable of contributing to the rule of law or achieving expressive goals absent military intervention is an empirical one that cannot be fully addressed here. Nonetheless, understanding effectiveness to be just one component of legitimacy undermines Binder's conclusion. Certainly, if international criminal law were absolutely ineffective it would be difficult to conclude that it is legitimate. But there is sufficient evidence that international and universal adjudication serve some purpose, however small, in promoting adherence to human rights to make the pertinent question 'how legitimate is such jurisdiction' rather than whether it is legitimate at all.

A second common challenge to the legitimacy of international and universal adjudication related to effectiveness is that such adjudication is inevitably political in a pejorative sense.[120] Charles Anthony Smith's book *The Rise and Fall of War Crimes Trials* provides an example. Smith sets out to answer the question: 'whether the purpose of [international] trials is justice or the appeasement of various political factions and political consolidation'.[121] He defines 'justice' to include substantive and procedural due process that aims to achieve retribution and deterrence.[122] Trials are political to the extent that they serve to consolidate the political power of those who conduct them by expanding the influence of those people over the government or appeasing constituent

[118] Ibid 309.
[119] Ibid 282.
[120] See eg Tor Krever, 'Unveiling (and Veiling) Politics in International Criminal Trials' in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law – An Introduction* (Routledge 2014) 3.
[121] Charles Anthony Smith, *The Rise and Fall of War Crimes Trials: From Charles I to Bush II* (CUP 2012) 7.
[122] Ibid.

groups.[123] The book's stated aim is to consider 'if more complete justice could be achieved through a less political process'.[124] However, as the book's title suggests, the author ultimately concludes not that international justice is incomplete but that in international trials politics prevail and 'justice is relegated to the status of a symbolic excuse for prosecution'.[125]

Again, the empirical question of the extent to which politics factor into exercises of international and universal jurisdiction is beyond the scope of this study. However, contrary to the claims of authors like Smith, there is insufficient evidence to conclude that politics influence international criminal adjudication in a way that is fatal to the legitimacy of the entire enterprise. On the contrary, what little empirical evidence exists suggests that international criminal law is not *merely* a tool for the consolidation of political power, even if it sometimes has that effect. For instance, in an influential article, Maximo Langer demonstrates that universal jurisdiction prosecutions tend to focus on defendants that the international community broadly agrees should be punished and whose own states of nationality are not willing to defend them.[126] This is because, although state executives have incentives to bring such cases to gain the support of constituencies supportive of human rights, they must be willing to pay whatever costs prosecution will incur in terms of relations with other states. The benefits of universal jurisdiction prosecutions tend to outweigh such costs only in cases where the appropriateness of prosecutions in widely agreed.[127] Langer's study shows that although politics play a role in encouraging universal jurisdiction prosecutions, that role is not incompatible with the pursuit of justice for human rights violations. He writes: 'Critics who have characterized universal

[123] Ibid 19.
[124] Ibid 21.
[125] Ibid 28.
[126] Maximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 AJIL 1, 4.
[127] Krever, 'Unveiling (and Veiling) Politics' (n 120) 3.

jurisdiction as simply a political tool to harass world leaders would . . . be well advised to take law more seriously'.[128]

Moreover, as Tor Kever has pointed out, the rhetoric of this debate, which pits critics arguing international trials are fatally political against advocates claiming they are apolitical, reflects a narrow understanding of the role of politics in criminal trials.[129] In fact, criminal trials necessarily reproduce and legitimate social structures in ways that require careful and nuanced normative analysis.[130] Again, the question of legitimacy must be treated as a matter of degrees, with the role of politics and other considerations of effectiveness constituting factors to be weighed in the normative evaluation.

iii. State consent

The two factors already discussed – comparative benefit and effectiveness – are the components of the legitimacy analysis that most clearly involve gravity. The gravity of cases and situations can help to determine both the benefits of international and universal adjudication and the goals of such adjudication. In addition, however, three other factors must be considered in determining moral legitimacy. The most important and controversial of these is state consent.

Some theorists, like Madeline Morris, argue that the moral value of democratic governance means that criminal adjudication can only be legitimate if it reflects the consent of democratic states.[131] Morris employs this reasoning to conclude that the ICC's jurisdiction is illegitimate. By allowing for jurisdiction over nationals of non-party states, the ICC 'displaces the state as the conduit for

[128] Langer, 'The Diplomacy of Universal Jurisdiction' (n 126) 7.
[129] Krever, 'Unveiling (and Veiling) Politics' (n 120) 14.
[130] Ibid.
[131] Madeline Morris, 'The Democratic Dilemma of the International Criminal Court' (2002) 5 Buff Crim L Rev 591; cf Russell Buchan, 'A Clash of Normativities: International Society and International Community' (2008) 10 Int C L Rev 3, 14-21 (arguing that states 'that fail to respect the liberal values of democracy' should not be considered part of the international community).
[131] Rome Statute (n 14) Article 13(b) Article 13(b).

democratic representation, and provides no alternative mechanism for democratic governance'.[132]

Shlomit Wallerstein, in contrast, argues that the ICC represents a morally appropriate delegation of states' primary jurisdiction to adjudicate crimes on their territories and against their nationals.[133] Wallerstein rejects the view that scholars including David Luban have advanced, that states may not legitimately delegate their criminal jurisdictions. She argues that such delegation is legitimate for several reasons. First, at least for certain crimes, international tribunals are at least as well placed as states to provide fair adjudication.[134] Second, international tribunals are 'part of the public realm' and thus subject to sufficient democratic control.[135] Third, when the state is unable to call a wrongdoer to account, international adjudication avoids impunity.[136] Finally, international crimes are created under international law and it is therefore just for international institutions to punish their violation.[137]

The case for delegated jurisdiction is easiest to make with respect to states that have accepted the ICC's jurisdiction either by joining the regime or by accepting the Court's jurisdiction over particular situations that have occurred on their territories. But what of situations referred by the Security Council that occurred on the territories of non-party states? Wallerstein disagrees with the

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[132] Morris, 'Democratic Dilemma of the International Criminal Court' (n 131) 599.
[133] Shlomit Wallerstein, 'Delegation of Powers and Authority in International Criminal Law' (2013) Oxford Legal Studies Research Paper No. 3/2013 8-18 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199397> accessed 28 March 2014; see also Michael J Struett, 'The Transformation of State Sovereign Rights and Responsibilities Under the Rome Statute for the International Criminal Court' (2005) 8 Chapman L Rev 179, 183 (discussing the establishment of the ICC as a function of delegation); see also William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone* (CUP 2006) 56 (arguing that there is little support in the literature for the view that 'states cannot delegate all of their criminal law powers to an international criminal tribunal').
[134] Wallerstein, 'Delegation of Powers and Authority' (n 133) 9.
[135] Ibid 11.
[136] Ibid 13.
[137] Ibid 16.

prevailing view that in such situations the ICC must be considered to exercise universal jurisdiction.[138] She reasons that when states join the United Nations they accept the power of the Security Council to act with respect to threats to peace, breaches of peace, and acts of aggression.[139] Since Security Council referrals to the ICC constitute an exercise of this power, states should be considered to have delegated their criminal jurisdictions to the ICC via the Security Council.

Wallerstein asserts that this form of delegation is morally sufficient even in situations in which the state with primary jurisdiction opposes prosecution, whether because it does not view the act as wrongful or because it prefers to address the wrongdoing in other ways, such as through a truth commission. Here Wallerstein relies on claims about the nature of the crimes in question, noting that international crimes 'have been recognized as wrongs by all states and are important for the maintenance of international peace and security'.[140] This amounts to a claim that the grave nature of international crimes legitimates jurisdiction over objecting non-party states.

A more common approach to state consent in the theoretical literature is to assert that the grave nature of international crimes, combined with the state's unwillingness or inability to prosecute them, make such consent entirely irrelevant to moral legitimacy. Theorists who advance this view include Larry May, co-authors Andrew Altman and Christopher Wellman, and Win-chiat Lee.

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[138] See eg Duff, 'Authority and Responsibility in International Criminal Law' (n 72); Ariel Zemach, 'The Limits of International Criminal Law: House Demolitions in an Occupied Territory' (2004) Connecticut J Intl L 14 ('Where any state can prosecutor regardless of their nationality and the place of the crime, a group of states may collectively do the same through an international court.'); but see Jan Klabbers, *International Law* (CUP 2013) 95 (noting that a 'proposal to make the ICC work on the basis of universal jurisdiction was explicitly rejected; it now works mainly on the basis of territoriality and nationality principles').

[139] Wallerstein, 'Delegation of Powers and Authority' (n 133) 20.

[140] Ibid 22-23. Wallerstein suggests, however, that when a state has granted amnesty in order to achieve peace, the moral legitimacy of a Security Council referral is more questionable. Ibid 24.

These authors argue that when states perpetrate or tolerate certain kinds of crimes they lose their claim to sovereignty, making international jurisdiction legitimate regardless of their consent.[141]

Similarly, Anthony Sammons rests the legitimacy of universal jurisdiction on the claim that when a state allows international crimes to take place on its territories 'the state becomes analogous to terra nullius for purposes of criminal jurisdiction'.[142] Michael Giudice and Matthew Schaeffer agree that, in light of the 'grave nature' of international crimes, '[d]emocratic authorization is simply the wrong tool for the job' of legitimating universal jurisdiction.[143]

Such theories of the moral legitimacy of international and universal jurisdiction rely on overly simplistic, absolutist understandings of the roles of state consent and of the gravity of crimes in supplying such legitimacy. According to delegation theories, state consent either is or is not present and therefore jurisdiction either is or is not legitimate. Likewise, under the theories that rely on the nature of the crimes, states either have or have not crossed the gravity-based threshold that makes state consent irrelevant.

Moreover, the theories do not explain convincingly when states should be considered to have consented to jurisdiction or when the gravity threshold has been crossed. Wallerstein's claim that states consented to international criminal jurisdiction by granting the Security Council the power to adopt measures to promote peace and security provides a rather weak basis for legitimacy. States

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[141] May, *Crimes Against Humanity* (n 69) 69; Lee, 'International Crimes and Universal Jurisdiction' (n 3) 32; see also Broomhall, 'International Justice and the International Criminal Court' (n 59) 43.

[142] Anthony Sammons, 'The "Under Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts' (2003) 21 Berkeley J Intl L 111, 114; but see Chehtman, *The Philosophical Foundations of Extraterritorial Jurisdiction* (n 80) 124.

[143] Michael Giudice and Matthew Schaeffer, 'Universal Jurisdiction and the Duty to Govern' in Francois Tanguay-Renaud & James Stribopoulos (eds), *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Hart Publishing 2012) 243-44.

almost certainly did not foresee the Security Council exercising its powers in that manner when they joined the United Nations. Moreover, Wallerstein does not explain which crimes are sufficiently important to peace and security to warrant ICC jurisdiction even when states with primary jurisdiction object.

Altman and Wellman's claim that states lose their sovereignty when they permit 'widespread and systematic' human rights violations to occur also seems unsatisfying as the basis for a moral threshold.[144] In seeking to justify this approach they assert: 'Saying that the violations are widespread or systematic is saying that the state's performance, measured in such terms, falls below what can be reasonably demanded.' Yet they give little indication of what they think is 'reasonably demanded' of states, nor is it clear that such a standard could be identified. May's 'harm principle' also relies on the idea that crimes must be widespread for international jurisdiction to be morally legitimate but does not explain when this threshold is met.[145] Likewise, Lee limits his theory to 'certain serious harm' with little elaboration.[146]

Rather than conceiving of sovereignty and state consent in absolute terms and gravity as a threshold, a moral theory of international and universal adjudication should consider each factor on a spectrum and in relation to the other legitimacy factors. Kristen Hessler makes the first point in critiquing the work of May and of Altman and Wellman.[147] She disagrees with these authors that international jurisdiction must be predicated on a state's complete loss of sovereignty. She points out that this approach fails to take account of the multi-disciplinary effort underway to reconceptualize state sovereignty.[148] Hessler advocates a more nuanced approach to sovereignty that considers which powers

[144] Altman and Wellman, 'Defense of International Criminal Law' (n 66) 64-65.
[145] May, *Crimes Against Humanity* (n 69) 83.
[146] Lee, 'International Crimes and Universal Jurisdiction' (n 3) 38.
[147] Kristen Hessler, 'State Sovereignty as an Obstacle to International Criminal Law' in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (CUP 2010) 39.
[148] Ibid 45.

are best allocated to states and which to the international community.[149] This leads her to conclude that international involvement 'could be justified in a wider range of cases' than the theories of those authors suggest.[150]

Hessler makes no attempt to delineate this 'wider range of cases' and thus fails to suggest an alternate theory of moral legitimacy to the theories she critiques. Nonetheless, she is right to point out that a moral theory of international criminal jurisdiction should include a nuanced understanding of the role of state sovereignty, and thus of state consent. Other scholars have made similar arguments in response to the prevalent narrative that portrays international criminal law as an attack on state sovereignty.[151] Sovereignty is not an absolute right for a state to be left alone, but rather 'a changing notion that adjusts to the developing nature of international law'.[152] As Ryan Goodman and Derek Jinks have explained, 'the constitutive features of states derive from world-level cultural models, and the nature of sovereignty itself is a global cultural product'.[153] As such, international criminal law itself serves to reshape the notion

[149] Ibid 57.
[150] Ibid 57.
[151] Robert Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' (2006) 16 EJIL 979, 985 (discussing scholarship). Cf *Prosecutor v Dusko Tadić,* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (1995) 105 Intl L Rep 453, 483 ('It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.').
[152] See Andrew Clapham, 'National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice', in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2003) 306. The Responsibility to Protect Doctrine represents an attempt to redefine sovereignty as contingent on a state's willingness and ability to protect its population from international crimes. See eg Saira Mohamed, 'Taking Stock of the Responsbility to Protect' (2012) 48 Stan J Intl L 319 (stating that 'the concept of a responsibility to protect – the notion that states have a responsibility to protect their own people, and the international community has a responsibility to step in when the state fails its responsibility – has unsettled traditional understandings of state sovereignty').
[153] Ryan Goodman and Derek Jinks, 'Toward an Institutional Theory of Sovereignty' (2003) 55 Stan L Rev 1749, 1785.

of state sovereignty,[154] and, as Eric Leonard argues, the ICC can be considered to exercise a form of sovereignty.[155]

This nuanced understanding of sovereignty as a changing bundle of powers supports the view that state consent as a legitimacy factor should be considered not in absolute terms but on a spectrum. State consent can be strong or weak. It is strongest when a state, which itself has strong claims to both legitimacy[156] and jurisdiction, agrees to the particular exercise of international or universal jurisdiction in question. It is weakest when such a non-party state adamantly objects to jurisdiction, and somewhat stronger when the state has consented to the institution's jurisdiction at an earlier point in time, such as by joining a treaty regime, but now objects.

Moreover, the importance of state consent to moral legitimacy depends on all of the other factors relevant to such legitimacy. The greater the concerns about comparative benefit, effectiveness, fairness or accountability and transparency, the more important it is to have strong state consent. When international or universal adjudication ranks high in terms of each of these factors, state consent becomes less important and, in some cases, unnecessary.

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[154] Michael J Struett, 'The Transformation of State Sovereign Rights and Responsibilities Under the Rome Statute for the International Criminal Court' (2005) 18 Chapman L Rev 179.

[155] Eric Leonard, *The Onset of Global Governance: International Relations Theory and the International Criminal Court* (Ashgate 2005); cf Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton UP 2008) 185 ('Sovereignty can be found in some international institutions, like the Security Council.').

[156] While it is beyond the scope of this study to examine the factors that contribute to state legitimacy, democratic governance is certainly important, if not determinative of such legitimacy. See Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) 93 AJIL 596, 599 (stating that 'democracy has become *the* touchstone of legitimacy in the modern world'); Shany, *Assessing the Effectiveness of International Courts* (n 104) 33 ('To the extent that the mandate providers are comprised of democratically elected national governments, international courts have some ability to trace their authority back to a democratically ratified decision that was made at the national level, thus mitigating the democratic deficit criticism directed at their exercise of power.').

iv. Fairness

A number of authors adopt fairness[157] as the litmus test for the moral legitimacy of international and universal jurisdiction. David Luban, for instance, rejects the idea that states can delegate their jurisdiction on the grounds that if such delegation were allowed jurisdiction could also be ceded to organizations like the 'Kansas City dog-catcher, the World Chess Federation, or the Rolling Stones'.[158] Moreover, Luban asserts that there is no world political community capable of authorizing such jurisdiction.[159] As a result, the legitimacy of international tribunals 'comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments'.[160] By conducting exemplary trials, international courts can 'build their legitimacy from the ground up'.[161] Luban implies that this argument applies equally to universal jurisdiction.

Aaron Fichtelberg agrees that fair procedures are the key to the moral legitimacy of institutions like the ICC.[162] He rejects Madeline Morris' claim that

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[157] Buchanan and Keohane call this factor 'minimal moral acceptability' and treat it is a threshold stating: 'Global governance institutions, like institutions generally, must not persist in committing serious injustices. If they do so, they are not entitled to our support.' While I agree that international institutions must meet such a threshold of fairness, the analysis in this section goes further to argue that degrees of fairness factor into degrees of legitimacy. Indeed, later in their article, Buchanan and Keohane acknowledge this point, making their use of the term 'minimal' seem inappropriate. Buchanan and Keohane, 'Legitimacy of Global Governance Institutions' (n 103) 424.

[158] David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' (2008) (2008) in Samantha Besson and John Tasioulas (eds), The Philosophy of International Law (OUP 2010) 13. Wallerstein provides a detailed refutation of this claim in Wallerstein, 'Delegation of Powers and Authority' (n 133).

[159] Wallerstein, Delegation of Powers and Authority' (n 133) 13 (stating that 'there is no political community called "humanity" that authorizes the tribunals; nor are they products of anything like a world government').

[160] Luban, 'Fairness to Rightness' (n 158) 13.

[161] Ibid 24.

[162] Aaron Fichtelberg, 'Democratic Legitimacy and the International Criminal Court: A Liberal Defense' (2006) 4 JICJ 765.

democratic governance is a necessary condition of legitimacy, arguing that democracy is simply a vehicle for the protection of more essential rights.[163] According to Fichtelberg: 'True political legitimacy comes solely out of respect for basic individual rights….'[164] Thus, he argues that the moral legitimacy of international courts depends on their 'respect for human rights to procedural and substantive due process and the right of the accused to decent treatment'.[165] Kirsten Fisher employs this argument to assert that the ICC has greater legitimacy than do national courts exercising universal jurisdiction.[166] According to Fisher, national courts are more likely to be politically motivated whereas the ICC 'ought to be able to provide more objective and even-handed justice'.[167]

While these authors are correct to identify fair procedures as an important component of moral legitimacy, their theories rely too heavily on this factor. This reliance leads Luban to conclude that international courts must deliver a standard of fairness that is at or near the top 'along every dimension of natural justice'.[168] In fact, since the moral legitimacy of international and universal adjudication depends on the range of factors discussed in this section, fairness must be balanced against these other factors.

Along these lines, Mirjan Damaška has argued that international criminal tribunals may legitimately depart from domestic standards of fairness because of both the gravity of the crimes they adjudicate and the special goals they pursue.[169] This argument requires modification in two regards. First, like most theorists,

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[163] Ibid.
[164] Ibid 776.
[165] Ibid 778.
[166] Kristen J Fisher, *Moral Accountability and International Criminal Law* (Routledge 2012) 119.
[167] Ibid 118-119.
[168] Luban, 'Fairness to Rightness' (n 158) 15.
[169] Mirjan Damaška, 'Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2011) 36 NC J Intl L & Com Reg 365, 379 (arguing that 'some departures by international criminal tribunals from domestic standards of fairness can be justified, given their *sui generis* goals, the complexity and the atrocity of the crimes they process, and the innate weaknesses of these tribunals').

Damaška frames his argument in absolute terms: when the crimes reach the necessary gravity threshold fairness can be sacrificed.[170] In fact, as already explained, gravity, like the other components of the legitimacy analysis, should be considered on a spectrum such that the greater the international interest in adjudication, the more likely it is that some fairness can be sacrificed without losing moral legitimacy.

Second, gravity and the 'special goals' of international courts are not the only factors that can justify sacrifices in terms of fairness. For instance, when a state that would normally exercise jurisdiction consents, lowered fairness standards that comport with norms in that state may be employed without loss of moral legitimacy.

Finally, and most importantly, fairness as a legitimating factor for any criminal trial is subject to a floor – a minimum requirement without which no criminal adjudication can be considered morally legitimate. The location of this floor is a matter of debate, but a good starting place for identifying minimum standards of fairness are the universal human rights norms contained in widely ratified treaties and in broadly agreed customary law. The idea that variation is permitted above a certain minimum is reflected in the 'margin of appreciation' doctrine of the European Court of Human Rights.[171] Although international courts need not adhere to the highest standards of fairness to be legitimate as Luban suggests, they must at least meet these minimum standards.[172]

The suggestion that fairness is a factor to be balanced with other values in determinations of moral legitimacy presents obvious dangers. In particular,

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[170] Ibid 379-380.

[171] See Hessler, 'State Sovereignty as an Obstacle to International Criminal Law' (n 147) 55 (stating that the margin of appreciation doctrine 'gives states some discretion in implementing human rights law, on the assumption that "a state knows its domestic situation better than the Court could know it"').

[172] Cf Feldman, 'Cosmopolitan Law?' (n 81) (asserting that a morally legitimate legal system does not violate defendants' 'basic human rights').

gravity rhetoric and the emotions that it invokes are easily used to justify doctrines and procedures that fall below minimum standards of fairness. This danger is explored in Chapter 5, where the argument is made that those implementing international criminal law must carefully consider all competing interests, including the interest in fairness, and must avoid being unduly influenced by emotional rhetoric concerning the gravity of crimes.

v. Accountability and transparency

The final factors, accountability and transparency, are critical to enabling an evaluation of the extent to which institutions exercising international and universal jurisdiction fulfill the other legitimacy factors and to improving their ability to do so. Constituents cannot determine how fair or effective an institution is unless the institution is sufficiently transparent; nor can they work to make the institution more legitimate without accountability.[173] According to Buchanan and Keohane:

> Accountability includes three elements: first, standards that those who are held accountable are expected to meet; second, information available to accountability holders, who can then apply the standards in question to the performance of those who are held to account; and third, the ability of these accountability holders to impose sanctions—to attach costs to the failure to meet the standards.[174]

Accountability serves to enhance legitimacy not only by encouraging institutions to fulfill the goals for which they were established, but also by stimulating deliberation about the appropriateness of those goals. That is, it enables ongoing

[173] Buchanan and Keohane, 'Legitimacy of Global Governance Institutions' (n 103) 425 . See also Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy & Public Affairs, 113, 145-147 (arguing that global justice happens gradually in reaction to unjust institutions).
[174] Buchanan and Keohane, 'Legitimacy of Global Governance Institutions' (n 103) 426.

evaluation of the appropriate role of the institution in the pursuit of global justice.[175]

Transparency is necessary to accountability because stakeholders cannot evaluate the extent to which institutions are meeting their goals without relevant information. Moreover, those who might contest the appropriateness of an institution's goals cannot do so unless they have access to information about the institution's current goals and its efforts to meet them. For ongoing critical evaluation to take place, therefore, information about an institution's performance must be available to a wide range of current and possible future stakeholders.

Commentators have tended to emphasize the importance of accountability and transparency to the legitimacy of particular global justice actors, rather than to that of the regime as a whole. In particular, substantial scholarship is devoted to arguing that the key to the legitimacy of the ICC's prosecutor is that she makes her decisions transparently and is held accountable for them.[176] Some writers have made similar arguments about the need for international judges to implement sentencing practices transparently.[177]

Maximo Langer is one of the few authors to have identified accountability and transparency as aspects of the legitimacy of the exercise of international and universal jurisdiction more generally. Langer argues that institutions adjudicating international crimes, whether national courts applying universal jurisdiction or international courts, must allow for the participation of the international community and be accountable to that community in order to be legitimate.[178] He

[175] Ibid 427.
[176] See Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 AJIL 510, 536-537.
[177] Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 Stan J Intl L 39.
[178] Maximo Langer, 'Universal Jurisdiction as Janus-Faced: The Dual Nature of the German International Criminal Code' (2013) 11 JICJ 737. Although this article focuses on the requirements for moral legitimacy of universal jurisdiction statutes, Langer also applies his argument to the ICC. Ibid.

further asserts that participation and accountability require transparency.[179] Langer rests these arguments on the idea that international crimes affect the entire international community and that the institutions adjudicating them act as agents of that community.[180] According to Langer, this is true whether one conceives of the international community as a political or moral one, and whether one subscribes to statist, cosmopolitan, or 'non-positivist' accounts of international law.[181]

Langer does not claim that participation and accountability (including transparency) are the sole requirements for the legitimacy of international or universal jurisdiction. Indeed, these attributes must be considered along with the other factors elaborated above in making judgments about the degrees to which exercises of jurisdiction over international crimes are legitimate. As for the requirement of fairness, a certain threshold of these attributes is likely required for an institution to be legitimate at all. Once that threshold is met, however, the other legitimacy factors, including gravity as a component of comparative benefit and effectiveness, serve to counter-balance the requirements of accountability and transparency.

In sum, under the complex theory elaborated above, gravity operates as a relative consideration, rather than an absolute threshold, in establishing the moral legitimacy of international and universal adjudication. Indeed, under the complex theory, the moral legitimacy of international and universal adjudication must be evaluated by considering all of the relevant factors, including gravity, along a spectrum. Where state consent is strong and institutions score well in terms of fairness, accountability and transparency, for instance, it may be less important

[179] Ibid 748.
[180] Ibid 744.
[181] Ibid 744-749. With regard to 'non-positivist' accounts of international law, such as those based on natural law, Langer's argument rests not on principle-agent theory but instead on the idea that fairness requires that those with an interest in the outcome of an institution's decisions be able to participate in the decision-making process and hold the institution accountable. Ibid 747-749.

what kinds of crimes an international institution adjudicates. These conclusions diverge from the dominant trends in the scholarship to evaluate the legitimacy of international and universal adjudication according to one or a small number of factors and by treating gravity as a threshold.

3. Applying the Complex Theory

In light of the ambiguity of the goals of international and universal adjudication, much of which stems from the reliance on gravity as a justifying concept, it is very difficult to reach reliable conclusions about the legitimacy of these forms of criminal adjudication. Thus, although this section offers a few thoughts about how the complex theory might be applied to evaluate the legitimacy of international and universal adjudication, it does so with the caveat that these conclusions are inherently and necessarily tentative.

One conclusion that application of the complex theory suggests is that the ICC generally enjoys greater moral legitimacy than do national courts exercising universal jurisdiction.[182] As Maximo Langer has noted, the ICC is generally stronger than national courts both in terms of accountability and participation, an indicator of state consent. He writes:

> The ICC regime has allowed more participation and is more accountable to the international community than universal jurisdiction institutions because a larger part of that community drafted and put into effect the ICC Statute and other relevant ICC documents that the Court has the duty to apply to individual situations and cases; and because the community of states and the people of the world have more formal and informal mechanisms to

[182] Langer, 'Universal Jurisdiction as Janus-Faced' (n 178) 747.

> make the Court accountable than in the case of universal jurisdiction statutes . . . and their proceedings.[183]

The ICC also probably provides greater benefits to the international community and to the national communities where the crimes occurred. In particular, the ICC is better able to express norms at the global level and thus to contribute to global crime prevention and possibly to such local goals as reconciliation and peace.[184] Moreover, the ICC's standards of fairness tend to equal or exceed those of national courts.[185] Although critics charge that the Court is biased against Africa, there is insufficient evidence to support this claim.[186]

It is possible to envision a circumstance in which national adjudication under universal jurisdiction would be more legitimate than ICC adjudication. For instance, if a state with primary jurisdiction and reasonably high legitimacy were to consent to the exercise of universal jurisdiction by another state but object to ICC adjudication such consent would help to render the former more legitimate, all other things being equal.

Nonetheless, the observation that ICC adjudication generally enjoys greater moral legitimacy than does universal adjudication has important policy

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[183] Ibid 746. See also ICC-OTP, 'Strategic Plan June 2012-2015' (11 October 2013) paras 85–86 (stating that the 'Prosecutor will responsibly and accountably exercise full authority over the management and administration of the Office, including the staff, facilities and other resources, in full compliance with the applicable procedures, Rules and Regulations' and '[t]he Office will take steps to enhance transparency throughout all phases of its activities to the extent possible, in view of its duties of privacy and confidentiality vis-à-vis staff, witnesses and partners').

[184] I have elaborated this argument in 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 Michigan J Intl L 265.

[185] See Lynne Mirian Baum, 'Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court' (2001) 19 Wisconsin Intl LJ 197 (concluding that '[t]he Statute therefore satisfies principles of fundamental fairness, establishes a system that lends the ICC legitimacy, and permits the court to pursue evenhanded justice in a climate of moral outrage').

[186] Although it is beyond the scope of this thesis to engage in this debate, I have done so elsewhere. See Margaret deGuzman, 'Is the ICC Targeting Africa Inappropriately?' <http://iccforum.com/africa#deGuzman> accessed 16 October 2014.

consequences. In particular, contrary to the dominant view,[187] the ICC probably should not apply the principle of complementarity to national courts exercising universal jurisdiction.[188] In other words, it should only defer to national courts exercising primary jurisdiction. In light of the generally greater moral legitimacy of ICC proceedings, it makes sense to permit the ICC to adjudicate even if a state is willing and able to exercise universal jurisdiction over the case.

The complex standard of legitimacy also provides insight into the appropriate resolution of conflicts among states wishing to exercise jurisdiction over international crimes. Some commentators assert that such conflicts should be resolved through application of a hierarchy of traditional bases of jurisdiction.[189] Diane Orentlicher argues that the state where the crimes were committed should be given preference, assuming it is able to provide adequate procedural guarantees because it is best placed to contribute to healing within the local community.[190] The next best option according to Orentlicher is the state of nationality of the victims, which she calls 'universality plus'.[191] Orentlicher argues that giving priority to states with such jurisdictional links 'can mitigate the appearance of hubris associated with universal jurisdiction'.[192]

The Institute of International Law's resolution on 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' suggests a similar hierarchy. It requires states considering exercising universal jurisdiction to:

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[187] Langer, 'Universal Jurisdiction as Janus-Faced' (n 178) fn 67 (citing authorities).
[188] Ibid 758; see also Diane Orentlicher, 'Striking a Balance: Mixed Law Tribunals and Conflicts of Jurisdiction' in Mark Lattimer and Phillippe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2003) 231.
[189] This analysis does not take a position on the controversial question of whether the presence of the accused should be required for universal jurisdiction.
[190] Orentlicher, 'Striking a Balance' (n 188) 233-34; see also Ratner, 'Belgium's War Crimes Statute' (n 71).
[191] Orentlicher, 'Striking a Balance' (n 188) 231.
[192] Ibid 233-34.

> c) ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so … [and to]
>
> d) carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.[193]

The complex standard suggests that such jurisdictional hierarchies should be avoided, or at least applied with caution. It is true that respect for traditional jurisdictional links reflects a degree of state consent in that states have adopted the jurisdictional principles through treaty and customary law. It is also often the case that adjudication in a state with a jurisdictional link to the crime provides greater benefit to the local population than adjudication elsewhere. However, there will be circumstances in which states lacking traditional links to the crime will be more effective, for instance due to decreased political influence, or proceedings that are more fair and transparent.[194] As such, the rules regarding universal jurisdiction should not reflect a general preference for courts with particular ties to the crime but should rather permit relative legitimacy determinations to be made according to the circumstances of each case.

Finally, the analysis above suggests that gravity may be less important as a determinant of the moral legitimacy of ICC adjudication than of adjudication at some hybrid courts. This is because, despite the difficulty of reaching reliable legitimacy determinations noted above, there are reasons to believe that the ICC

[193] Institute of International Law, 'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' (adopted 25 August 2005).
[194] Cf Ratner, 'Belgium's War Crimes Statute' (n 71) 895.

ranks higher with regard to many of the legitimacy factors than do some hybrid courts. With respect to most of its current cases, the ICC enjoys a substantial degree of consent from relevant states; indeed, most of its cases were referred to the Court by states where the crimes occurred. With regard to the Kenya situation, state consent can be considered lower, although not absent, because although Kenya objects to the ICC exercising jurisdiction over the situation, it agreed generally to the Court's jurisdiction by joining the regime. Only in the Libya and Sudan situations is state consent arguably absent, and some commentators would argue that even those states consented in a sense by delegating part of their criminal jurisdictions to the Security Council when they joined the United Nations.

Moreover, ICC adjudication likely provides an important benefit compared to the alternative in most of these situations. The ICC's complementary jurisdiction means that it only prosecutes cases that no state with jurisdiction is investigating or prosecuting effectively. The alternative to ICC prosecution, therefore, is often impunity. However, this statement requires an important caveat. In order to decide when the ICC should decline jurisdiction based on complementarity, the Court applies a 'same person, same conduct' test.[195] This test requires that the state be investigating or prosecuting the same defendant for essentially the same set of acts.[196] This rather strict test means that the ICC may exercise jurisdiction in situations where national adjudication is arguably of greater benefit, for instance because it addresses more serious crimes. However, in most of the current situations there appears to be little likelihood that adjudication by the states with primary jurisdiction would yield greater benefits

[195] *Prosecutor v Muthuara et al* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-02/11 (30 May 2011) para 51 (stating that 'a determination of inadmissibility of a "case" requires that "national proceedings ... encompass both the person and the conduct which is the subject of the case before the Court"').

[196] Ibid; for discussion see Nidal Nabil Jurdi, 'Some Lessons on Complementarity for the International Criminal Court Review Conference' (2009) 34 SAYIL 28, 36.

than ICC adjudication. Finally, as noted above, the ICC ranks reasonably well in terms of fairness, accountability, and transparency. The ICC's relative strength in terms of many of the legitimacy factors means that the gravity of the crimes at issue plays a less significant role in ensuring the moral legitimacy of ICC adjudication.

In contrast, the ECCC ranks relatively low on many of the legitimacy factors, making gravity more important than at the ICC; the SCSL is probably somewhere in the middle. Hybrid tribunals generally rank high in terms of state consent since they are often established in cooperation with the government of the state where the crimes took place. This is true of both the SCSL and the ECCC. Indeed, hybrid tribunals have been portrayed as representing 'a return to state sovereignty'.[197] However, the moral legitimacy of tribunals set up in cooperation with a government depends significantly on the moral legitimacy of the governments in question. Unfortunately, the governments of Cambodia and Sierra Leone that established those tribunals do not score very well in terms of legitimacy. As such, state consent does not contribute greatly to the legitimacy of those tribunals.

Moreover, both courts have troubled records with regard to fairness, accountability, and transparency. The work of the ECCC has been significantly influenced by the political objectives of the Cambodian government.[198] This has been somewhat true for the SCSL as well, although perhaps not to the same extent

[197] Steven D Roper and Lilian A Barria, *Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights* (Ashgate 2006) 13.

[198] See eg Charlie Campbell, 'Cambodia's Khmer Rouge Trials are a Shocking Failure' *Time Magazine* (13 February 2014) <http://time.com/6997/cambodias-khmer-rouge-trials-are-a-shocking-failure/> accessed 16 October 2014 (detailing 'allegations of corruption and politicization [that have] dogged the ECCC's glacial progress, and proceedings were halted for long periods as national staff went on strike after not being paid').

as for the ECCC.[199] As Orentlicher points out, while 'Cambodia wanted to retain as much control as possible and was confident of its negotiating power', the government of Sierra Leone wanted to 'establish an internationally legitimate process for prosecuting atrocities committed mainly by rebel forces opposing the government'.[200] On the other hand, both tribunals likely offer a significant benefit compared to the alternative, which, in each case, was probably impunity. The Cambodian government made it quite clear it would not agree to a more international tribunal, and the government of Sierra Leone had signed an amnesty agreement that bars national prosecutions.

If this very preliminary legitimacy analysis of the three institutions is correct, it suggests that the gravity of the crimes at issue is most important for the legitimacy of the ECCC, which scores lowest on the various legitimacy factors, and least important for the ICC, with the SCSL somewhere in between. This conclusion has implications for the policies of these institutions as well as for the design of institutions created in the future. For instance, the SCSL was probably right not to prosecute defendants for small-scale crimes under national law, even though such crimes were within its jurisdiction. In contrast, the ICC's decision to prosecute a case involving a reasonably small number of peacekeepers in Sudan probably does not detract from its legitimacy. If additional *ad hoc* or hybrid international courts are established in the future, it would be wise for their creators to consider the various aspects of legitimacy in determining the scope of their jurisdictions.

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[199] Chris Mahony, 'Prioritising International Sex Crimes before the Special Court for Sierra Leone: Another Instrument of Political Manipulation?' in Morten Bergsmo (ed), *International Sex Crimes as a Criminal Justice Theme*, (Torkel Opsahl Academic EPublisher 2012) 59, 66-69.
[200] Orentlicher, 'Striking a Balance' (n 188) 219.

CHAPTER 5: OPERATIONALIZING GRAVITY

In light of the central role that gravity plays in determining the legitimacy of international prescriptive and adjudicative authority, it is important to operationalize the concept. This Chapter focuses primarily on how gravity should be operationalized for purposes of decisions to adjudicate cases and situations at international courts, particularly the ICC. Operationalizing gravity for purposes of universal adjudication is more difficult because there is no global institutional framework for making decisions about when such adjudication is appropriate. Nonetheless, the conclusions reached herein also likely apply in that context.

In addressing the role that gravity should play in decisions about adjudicative authority, the Chapter necessarily also addresses the concept's role in determining legitimate international prescriptive authority. As noted at the beginning of Chapter 4, adjudication by an international court is not justified simply by labeling a crime 'international'. In other words, the international community's prescriptive authority is broader than the jurisdiction of any particular court. However, the decision that international adjudication is legitimate requires a determination that an international crime has been committed. As such, any discussion of gravity's role in determining the legitimacy of international adjudication inherently comprises an evaluation of the concept's role in the international community's prescriptive authority.

International prosecutors and judges make decisions about gravity in several contexts. The most important of these relate to the exercise of jurisdiction, case selection, defendant's rights and sentencing. The ICC's prosecutors and judges engage with the concept of gravity in deciding which situations and cases pass the gravity threshold for admissible; the ICTY and ICTR prosecutors and judges do so in determining which cases are grave enough to be adjudicated by those tribunals pursuant to their 'completion strategies'. International prosecutors also consider gravity in exercising their discretion to decide which situations and cases to investigate and prosecute, and international judges evaluate gravity in determining proportionate sentences and defendants' right. Each of these decisions affects the legitimacy of international criminal law's institutions, in both normative and sociological terms.

This Chapter argues first that current efforts to operationalize gravity by applying a purportedly 'objective' factor-based method threaten the sociological legitimacy of international criminal law's institutions. Gravity determinations are never entirely objective; they depend significantly on the decision-makers' preferences about the goals and priorities the decision should advance. As such, efforts to portray gravity determinations as value-neutral are often perceived as political or otherwise flawed.[1] Second, the Chapter explains why the purportedly objective approach to gravity determinations promotes the rhetorical use of the concept in a way that threatens to undermine the fairness of international criminal law institutions. Third, the Chapter proposes an alternate way of evaluating gravity that contextualizes gravity according to the goals and priorities international criminal courts should pursue. This method would enhance legitimacy in particular by clarifying the benefits of international adjudication and promoting effectiveness by also by improving fairness, accountability, and transparency. Fourth, the Chapter proposes a flexible, dialogic process for reaching greater global consensus concerning the goals and priorities that should inform gravity determinations. Finally, the Chapter argues that in engaging in the process of identifying goals and priorities, international criminal courts should adopt a largely cosmopolitan vision of their roles in the global legal order that emphasizes global crime prevention rather than the needs or desires of local social groups in particular situations.

1. 'Objective' Gravity as a Threat to Sociological Legitimacy

International prosecutors and judges generally treat gravity as an entirely 'objective' phenomenon that can be measured independent of institutional goals and priorities by applying a set of predetermined factors.[2] The decisions and policies divide

[1] Fred C Zacharias and Bruce A Green, 'Prosecutorial Neutrality' (2004) University of San Diego School of Law Legal Studies Research Paper Series: Research Paper No 05-03, 847; Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 Stan J Intl L 39, 50 (arguing that selection will inevitably remain contingent on 'discretionary political decisions'); James A Goldston, 'More Candor About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8 JICJ 383 (arguing that we should acknowledge the political aspects of selection decisions).

[2] See *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization into an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr (31 March 2010) para 188 <www.icc-cpi.int/iccdocs/doc/doc854562.pdf> accessed 10 April 2014; Carla Del Ponte, 'Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of

gravity into quantitative and qualitative factors.[3] Quantitative measures usually consider the number of victims and the geographic and temporal scope of the harm.[4] Qualitative measures generally include the nature of the harm, the manner in which it is committed, and its impact.[5] Gravity-related decisions usually also take into account the position and role of the accused. The gravity of the 'crime', combined with the position and role of the perpetrator, are then considered together in determining the gravity of the 'case'.[6]

Judicial decisions based on gravity generally begin by listing some set of factors similar to those above and then proceeding to discuss the facts of the case. The gravity discussion culminates in a declaration that the case is 'grave', 'very grave', 'exceptionally grave' and so forth, or, more rarely, that it is not as grave as other cases.[7] The conclusion is rarely that the case is 'not grave', since international crimes are all considered grave in some way, as discussed throughout this thesis. The conclusion about gravity then contributes to a decision about whether the situation or case is admissible or deserving of prosecution or whether a given sentence is justified.[8]

The ICC prosecutor's policies concerning gravity determinations follow a similar approach.[9] The prosecutor asserts that she makes decisions about admissibility

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the ICTY' (2006) 4 JICJ 539, 543; Statement by Luis Moreno-Ocampo, Prosecutor of the ICC, Informal meeting of Legal Advisors to Ministries of Foreign Affairs, New York (24 Oct 2005) 5-6; cf Lars Waldorf, 'A Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal' (2011) 33 Ford Intl LJ 1221, 1259.

[3] *Prosecutor v Bahar Idriss Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010) para 31 <www.icc-cpi.int/iccdocs/doc/doc819602.pdf> accessed 17 October 2014.

[4] ICC-OTP, Criteria for Selection of Situations and Cases 1-7 (2006) (unpublished policy paper) (on file with author); ICC-OTP, 'Policy Paper on Preliminary Examinations' (4 October 2010) 13-14 <http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf> accessed 10 April 2014; *Situation in the Republic of Kenya* Authorization Decision (n 2) para 188 <www.icc-cpi.int/iccdocs/doc/doc854562.pdf> accessed 10 April 2014.

[5] See ibid.

[6] See eg ICC-OTP, Policy Paper on Preliminary Examinations (n 4); ICC-OTP, Criteria for Selection of Situations and Cases 1-7 (n 4).

[7] See eg *Abu Garda* Confirmation Decision (n 3) para 30; *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (Corrigendum of the 'Decision on the Confirmation of Charges') ICC-02/05-03/09 (7 March 2011) paras 27–28.

[8] See eg *Situation in the Republic of Kenya* Authorization Decision (n 2) para 56; *Situation in the Republic of Côte d'Ivoire* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire) ICC-02/11 (3 October 2011) paras 201–206 <www.icc-cpi.int/iccdocs/doc/doc1240553.pdf> accessed 17 October 2014.

[9] Regulation 33 regarding 'Selection of Cases Within a Situation' states: 'The Office shall review the information analysed during preliminary examination and evaluation and shall collect the necessary information and evidence in order to identify the most serious crimes committed within the situation.' Regulation 34(2) concerning 'Identification of Case Hypothesis' states: 'In each provisional case

impartially and objectively through the application of 'consistent methods and criteria'.[10] The Regulation of the Office of the Prosecutor regarding the initiation of investigations and prosecutions states: 'In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact.'[11]

The prosecutor's policy regarding 'preliminary examination', the precursor to investigation, expands slightly on the four factors. It states that the scale of the crimes includes, among other things, the number of victims and the geographic and temporal spread of the crimes; the nature of the crimes includes, among other things, whether they involve gender violence, persecution, or targeting of children; the manner in which the crimes are committed includes, among other things, the perpetrator's intent, degree of participation, and use of cruelty; and the impact of the crimes includes, among other things, the infliction of social, economic, and environmental harms.[12]

The few gravity-related decisions that the prosecutor's office has made public invoke one or more of these factors to declare the situation or case sufficiently grave or, in one case, insufficiently grave, for ICC adjudication. The ICC's first prosecutor, Luis Moreno Ocampo, invoked the scale of the crimes in deciding not to charge British soldiers alleged to have committed war crimes in Iraq. Moreno Ocampo framed the decision as an objective application of the gravity threshold based on a comparison among situations. He asserted that although there was reason to believe that war crimes had been committed, the number of victims – '4 to 12 victims of wilful killing and a limited number of victims of inhumane treatment' – was much lower than the number of victims in other situations before the Court.[13]

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hypothesis, the joint team shall aim to select incidents reflective of the most serious crimes and the main types of victimisation - including sexual and gender violence and violence against children - and which are the most representative of the scale and impact of the crimes.'

[10] ICC-OTP, Policy Paper on Preliminary Examinations (n 4); ICC-OTP, Criteria for Selection of Situations and Cases 1-7 (n 4) 7.

[11] ICC-OTP Regulations (n 9) Regulation 29(2).

[12] ICC-OTP, Policy Paper on Preliminary Examinations (n 4).

[13] Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC to the Hague (9 February 2006) <www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 17 October 2014.

The prosecutor also evaluates gravity in exercising her discretion to decide which cases to select for prosecution within each situation. The prosecutor's policy is to target 'those most responsible for the most serious crimes'.[14] In this context, the prosecutor applies the same factors as in the admissibility context but here the evaluation is necessarily relative rather than based on a threshold.[15] The prosecutor selects those who committed the most serious crimes within the situation and who are most responsible relative to all those who committed such crimes. Such decisions are discretionary and there is less information in the public domain about how they are made. Indeed, the prosecutor's office seems to have had difficulty finalizing a policy on case selection. The office circulated a draft memorandum on the issue among members of the international justice community in 2006 without making it generally available on the Internet or otherwise. No further policy statements on case selection have been made since then.

The ICC judges have taken a similar approach to determining gravity for admissibility to the prosecutor's. Indeed, in confirming the charges in the Abu Garda case the Pre-Trial Chamber explicitly endorsed the factors proposed by the prosecutor.[16] The judges also looked to the elaboration of the concept of gravity for sentencing purposes in the Court's Rules of Procedure and Evidence.[17] These require the judges to consider 'the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime'.[18] These considerations essentially replicate the prosecutor's factors of the impact, nature, and manner of commission of the crimes.

Admissibility decisions generally list the evidence related to each factor and state a conclusion. Thus, for example, in determining the situation involving post-election violence in Kenya to be sufficiently grave to be admissible the judges noted that scale of the crimes involved over 1,000 murders, 900 rapes, and 350,000 displaced persons;[19] the

[14] Office of the Prosecutor of the International Criminal Court, 'Paper on Some Policy Issues Before the Office of the Prosecutor' (Sep 2003) <www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf> accessed 17 October 2014.
[15] ICC-OTP, Policy Paper on Preliminary Examinations (n 4); ICC-OTP, Criteria for Selection of Situations and Cases 1-7 (n 4) 7.
[16] *Bahar Idriss Abu Garda* Confirmation Decision (n 3) para 31.
[17] Ibid para 32.
[18] Rules of Procedure and Evidence (2000) UN Doc PCNICC/2000/1/Add.1, Rule 145(1)(c).
[19] *Situation in the Republic of Kenya* Authorization Decision (n 2) para 190.

manner in which the crimes were committed included 'a degree of brutality' such as cutting off body parts;[20] the impact of the crimes on the victims included psychological trauma and social stigma;[21] and those likely to be prosecuted included people in high-ranking positions who played significant roles in the crimes.[22] Based on these findings, the Court concluded that: 'the general gravity threshold under Article 17(1)(d) of the Statute is met'.[23] Decisions of the ICTY and ICTR about whether to refer cases to national courts pursuant to the 'completion strategies' look similar.[24]

Decisions concerning gravity for purposes of determining proportionate sentences also follow the same basic pattern: the judges list the relevant factors, state the associated facts, and reach a conclusion. In the ICC's first sentencing judgment in the Lubanga case, for instance, the judges begin by setting forth the statutory provisions and rules governing sentencing, which require them to consider the gravity of the crime, the individual circumstances of the convicted person, and any aggravating and mitigating circumstances.[25] They then review the evidence relevant to each of the sentencing factors and impose a sentence of fourteen years imprisonment.[26] The separate opinion of Judge Odio Benito adopts a similar strategy, concluding that the sentence should be one year longer.[27] Neither decision attempts to justify the outcome in terms of the purposes of punishment.

In identifying and applying consistently a set of gravity criteria, international prosecutors and judges seek to enhance the legitimacy of their decisions. Fair and consistent procedures are widely considered to be critical to both normative and sociological legitimacy.[28] Indeed, for this reason, scholars and advocates have

[20] Ibid para 193.
[21] Ibid.
[22] Ibid para 198.
[23] Ibid para 200.
[24] See eg *Prosecutor v Ademi & Norac* (Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 *bis*,) IT-04-78-PT (14 September 2005) para 28; see *Prosecutor v Stanković* (Decision on Referral of Case Under Rule 11 *bis*) IT-96-23/2-AR11bis.1 (1 September 2005) para 19; *Prosecutor v Janković* (Decision on Referral of Case Under Rule 11 *bis*) IT-96-23/2-PT (22 July 2005) para 19.
[25] *Prosecutor v Lubanga* (Decision on the Sentence pursuant to Article 76 of the Statute) ICC-01/04-01/06 (10 July 2012) paras 23-26.
[26] Ibid paras 27-107.
[27] Ibid (Dissenting Opinion of Judge Odio Benito) (10 July 2012) paras 26, 27.
[28] See discussion in Chapter 4.

encouraged international courts to adopt *ex ante* criteria to guide their decisions about which cases and situations to prosecute and how much punishment to inflict.[29]

While such criteria are somewhat helpful in establishing the legitimacy of gravity-related decisions, their value is limited by the highly indeterminate nature of the concept of gravity. Even though many national systems have long considered gravity an important consideration in decisions regarding prosecutorial selection and sentencing, little progress has been made toward theorizing the concept.[30] The few scholars who have sought to measure seriousness, usually in the sentencing context, have achieved limited success and their theories are not easily extended to international crimes.[31]

One approach relies on empirical data regarding people's intuitions about the relative seriousness of crimes. Paul Robinson and others have conducted surveys that they claim demonstrate a high level of agreement about the relative seriousness of certain crimes.[32] However, other scholars have questioned the validity of these claims.[33] Moreover, as Andrew Woods has observed, regardless of the theory's validity at the national level, it is almost certainly not applicable to international criminal courts.[34] First,

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[29] Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 AJIL 510, 538 (arguing for *ex ante* guidelines regarding discretion); Jerry Fowler, 'The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations' (1998) 6 Hum Rts Brief 1, 4 ('As for the danger of "political decision-making," the surest way to avoid that is precisely the mechanism embodied in the treaty: an independent prosecutor subject to judicial oversight applying crimes that are strictly defined and widely accepted.'); Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Court* (CUP 2005) 226; Alexander KA Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50 VJIL 107, 138 citing L Keller, 'Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 Conn J Intl L 209.

[30] Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 OJLS 1 ('[T]he jurisprudence of crime seriousness is a topic that has scarcely been touched.').

[31] For a more detailed discussion of this issue see Margaret M deGuzman, 'Harsh Justice for International Crimes?' (2013) 39 Yale J Intl L. 1.

[32] See Paul H Robinson and Robert Kurzban, 'Concordance and Conflict in Intuitions of Justice' (2007) 91 Minn L Rev 1829, 1892; Paul H Robinson, Robert Kurzban and Owen D Jones, 'The Origins of Shared Intuitions of Justice' (2007) 60 Vand L Rev 1633, 1687; Paul H Robinson and John M Darley, 'Intuitions of Justice: Implications for Criminal Law and Justice Policy' (2007) 81 S Cal L Rev 1, 1.

[33] Donald Braman, Dan M Kahan and David A Hoffman, 'Some Realism About Punishment Naturalism' (2010) 77 U Chi L Rev 1531, 1532 (challenging the idea of shared intuitions of deserved punishment); Christopher Slobogin and Lauren Brinkley-Rubenstein, 'Putting Desert in its Place' (2012) 65 Stan L Rev 1, 80; cf Carlos Berdejo and Noam Yuchtman, 'Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing' (2013) 95 Rev Economics and Statistics 741, 742 (concluding that, rather than adhering to community norms to decide sentencing, judges succumb to political pressure and give higher sentences toward the end of their terms in the hopes of re-election).

[34] Andrew K Woods, 'Moral Judgments & International Crime: The Disutility of Desert' (2011) 52 VJIL 633, 681.

the evidence proffered in the studies is highly context and community-specific, supporting the existence of contingent community norms, rather than universal ones.[35] Second, the studies are limited to a small set of 'core' crimes such as theft, rape and murder; they do not encompass complex international crimes such as genocide and crimes against humanity. In fact, given the complexity of international crimes it is unlikely that a study could be designed that would capture enough variables to be meaningful.

Other scholars have attempted to measure harm based on principles rather than intuitions. In a book entitled *Harm to Others*, Joel Feinberg argues that harm can be measured according to the degree to which it affects individual choice.[36] Crimes that affect 'welfare interests' are the worst because they diminish our ability to choose how to live our lives.[37] This approach to measuring harm is also flawed, especially for international crimes. The theory assumes that all humans value choice over other interests, an inaccurate assumption, particularly in cultures that privilege communal values. Indeed, as Andrew Von Hirsch and Nils Jareborg point out, it is not even an accurate assumption in more individualist cultures. Intense pain is usually considered a serious harm not simply because it infringes on the ability to choose but because it diminishes quality of life.[38]

Von Hirsch and Jareborg propose an alternative theory of harm measurement that they call the 'living standard'.[39] Allison Danner has suggested that this standard could be adopted in international courts.[40] The theory measures harm according to the extent to which it affects the victim's standard of well-being.[41] This theory, like Feinberg's, however, fails to identify universal interests and priorities among them. Von Hirsch and Jareborg admit that their theory can only capture 'standard' harm and that judgments of

[35] Ibid 648.
[36] Joel Feinberg, *Harm to Others* (OUP 1984) 37.
[37] Ibid 37.
[38] Hirsch and Jareborg, 'Gauging Criminal Harm' (n 30) 8.
[39] Ibid 10.
[40] See Allison Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 Va L Rev 415 (suggesting that international courts could adopt a standard like the 'living standard' for measuring harm).
[41] Hirsch and Jareborg, 'Gauging Criminal Harm' (n 30) 7 ('The most important interests are those central to well-being; and, accordingly, the most grievous harms are those that drastically diminish one's standard of well-being.').

harm vary across cultures.[42] These limitations point to the fundamental problem with efforts to measure harm – there are simply too many variables to make such measurement meaningful. People value different things, in different amounts, at different times.

The incommensurability of gravity means that efforts to 'standardize' gravity evaluations sometimes have the opposite of their intended effect of enhancing legitimacy. In the absence of goals and priorities to anchor gravity determinations, they can appear to be unprincipled or even pretextual. The malleable nature of the factors means that virtually any case can be declared grave by highlighting one of the factors. If a case has a limited victim impact, it can be declared grave because the victims were spread out over time or space. A case with few victims in a confined space may have been committed in an especially brutal manner. If these factors are not present, the decision-maker can argue that other aspects of the nature of the crime, such as its discriminatory basis, render it grave, and so on. Since there is no agreement in the international community about which factors are most important, gravity-related decisions are easily challenged.

This problem has been evident in the early years of the ICC's operations. Some gravity-related decisions at the ICC that were presented as 'objective' or dictated by the law have instead appeared unprincipled to some audiences. Such decisions have sometimes fostered charges that their true motivation was improperly 'political'.[43] A good example is the ICC prosecutor's decision not to investigate the alleged British war crimes in Iraq. Moreno Ocampo's claim that the number of victims was too low in comparison to the numbers in other situations to reach the statutory gravity threshold struck some observers as unconvincing, given that the threshold requires no agreed number of victims. Moreover, since a threshold by definition requires an absolute determination, it made little sense for the prosecutor to evaluate the gravity threshold in comparison with other situations. The absence of a principled basis for the decision

[42] Ibid 6 ('How harmful a burglary is [in our sense, of how injurious it *should* be considered] depends on its typical impact, and that impact will vary across cultures- depending on both factual and normative differences.').

[43] To maintain resource support the ICC is incentivized to investigate wrongdoing in politically powerless places. See Mark A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 152 ('Decisions whether or not to investigate or prosecute therefore become contoured by concerns over how they affect the ICC's political standing, funding, and support among states. Cases may be turned away because of politics and initiated because of politics, instead of cases initiated or turned away solely because of the gravity of the alleged violations of international law that they actually present'.).

made it easy fodder for criticism that the prosecutor's true motivation was political – that he was protecting a great power.[44] Likewise, when the ICC prosecutor explains decisions to focus prosecutions in some situations on rebel commanders rather than government soldiers in light of the greater gravity of the crimes the former have committed, some observers suspect that gravity is being used as a pretext for decisions that protect government actors in order to retain state support for the ICC.[45]

Purely factor-based gravity decisions can also be attacked on the grounds that they privilege the wrong factors. In the Sudan situation one of the cases involves an attack that killed twelve peacekeepers and wounded eight others.[46] In confirming the charges in the case, the Pre-Trial Chamber held that the gravity threshold was met despite the relatively low number of victims because the crime had the broader impact of reducing peacekeeping forces in the area.[47] This decision can be criticized as insufficiently attentive to the need for scale in the gravity analysis. Moreover, observers may wonder whether the lives of peacekeepers are being valued more highly than the lives of those they seek to protect, who were victimized in much higher numbers.

The ICC prosecutor's decision to charge Thomas Lubanga, a mid-level commander in the Democratic Republic of Congo, only with enlisting and recruiting child soldiers generated controversy for similar reasons. While the prosecutor's office asserted that it is important to highlight crimes against children,[48] others pointed out that the 'nature' of these crimes is less serious than that of murder or rape, which were also committed on a widespread basis in the conflict.[49]

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[44] See eg William A Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court' (2008) 6 JICJ 731, 742-743; ICC Watch, 'Why Won't the ICC Move Against Tony Blair on War Crimes?' (Press Release) (4 February 2010) <www.iccwatch.org/pdf/Press%20Release%2004Feb10.pdf> accessed 17 October 2014 .

[45] Ibid.

[46] *Abu Garda* Confirmation of Charges (n 3) para 21.

[47] Ibid paras 33, 34.

[48] Fatou Bensuda, Deputy Prosecutor of the ICC, Statement at the OTP Monthly Media Briefing (28 August 2006) 3 <www.icc-cpi.int/NR/rdonlyres/53FB2CF6-B86C-4026- A8DC-FA2FC2450BCA/277236/FB_20060828_en5.pdf > accessed 17 October 2014 ('It is the view of the Office of the Prosecutor that the abuse of child soldiers has gone largely unrecognized and unpunished for too long.… Regardless of the outcome of these proceedings, the hearing represents an unprecedented opportunity to shine a spotlight on this abuse of children worldwide.').

[49] Women's Initiatives for Gender Justice, 'Beni Declaration' in *Making a Statement: A Review of Charges and Prosecutions for Gender-based Crimes before the International Criminal Cour*t (June 2008) 17, 17 <www.iccwomen.org/publications/articles/docs/MakingAStatement-WebFinal.pdf> accessed 17 October 2014 (reporting that various women's rights and human rights NGOs complain that the ICC improperly

The purportedly 'objective' factor-based approach to gravity also fosters legitimacy challenges in the sentencing context. The sentencing practices of international courts have been criticized as both inconsistent and ineffective.[50] Such criticisms stem in part from the malleability of gravity, which encourages inconsistent outcomes.[51] Like prosecutors deciding which cases to bring, judges can cite gravity factors to justify virtually any sentencing outcome. Moreover, for the reasons explained below, the failure to link sentencing decisions to goals fosters charges of ineffectiveness.

In sum, efforts to determine gravity through a purportedly objective factor-based test risk undermining rather than enhancing the sociological legitimacy of international criminal courts.

2. Gravity Rhetoric as a Threat to Fairness

The purportedly objective factor-based approach to gravity also threatens to diminish the moral legitimacy of international courts by undermining fairness to defendants. The assumption that gravity is entirely a matter of objective fact, rather than goal-based context, promotes rhetoric that portrays all international crimes as exceptionally serious. This rhetoric endangers defendants' rights.

Rhetorics involve the use of language to frame and address contested issues, whether in law or in other areas of human interaction.[52] Unexamined rhetorics can be

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focused on the crime of conscripting child soldiers though the Union des Patriotes Congolais (UPC) had committed many other more serious crimes); see also Julie Flint and Alex de Waal, 'Case Closed: A Prosecutor Without Borders' (2009) Vol 171 No 4 World Affairs 30 (noting shock felt by Congolese human rights groups and women's groups at learning of limited charges brought against Lubanga and belief that the OTP's choice of charges threatened to offend victims and undermine trust in the ICC and OTP); Justin Coleman, Comment, 'Showing Its Teeth: The International Criminal Court Takes on Child Conscription in the Congo, but Is Its Bark Worse than Its Bite?' (2007) 26 Penn St Intl L Rev 765, 780 (noting criticism by and concerns of Congolese people and foreign organizations regarding the OTP's failure to pursue prosecution of widespread incidents of rape, murder, and torture).

[50] Allison Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 Va L Rev 415, 441 (claiming that the tribunals' inconsistent sentencing practices 'reinforce the views of critics who view the enforcement of international criminal law as fatally arbitrary'); Ralph Henham, 'Developing Contextualized Rationales for Sentencing in International Criminal Trials' (2007) 5 J Intl Crim Just 757, 760-61; Mark A Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) Vol 99 No 2 Nw U L Rev 539, 544.

[51] Henham, 'Developing Contextualized Rationales' (n 50) 774; Adrian Hoel, 'The Sentencing Provisions of the International Criminal Court: Common Law, Civil Law or Both?' (2009) 33 Mon U L Rev 264, 266.

[52] Anthony G Amsterdam and Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Way We Understand the Law – and Ourselves* (Harvard University Press 2000) 165; Jane B Baron and Julia Epstein, 'Is Law Narrative?' (1997) 45 Buff L Rev 141, 146 (citing

problematic because they 'narrow the range of discursive space and interpretive possibility'.[53] For example, Alice Ristroph has exposed the limiting effects of 'violence' rhetoric on efforts at criminal law reform in the United States.[54]

Gravity provides international criminal law's dominant justificatory rhetoric. International crimes are universally said to be exceptionally serious and their gravity is used to justify a range of doctrines and policies related to the treatment of defendants. By portraying gravity as an entirely objective phenomenon, the factor-based approach discourages an examination of the goals and values at stake in the development of these doctrines and policies. In particular, gravity rhetoric deters decision-makers from balancing the value of accountability against the values of defendants' rights and sovereignty, purporting instead to resolve any conflict between these values in favor of accountability.

This problem is not new. A Latin maxim holds that '*in delictis atrocissimus jura transgredi liceat*' – with atrocious crimes, legal rules can be relaxed.[55] International criminal law claims to adjudicate 'atrocious crimes' and, on that basis, relaxes some of the rules that normally protect defendants. For example, the Rome Statute, as well as international criminal law generally, denies immunity to anyone accused of international crimes.[56] In explaining the decision to reject former Liberian president Charles Taylor's immunity defense, the SCSL relied in part on the 'nature' of the offenses at issue—an implicit reference to gravity.[57] As Professor Charles Jalloh has written, the Taylor decision is seen as proof that the 'long arm of international criminal law [can] extend to

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Aristotle, 'Rhetoric' in Jonathan Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press 1984); Jack Balkin, 'A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason' in Peter Brooks and Paul Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996) 211.

[53] Amsterdam and Bruner, *Minding the Law* (n 52) 193.

[54] See Alice Ristroph, 'Criminal Law in the Shadow of Violence' (2011) 62 Ala L Rev 571, 575.

[55] Beth Van Schaack and Ronald Slye, *International Criminal Law and its Enforcement: Cases and Materials* (2nd edn, Foundation 2010) 362; Mirjan R Damaska, 'The Shadow Side of Command Responsibility' (2001) 49 Am J Comp L 455, 482; see also Caroline Davidson, 'May it Please the Crowd?—The Role of Public Confidence, Public Order and Public Opinion in Bail for International Criminal Defendants' (2012) 43 Colum Hum Rts L Rev 349, 402 ('Arguably, the gravity of international crimes means that the ordinary rules go out the window.').

[56] Rome Statute of the International Criminal Court, UN Doc A/Conf.183.9 (adopted 17 July 1998, entered into force 1 July 2002).

[57] *Prosecutor v Taylor* (Decision on Immunity from Jurisdiction) SCSL-03-01-I (31 May 2004) para 49 ('The nature of the offences for which jurisdiction was vested in these various tribunals [ie the ICTY, ICTR, ICC, and Tokyo and Nuremberg International Military Tribunals] is instructive as to the circumstances in which immunity is withheld.').

reach the most powerful state official, so long as that person commits crimes that shock the conscience of the international community'.[58] In rejecting a similar claim in the case of former Yugoslav president Milosevic the ICTY, quoting the House of Lords' decision in the *Pinochet* case, stated: 'In future those who commit *atrocities* against civilian populations must expect to be called to account if fundamental human rights are to be properly protected.'[59]

Courts also invoke the gravity of international crimes to reject defenses based on the principle of legality or *nullum crimen sine lege*.[60] That principle is designed to provide notice to defendants of the types of conduct that are punishable and thus ensure the fair application of the law. When defendants at the ICTR objected that applying the newly developed liability doctrine of 'joint criminal enterprise' in the context of internal armed conflicts violated the principle of legality, the trial chamber invoked gravity to reject the claim, stating that 'any potential perpetrator was able to understand that the criminalization of acts of such gravity did not depend on the international or internal nature of the armed conflict'.[61] The SCSL used similar reasoning in convicting defendants retroactively of the newly developed crimes of enlisting child soldiers and forced marriage.[62]

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[58] Charles Jalloh, 'Immunity from Prosecution for International Crimes: The Case of Charles Taylor at the Special Court for Sierra Leone' Vol 8 Issue 21 ASIL Insights <www.asil.org/insights/volume/8/issue/21/immunity-prosecution-international-crimes-case-charles-taylor-special > accessed 17 October 2014.

[59] *Prosecutor v Milosevic* (Decision on Preliminary Motions) IT-02-54 (8 November 2001) para 33. (emphasis added). The ICJ may also have implicitly relied on gravity when it declared in the Yerodia decision that international courts are not required to respect immunity. See *Dem Rep Congo v Belg* (Arrest Warrant of 11 April 2000) (14 February 2002) ICJ 3 para 61.

[60] See eg *Prosecutor v Milutinovic, Sainovic & Ojdanic* (Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003) paras 37-42 (rejecting defense of *nullum crimen sine lege*, in part because of grievous nature of accused's actions). See Beth Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 GEO L J 119 134-35 (citing, among other authorities, *Prosecutor v Delalic*, M*ucic, Delic & Landzo* (Judgment) IT-96-21-T (16 November 1998) 403).

[61] *Prosecutor v Karemera* (Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, Andre Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise) ICTR-98-44-T (11 May 2004) para 44.

[62] *Prosecutor v Brima, Kamara & Kanu* (Judgment) SCSL-04-16-A-675 (22 February 2008) 175-86, 293-97; see also Micaela Frulli, 'Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a "New" Crime against Humanity' (2008) 6 J Intl Crim Just 1033. But see *Prosecutor v Sam Hinga Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction) SCSL2004-14-Ar72(e) (31 May 2004) Robertson Dissent paras 10-13 (rejecting argument that the moral gravity of recruiting child soldiers made the principle of legality inapplicable and stating: 'On the contrary, it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most

Professor Nancy Combs has suggested that the gravity of international crimes helps to justify application of a lower standard of proof at international trials compared to the 'beyond a reasonable doubt' standard common in national courts. Combs conducted a large-scale review of transcripts from proceedings at the ICTR, SCSL, and Special Panels for East Timor and discovered that those courts routinely convict defendants on the basis of highly unreliable evidence.[63] In particular, such convictions often rest on witness testimony that is riddled with inconsistencies. Combs argues that this reliance on a standard below 'beyond a reasonable doubt' may be justified by the fact that international courts often prosecute leaders of organizations that are widely known to be engaged in widespread criminality.[64] The overall gravity of the organization's crimes relieves judges of the responsibility to ensure that a particular defendant committed a particular crime on a particular date.

Finally, gravity rhetoric is sometimes used to justify relaxed criminal procedures and harsh punishments.[65] Defendants are subject to lengthy pre-trial detention and denied provisional release in part based on the gravity of the crimes alleged.[66] Many jurisdictions exclude international crimes from statutes of limitation.[67] The ICTY has

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stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime.'). Scholars have justified violations of the principle of legality in international criminal law by invoking the gravity of the crimes at issue. See Beth Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals' (2008) 97 Geo LJ 119; Andrew Altman and Christopher Heath Wellman, 'A Defense of International Criminal Law' (2004) 115 Ethics 35, 61 (arguing that there is not practical alternative to violations of the principle of legality in international criminal law).

[63] Nancy M Combs, *Fact-finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (CUP 2010) 43, 79-100, 149; see also Elise van Sliedregt, 'The Curious Case of International Criminal Liability' (2012) 10 J Intl Crim Just 1171, 1173 (arguing that the unique features of international criminality 'put pressure' on the principle of individual culpability).

[64] Ibid 244.

[65] See Caroline Davidson, 'No Shortcut on Human Rights: Bail and the International Criminal Trial' (2010) 60 Am U L Rev 1, 33-34 (Arguing that 'international courts should not be bound by precedent dealing with the reasonableness of detention in domestic jurisdictions, scholars and courts have listed a number of factors that distinguish international criminal tribunals from domestic jurisdictions including the gravity of the crimes').

[66] Ibid 33. See also Johan David Michels, 'Compensating Acquitted Defendants for Detention before International Criminal Courts' (2010) 8 JICJ 407, 415 (citing *Prosecutor v Delalic* (Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic) IT-96-21-A (25 Sept 1996) para 20). In Delalic, the ICTY trial chamber stated that 'both the gravity of the offences charged and the unique circumstances in which the International Tribunal operates justify the shifting of the burden to the accused and the requirement that he show exceptional circumstances to qualify for provisional release'. *Prosecutor v Delalic* (Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic) IT-96-21-A (25 September 1996) para 20.

[67] An ABA resolution urges all states to reject statutes of limitations for genocide, crimes against humanity and serious war crimes. American Bar Association Section of International Law, 'Report to the House of

held that the gravity of international crimes justifies adjudicating the case of a defendant who was illegally apprehended.[68] The ICC prosecutor has urged that all persons convicted by that Court should be subject to a presumptive sentence of 24 years' incarceration in light of the gravity of the crimes within the ICC's jurisdiction.[69]

In each of these contexts, gravity rhetoric is used to limit choices and discourage consideration of competing values. The claim is that *all* international crimes, by their nature, are so serious that they warrant international adjudication, limited defenses, lengthy punishment and so forth. As argued in Chapter 3, however, gravity is not a threshold above which crimes become international and such consequences become legitimate. Rather, it is one of the considerations that help to legitimate international criminal law's jurisdictions and doctrines, along with other factors. In particular, considerations related to fairness and sovereignty must be weighed alongside gravity in determining the legitimacy of international adjudication and doctrines.

Determining gravity in relation to institutional goals rather than exclusively as objective fact would moderate gravity rhetoric by requiring judges and prosecutors to grapple with the values at stake in their decisions. Take, for instance, the question of whether duress should be available as a defense to killing an innocent person under international criminal law. In the Erdemovic case at the ICTY, the defendant helped to execute hundreds of civilians under threat that his failure to participate would result in his own death.[70] To resolve the question of whether he could be acquitted on the basis of duress, the majority of the Appeal Chamber first considered whether an applicable customary international rule existed and found none.[71] The judges next found that national jurisdictions are split on the question, with civil law systems generally

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Delegates' (2013) ABA Res 107a <www.americanbar.org/content/dam/aba/uncategorized/international_law/2013_hod_annual_meeting_107A.authcheckdam.pdf > accessed 17 October 2014.

[68] *Prosecutor v Nikolic* (Decision on Interlocutory Appeal Concerning Legality of Arrest) IT-94-2-AR73 (5 June 2003) para 26 ('Therefore, the Appeals Chamber does not consider that in cases of universally condemned offenses, jurisdiction should be set aside on the ground that there was a violation of the sovereignty of a State, when the violation is brought about by the apprehension of fugitives from international justice, whatever the consequences for the international responsibility of the State or organization involved.').

[69] *Prosecutor v Lubanga* (Decision on Sentence Pursuant to Article 76 of the Statute) ICC-01/04-01/06 (n 25) 92.

[70] *Prosecutor v Erdemovic* (Judgment) IT-96-22-A (7 October 1997).

[71] Ibid; *Prosecutor v Erdemovic* (Judgment) IT-96-22-A (7 October 1997) (Joint Separate Opinion of Judge McDonald and Judge Vohrah).

permitting the defense and common law systems generally rejecting it. Faced with this lacuna, two judges writing for the majority concluded that the gravity of international crimes mandated rejection of the defense. They wrote:

> If [some] national law denies recognition of duress as a defence in respect of the killing of innocent persons, international criminal law can do no less than match that policy since it deals with murders often of far greater magnitude. If national law denies duress as a defence even in a case in which a single innocent life is extinguished due to action under duress, international law, in our view, cannot admit duress in cases which involve the slaughter of innocent human beings on a large scale.[72]

This opinion illustrates the use of gravity rhetoric to narrow the discursive space surrounding an issue. If international crimes 'involve the slaughter of innocent human beings on a large scale' it is hard to disagree that good policy requires rejecting the defense of duress. Yet the first sentence quoted above tacitly admits that international crimes are *sometimes* of no greater magnitude than national crimes.

In this decision, fairness to the defendant and the prevention of crimes constituted competing goals. The statement above asserts the exceptional gravity of international crimes to privilege prevention (in the form of deterrence) over fairness. Had the judges viewed gravity as a contingent quality rather than an absolute attribute of all international crimes, however, they might have reached the opposite conclusion. That is, they might have concluded that the defense should be available, at least for international crimes that do not involve massive slaughter. When a soldier kills one innocent civilian, under a threat of death and the stress of war, perhaps it is unfair to convict her of a war crime.

The risks associated with gravity rhetoric are increasing as the regime expands. The development of international criminal law over the past several decades has seen a steady extension of the types of crimes considered 'international'. War crimes have grown to include crimes committed in internal armed conflict; crimes against humanity have been interpreted to extend to crimes committed in rather restricted geographic and temporal spaces and affecting limited numbers of victims; and genocide has been held to

[72] *Erdemovic* Judgment (Joint Separate Opinion of Judge McDonald and Judge Vohrah) (n 71) para 75.

apply to the acts of a lone madman.[73] The types of acts that can constitute war crimes and crimes against humanity have also expanded to include, for instance, the theft or destruction of various kinds of property.[74] International courts have adopted increasingly expansive doctrines regarding *mens rea* and modes of liability.[75]

Such expansion is likely to continue in light of the identities and incentives of international judges and prosecutors. As Darryl Robinson has persuasively argued, these regime actors often see their work as part of a broader human rights promotion agenda.[76] Judges therefore employ interpretive approaches borrowed from the human rights context to justify expansive doctrines and conflate international criminal law norms with human rights norms.[77] International judges and prosecutors are also connected to human rights advocacy networks that encourage regime expansion.[78] For example, human rights organizations pushed strongly for the crimes in Darfur to be labeled genocide even though many international law experts argued that the requirement of intent to destroy a group was not met.[79] These advocacy efforts likely influenced Moreno Ocampo's decision to seek a genocide charge against Sudan's president.[80]

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[73] The argument that international crimes are expanding is developed in more detail in Margaret M deGuzman, 'How Serious are International Crimes? The Gravity Problem in International Criminal Law' (2012) 51 Colum J Tranl L 18.

[74] Ibid; see also *Prosecutor v Katanga* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2004) para 953.

[75] deGuzman, 'How Serious are International Crimes?' (n 73) 18.

[76] Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 LJIL 925, 939.

[77] Ibid 946-47.

[78] Daniel Terris and others, 'Toward a Community of International Judges' (2008) 30 Loy LA Intl & Comp L Rev 419, 460.

[79] Interview by Zachary Manfredi and Julie Veroff (ICC Observers Project) with William A Schabas, Professor of Human Rights Law and Director of the Irish Centre for Human Rights, National University of Ireland, Galway (26 March 2009) < https://iccobservers.files.wordpress.com/2009/03/schabas_interview_official.pdf> accessed 17 October 2014

(stating that the prosecutor made an 'error in judgment' and should have 'consigned himself to the clearly established charges of crimes against humanity and war crimes' in indicting Bashir); see also International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the UN Secretary-General' (2005) 4 <http://www.un.org/news/dh/sudan/com_inq_ darfur.pdf> accessed 17 October 2014 (stating that the Sudanese government has not pursued a policy of genocide because 'the crucial element of genocidal intent appears to be missing').

[80] See Michael J Kelly, 'The Debate Over Genocide in Darfur, Sudan' (2011) 18 UC Davis J Intl L 205, 213, 217; Andrew T Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide' (2008) 6 JICJ 829, 830 (suggesting that, given the ongoing debate as to whether the events actually amounted to genocide, it was external pressures, rather than Ocampo's own judgment, that led to the decision to request a warrant including the charge of genocide); Roberta Cohen, 'Darfur Debated' (2007) 29 Forced Migration Rev 55, 55-6.

The more international criminal law expands, the more problematic it becomes for the regime's legitimacy for decision-makers to use gravity rhetoric to justify limits to defendants' rights. It is one thing to say that the defendants at Nuremberg should have known what they were doing was illegal and quite another to say the same of a rebel commander who recruited children to fight for his cause. Adopting a new approach to gravity determinations is therefore important to both the sociological and normative legitimacy of international criminal courts.

3. A Better Approach: Linking Gravity to Goals

To bolster the legitimacy of gravity-related decisions, and thus of the decision-makers and institutions behind them, such decisions should be justified in terms of the appropriate goals of international courts and the priorities among them. This would not require abandoning the factor-based method entirely but rather adding another layer of explanation. The factors help to explain why decision-makers believe a case or situation is worthy of international adjudication or of a particular sentence. On an intuitive level, people often agree that some crimes are worse than others based on considerations such as scale, nature, manner of commission and impact of the crimes. Agreement is easiest to obtain when a situation or case ranks high with respect to all of the gravity factors. There is little disagreement, for instance, about the extreme gravity of the crimes committed in the Holocaust or the Rwandan genocide. However, particularly for situations and cases that do not rank high with regard to some of the factors, additional justification is necessary to explain the appropriateness of international adjudication, doctrines that limit defendants' right, or a given sentence. Such cases are particularly susceptible to legitimacy challenges from those who disagree with the factors being privileged to reach an outcome.

Linking gravity analysis to the appropriate goals of international adjudication and the priorities among them would enhance the normative legitimacy of such adjudication with respect to each of the legitimacy factors discussed in Chapter 4, in particular comparative benefit and effectiveness.[81] In so doing, this approach would also likely

[81] Alexander Greenawalt argues, to the contrary, that the goals of international courts are not important determinants of their decisions. This is because Greenawalt assumes, like most authors, that gravity can be

improve the sociological legitimacy of these institutions. As explained in Chapter 1, institutions that are perceived as being fair, effective, transparent and so forth are more likely to be viewed as legitimate than those that score poorly in terms of these qualities.[82]

First, linking gravity analysis to the goals of international adjudication would increase the likelihood that such adjudication would provide a benefit compared to the alternative, whether non-prosecution or prosecution in a national court. Requiring prosecutors and judges to articulate gravity-based decisions not only in terms of objective factors, but also in relation to institutional goals would result in decisions that more clearly promote those goals. For example, the ICC prosecutor would not decline to investigate a situation simply because the number of victims was too low in comparison to those in other situations, as Moreno Ocampo did with regard to British war crimes in Iraq. Instead, she would explain why the relatively low number of victims makes it comparatively beneficial for the ICC to adjudicate other situations. For instance, if the prosecutor believes that the central goal of the ICC is deterrence, she might assert that the relatively low number of victims makes it relatively less important for the international community to seek to deter crimes in this situation compared to other situations. If the prosecutor views retribution as an important goal, she might suggest that greater retribution can be achieved by focusing on situations in which more victims have been harmed, and so forth.

Linking gravity to goals in this way would also increase the effectiveness of international criminal courts. As discussed in Chapter 4, effectiveness requires clarity of goals and priorities. Currently, a huge number of goals are ascribed to the ICC and those goals sometimes conflict.[83] The ICC cannot be highly effective until it develops priorities among its goals. In particular, goals aimed at improving victim welfare are sometimes incompatible with goals that seek to benefit the global community more broadly. When the ICC decides which cases to adjudicate it sometimes has to choose between cases that will provide relief to local victims and cases that will better express

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determined independent of those goals. See Alexander KA Greenawalt, 'International Criminal Law for Retributivists' (2014) 35 U Pa J Intl L 101, 164 ('The focus on crimes of special gravity, moreover, flows both from a retributive emphasis of individual culpability and with a utilitarian concern for preventing great societal harms.').

[82] For discussion, see Chapter 1, above.

[83] For discussion, see Chapter 4, above.

global norms.[84] Likewise, when local sentencing norms conflict with global values the ICC must choose which to apply.

In discussing the ICC's effectiveness, Yuval Shany and his co-authors assert that the Rome Statute's gravity threshold for admissibility and jurisdictional gravity limitations can enhance the institution's legitimacy because they 'assure states that the Court only intervenes in exceptional cases, where strong justice considerations support an international response'.[85] As this study has sought to demonstrate, however, this 'assurance' is of limited value given the absence of agreed meaning behind the concept of gravity. By masking uncertainty about the ICC's goals and conflicts among them, the concept of gravity increasingly threatens to undermine the ICC's ability to be effective. A goal-oriented approach to gravity, on the other hand, would increase the ICC's effectiveness by requiring decision-makers to specify the goals they seek to pursue, making it more likely that the decisions would, in fact, promote those goals.

Articulating gravity in relation to goals would also improve the transparency with which the Court operates and the accountability of its prosecutors and judges. As discussed above, claims that decisions are based solely on 'objective' gravity sometimes obscure, or are believed to obscure, other motives. Explaining gravity-related decisions in terms of goals and priorities would lend clarity to the process, which in turn would improve the accountability of decision-makers. Finally, a goal-oriented approach to gravity would increase fairness by avoiding the dangers of gravity rhetoric discussed above.

4. A Dialogic Process

In order for a goal-oriented approach to gravity to have the legitimacy-enhancing effects discussed above, normatively appropriate and widely agreed goals and priorities must be ascertained for international courts. As already discussed, the creators of these institutions generally fail to endow the institutions with clear goals and priorities. As

[84] Madeline Morris, 'Complementarity in Conflict: States, Victims, and the ICC' in Sarah B Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield 2000) 197-98.
[85] Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 243-44.

such, the task of identifying institutional goals falls largely to decision-makers within the institutions.

The best way for decision-makers at institutions like the ICC to identify institutional goals and priorities is to engage in continual dialog with the institutions' various legitimacy audiences. Indeed, even if the goals of international courts were clearer at their inception, such a process would be necessary to enable institutions to maintain the ability to adapt to changing circumstances.[86] In some domestic courts, this process takes place in part via the election of judges and prosecutors based on the visions of justice they express in their campaigns. Given the absence of such a mechanism at the international level, international judges and prosecutors must express their views through clearly articulated explanations for their decisions.

If decision-makers are open and transparent about the goals that inform their decisions about issues such as jurisdiction, case selection, and sentencing, the various constituencies of international courts, including state actors, advocacy groups, and the general public, can provide feedback. Such feedback can take various forms, including official statements and positions in the ICC's Assembly of States Parties, reports of non-governmental organizations, and expressions of public opinion in the media. Decision-makers at international courts can then take this feedback into account in future decisions. Through this dialogic process between courts and their constituencies, community norms regarding the appropriate goals and priorities of international adjudication will emerge over time.

To use the decision-making process effectively to identify goals and priorities, international courts should avoid rigid doctrines and policies that commit them to particular outcomes – especially in the courts' early years. For instance, the ICC should continue to resist endowing the gravity threshold for admissibility with substantial content. If the Court holds, for instance, that the gravity threshold requires that all ICC

[86] Allen Buchanan and Robert Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics and Intl Affairs 405, 433; see also David D Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 AJIL 552, 561 ('These observations suggest that a basic challenge for international governance is to seek designs that promote institutional integrity, and that consequently address in the ordinary course of business the circumstances that make possible the resonance of allegations of illegitimacy.').

cases concern top leaders, or involve a certain number of victims, the Court will have less flexibility to pursue a range of goals.

The ICC's Appeals Chamber concluded as much in overturning the Pre-Trial Chamber admissibility decision in the Lubanga case. The Pre-Trial Chamber had ruled that the admissibility threshold requires that all ICC cases involve systematic or large-scale harm committed by the most responsible perpetrators. The Appeals Chamber found that this approach would not only conflict with the Rome Statute's broader grant of subject matter and personal jurisdiction to the Court, but that it would also undermine the Court's ability to deter crimes by all levels of perpetrators.

The ICC prosecutor has also wisely abandoned the gravity threshold as a justification for declining to prosecute. After the negative reaction to Moreno Ocampo's assertion that the Iraq situation failed to meet the gravity threshold, the prosecutor's office has not declared any situation to fall below the threshold. Indeed, the office has reopened consideration of the Iraq situation.[87]

Likewise, at least until greater consensus develops about the appropriate goals and priorities of international courts, decision-makers should avoid interpreting the elements of international crimes to require strict gravity-related limitations. Thus, for example, they should continue to reject the view that crimes against humanity can only be committed by states or state-like organizations. The requirement of high-level organization is, as explained in Chapter 3, a way of understanding the gravity of crimes against humanity. It restricts the ambit of such crimes on the grounds that the involvement of states or state-like organizations is part of what makes crimes against humanity sufficiently serious to concern the international community.

When Judge Kaul endorsed the requirement of a state-like organization for crimes against humanity in the Kenya situation, he reasoned that:

> 'A distinction must be upheld between human rights violations on the one side and international crimes on the other side, the latter forming the nucleus of the most heinous violations of human rights representing the

[87] ICC-OTP Press Release, 'Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq' (13 May 2014) <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-iraq-13-05-2014.aspx> accessed 17 October 2014.

most serious crimes of concern to the international community as a whole.'[88]

For Judge Kaul, the involvement of a state-like organization is what makes crimes against humanity serious enough to warrant international adjudication. His opinion draws on both the idea that state-sponsored crimes are particularly serious because states 'normally have the duty to uphold the rule of law and to respect human rights' and that only states or state-like organizations are capable of committing crimes on the scale necessary for crimes against humanity.[89] He defines a 'state-like organization' as one that has 'the capacity and means available to attack any civilian population on a large scale'.[90]

The majority of the Pre-Trial Chamber rejected Judge Kaul's view, holding that crimes against humanity can be committed by any organization that 'has the capability to perform acts which infringe basic human values'.[91] A Trial Chamber of the Court confirmed this approach in the Katanga judgment, holding that the term 'organization' simply requires sufficient coordination to be able to carry out an attack.[92]

Leaving the definition of crimes against humanity broad in this manner enables the Court, and other international and even national institutions that are likely to take the ICC's jurisprudence into account, free to consider a wider range of crimes as potentially grave enough to constitute crimes against humanity, and thus to pursue a wider range of goals. Moreover, when other legitimating factors such as state consent and fairness are strongly present, perpetration by a state-like entity may not be necessary to legitimate international adjudication.

The prosecutor should also avoid adopting stringent criteria in her policies and practices regarding the jurisdictional gravity requirements. In determining that crimes against humanity had not been committed in Venezuela, Moreno Ocampo stated that the

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[88] *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authoriation of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19 (31 March 2010) Dissenting Opinion of Judge Hans Peter Kaul para 53.
[89] Ibid paras 61, 63.
[90] Ibid para 51.
[91] Ibid para 90.
[92] *Katanga Judgment* (n 74) para 1120. See also *Prosecutor v Gbagbo* (Judgment on the Appeal of the Prosecutor Against the Decision of Pre-trial Chamber I of 3 June 2013 entitled 'Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute') ICC-2/11-01/11 (16 December 2013) para 215. See also *Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06 (9 June 2014) para 19.

'widespread or systematic' element creates a 'stringent threshold' that had not been met.[93] In considering whether to investigate crimes connected to a coup d'etat in Honduras that resulted in 6 to 20 killings, current ICC prosecutor Fatou Bensouda concluded that the scale of serious crimes committed was small relative to the population allegedly under attack and could not therefore be considered sufficiently 'widespread' to constitute a crime against humanity.[94] Each of these conclusions can be attacked as arbitrary, given the lack of agreement about what makes crimes against humanity serious.

Rather than basing decisions on such debatable statements about the elements of international crimes, the prosecutor should embrace her discretion to consider *relative* gravity in deciding when investigation and prosecution are warranted. Basing decisions on relative gravity, rather than on claims about absolute gravity, would provide the prosecutor the flexibility she needs to express her vision of the ICC's goals and priorities to the global community. Members of that community can then react to her decisions based on their views about appropriate goals and priorities, helping to develop global norms to guide future decisions.

Although the extent of the prosecutor's discretion to reject potential situations is somewhat unclear under the statute, there are at least two ways to interpret the Statute to grant the prosecutor broad discretion. First, Article 15, which governs *proprio motu* investigations, can be read to allow the prosecutor to decide not to pursue potential situations on the grounds that she deems other potential or actual situations to be more serious.[95] The prosecutor currently interprets the provision to provide no such discretion. In her view, she must initiate investigation of any situation where an admissible crime within the Court's jurisdiction has been committed.[96]

Another way to interpret the Statute to allow the prosecutor to decline to investigate situations based on relative gravity is to adopt a broad view of the 'interests of

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[93] ICC-OTP, 'OTP Response to Communications Received Concerning Venezuela' (9 February 2006) 4.
[94] ICC-OTP, 'Report on Preliminary Examination Activities 2013' (November 2013) para 72.
[95] I elaborate this argument in Margaret M deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2009) 32 Fordham Intl LJ 1400. I read such discretion into Article 15's statements that the prosecutor 'may' initiate investigations *proprio motu* and that she should do so only after analyzing the seriousness of the information she has received. See Rome Statute (n 56) art 15.
[96] International Criminal Court, 'Policy Paper on Preliminary Examinations' (4 October 2010) 13-14 <http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf> accessed 10 April 2014.

justice' provision.[97] Article 53 governing the initiation of investigation requires the prosecutor to determine whether there is a reasonable basis to investigate in part by considering whether 'taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'.[98] The prosecutor has also taken a narrow view of this provision and has yet to invoke the interests of justice to justify any decision.[99]

While the statute's legislative history does not support the idea that the interests of justice were intended to encompass relative gravity considerations, it also does not preclude such an interpretation. Like the gravity threshold, therefore, the role of interests of justice in the ICC's appropriate adjudication is open for interpretation. An argument can be made that the prosecutor could decline to investigate situations she deems relatively less serious in light of her view of the Court's goals and priorities, conserving resources for situations she deems more serious. Such decisions would contribute to the interests of justice globally, if not to those of the particular situations the prosecutor declines to investigate.

A benefit of using the interests of justice provision to help determine the ICC's reach is that it would enable the Court's judges to review the prosecutor's discretion, thereby contributing their voices to the process of honing the ICC's goals and priorities. When the prosecutor decides not to proceed based on the interests of justice, the judges may review the decision on their own motion and, if they disagree, the prosecutor's decision will be 'ineffective'.[100]

International judges should also embrace discretion in determining gravity for sentencing purposes. Some authors have urged international courts to adopt *ex ante* sentencing guidelines, arguing that this would improve consistency and thus legitimacy.[101] However, restricting judicial discretion without basing the restrictions on

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[97] Ignaz Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda' (2009) 9 Intl Crim L Rev 547 (arguing that policy-related gravity decisions fall under the interests of justice provision while legal threshold considerations are under articles 17 and 53(1)(b) and (2)(b)).
[98] Rome Statute (n 56) art. 53.
[99] ICC-OTP, 'Policy Paper on The Interests of Justice' (September 2007) <www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> accessed 17 October 2014.
[100] Rome Statute (n 56) art 53.
[101] See discussion in Chapter 3.

agreed goals and priorities could actually decrease legitimacy by making decisions appear arbitrary rather than reasoned. Instead, international judges should retain the flexibility to express the goals and priorities they believe best justify punishment, thereby contributing to a gradual process of global norm consolidation.

Finally, international courts should avoid adopting hierarchies among international crimes. International courts are split on whether some crimes should be considered more serious than others.[102] Although the ICC statute does not establish a hierarchy, it does permit the defense of superior orders for war crimes and not for crimes against humanity or genocide, suggesting that the former are less serious.[103] Scholars are also divided on this question. Some authors advocate a hierarchy that places crimes against humanity and genocide above war crimes.[104] For instance, Allison Danner argues that the expressive function of international criminal law supports the notion of a hierarchy among international crimes.[105] According to Danner, the chapeau elements of international crimes 'reflect a hierarchy of evolving norms about the relative gravity of each category of crimes' that should find expression in sentencing decisions. For Danner, crimes involving discriminatory intent, in particular genocide and the crime against humanity of persecution, should be at the top of the hierarchy.[106]

In contrast, Steven Roach argues against the adoption of a hierarchy among international crimes on the grounds that the elements of international crimes constitute a universal standard of gravity that must be respected in service of global cosmopolitanism. He writes:

> Although it may make moral sense to classify genocide as a more serious crime than war crimes, the ICC's legal and ethical character permits no such formal distinction to be made or to be used in the court of law to obtain a lighter sentence. This is because the gravity of all crimes constitutes one legitimate universal standard by which state parties and

[102] See discussion in Chapter 3.
[103] Rome Statute (n 56) art 33(2).
[104] See eg Allison Marston Danner, 'Constructing a Hierarchy' (n 50) 415; Steven R Ratner, 'Labeling Mass Atrocity: Does and Should International Criminal Law Rank Evil' (2008) 54 Wayne L Rev 569.
[105] Danner, 'Constructing a Hierarchy' (n 50) 491.
[106] Ibid 480.

> nation states learn (by example) to develop their primary attachment to enforcing all elements of crimes contained in the ICC Statute.[107]

According to Roach, differentiating among international crimes in terms of gravity would decrease the coherence of the global normative community.

As discussed in Chapter 3, the idea that international crimes represent a universal standard of gravity is a fallacy. It is not respect for a universal standard that militates against hierarchies, but rather the need to maintain flexible norms that enable international courts to pursue a range of goals. This is particularly important in these early years of the regime's existence. In the absence of state-endorsed goals for international courts, judges and prosecutors need a flexible approach to gravity that enables them to take into account the goals and priorities they consider most appropriate for their institutions. This may sometimes mean a longer sentence for war crimes than for crimes against humanity or genocide. For instance, the ICC may want to express global condemnation of crimes against humanity resulting in harm to civilian property but may determine that the sentence for such crimes should be shorter than for war crimes involving killing or rape.

Maintaining a flexible process for determining gravity in the contexts of decisions about jurisdiction, situation and case selection, and sentencing will provide international courts the freedom they need to identify goals and priorities to guide such decisions. By expressing the reasons for their decisions clearly and transparently, decision-makers can contribute to a dialogic process with court constituencies that, over time, will help to develop consensus around the appropriate goals and priorities for these institutions.

5. Giving Priority to Global Justice Goals

To enhance the legitimacy of international criminal courts, gravity-related decisions must be linked to goals that are both (1) normatively appropriate for the organization and (2) broadly agreed among the most important legitimacy audiences. The first criterion supports normative legitimacy, while the second relates to sociological legitimacy. The process described above will help to refine the goals and priorities of

[107] Steven C Roach, 'Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court' (2005) 4 J Hum Rts 475, 486-87.

international criminal courts, and to promote their acceptance in relevant communities. This section makes a normative argument about what goals and priorities are most appropriate for international criminal courts. It begins by arguing for a focus on global justice, rather than on local or transitional justice, at least for truly international courts like the ICC. It then asserts that the global justice goal to which international courts like the ICC are best suited is the prevention of wrongdoing, particularly through the expression of global norms. It concludes by explaining the implications of this global justice agenda for understanding the concept of gravity as it relates to decisions about jurisdiction, situation and case selection, and sentencing.

International criminal courts appropriately seek to promote both global and local justice. However, when the goals of these communities conflict or compete for scarce resources, courts must know which to privilege.[108] There are two competing visions of the role of international criminal courts in the global legal order. One vision sees these courts primarily as vehicles for local or 'transitional' justice in societies emerging from conflict or dictatorial regimes.[109] According to this view, international courts should serve as back-ups for unavailable or inadequate national justice systems and should seek to address the justice needs of local populations. Many scholars in the field of transitional justice consider international courts to be one of a number of tools available to promote justice and the rule of law in transitional or post-conflict societies.[110] In this paradigm, international courts should select goals and priorities that reflect those of the national communities they serve.[111]

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[108] See eg Alexander KA Greenawalt, 'Justice Without Politics?: Prosecutorial Discretion and the International Criminal Court' (2007) 39 NYU J Intl L & Poly 583, 658 (claiming the ICC 'must face the irreducible tension between the policy priorities of the international institution on the one hand, and those of the societies most directly affected by international crimes on the other'); Sloane, 'The Expressive Capacity of International Punishment' (n 1) 41 ('First, unlike national criminal law, ICL purports to serve multiple communities, including both literal ones—for example, ethnic or national communities—and the figurative "international community," which, needless to say, is not monolithic; it consists of multiple, often competing, constituencies and interests.').

[109] 'Transitional justice' has been defined in various ways, but generally relates to efforts to redress large-scale harms stemming from armed conflict or repressive regimes. See Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (CUP 2006) 1.

[110] See eg Paolo de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50 Politorbis 17 (discussing various mechanisms of transitional justice, including criminal trials).

[111] Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) 32 Mich J Intl L 1, 24 (arguing that 'internationalized criminal courts … have not fared well in the eyes of local populations. The ad hoc tribunals' failure to incorporate local preferences into their design process led

The second vision sees international criminal courts primarily as vehicles of global criminal justice. Global criminal justice takes various forms in the literature, with the most prominent theories focusing on global retribution,[112] crime prevention,[113] or some combination.[114] Theories of global crime prevention include the range of utilitarian theories from deterrence to rehabilitation, and norm expression.[115]

The laws and policies of international criminal courts currently reflect both the national and global justice visions of their role, without privileging one over the other. The Rome Statute's preamble seems to imply a global agenda for the Court, stating that grave international crimes 'threaten the peace, security and well-being of the world' and that the ICC was created to help prevent such crimes. At the same time, the Statute provides for a significant level of victim participation, indicating a desire to meet the needs of the communities most affected by international crimes.[116] The Court's rules regarding the initiation of investigations likewise provide for the Court to consider both the 'interests of victims' and the broader though unspecified 'interests of justice'.[117] The ICC prosecutor's policies in this regard require her to consider global justice goals such as norm promotion alongside the needs of victims.[118] Finally, sentencing decisions of

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to widespread rejection of these courts by members of the affected societies.'); see also Jaya Ramji-Nogales, 'Bespoke Transitional Justice at the International Criminal Court', in *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Christian DeVos, Sara Kendall, and Carsten Stahn eds. Cambridge University Press forthcoming 2015) 31.

[112] See eg Greenawalt, 'International Criminal Law' (n 81); Adil Ahmad Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (2005) 9 Buff Crim L Rev 273. But see Mark A Drumbl, *Atrocity, Punishment and International Law* (n 43) 151 (2007) (arguing that retribution is insufficient justification for international criminal law); David S Koller, 'The Faith of the International Criminal Lawyer' (2008) 40 NYU J Intl L & Pol 1019, 1025–26 (asserting that retributive justifications have had little influence in international criminal law because they have been discredited in domestic criminal justice systems); Tallgren, *supra* note 173, at 583 (asserting the ICC's adoption of complementarity limits the role of the ICC in achieving retributive justice).

[113] Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 AJIL 7.

[114] See eg Mirjan R. Damaska, 'What is the Point?' (n 55); M Cherif Bassiouni, 'The Discipline of International Criminal Law' in M Cherif Bassiouni (ed), *International Criminal Law: Sources, Subjects and Contents* (3rd edn, Brill 2008) (stating that international criminal law's 'goals include prevention and suppression of international criminality, enhancement of accountability and reduction of impunity, and the establishment of international criminal justice').

[115] See eg Sloane, 'Expressive Capacity of International Punishment' (n 1); Kirsten Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (Routledge 2012).

[116] Rome Statute (n 56) arts 15(3), 19(3), 43(6), 54(3)(b), 68(3), 75(3), 82(4).

[117] Ibid art 53.

[118] See discussion in Chapter 4.

international courts have invoked rationales related to both global and local justice goals.[119]

In order to refine their goals and priorities, and thus enhance their legitimacy, international courts must choose between these visions of their role in the global order. Although it is sometimes possible for international courts to pursue local and global justice goals simultaneously, conflicts between the goals as well as resource limitations often require one set of goals to be privileged over the other. For example, the visions entail conflicting priorities in terms of the roles that local groups, in particular victims, should play in the decision-making and proceedings of international criminal courts. Jaya Ramji-Nogales argues that the ICC should conduct broad-based opinion surveys among local social and political groups to determine which situations and cases to investigate and prosecute.[120] Likewise, some scholars argue that victims should play important roles in international criminal trials and sentencing proceedings. Ralph Henham argues that 'the demands for justice of victims and post conflict societies should … be translated into effective procedural norms' at international courts.[121]

Global justice advocates, on the other hand, would accord a less important role to such groups in the decision-making and processes of international criminal courts. Sergey Vasiliev, for instance, has urged the ICC to 'disavow[] the goal of achieving "restorative justice" through victim participation'.[122] He asserts that: 'When it comes to the criminal process, the ICC is but a "retributive" court that is rigidly constrained in its mandate and resources, rather than a form of restorative justice.'[123]

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[119] See Ralph Henham, 'The Philosophical Foundation of International Sentencing' (2003) 1 J Intl Crim. Just 64.
[120] Ramji-Nogales, 'Designing Bespoke Transitional Justice' (n 111); see also Ramji-Nogales, 'Bespoke Transitional Justice' (n 111).
[121] Ralph Henham, 'Developing Contextualized Rationales for Sentencing in International Criminal Trials' (2007) 5 JICJ 757, 796. See also Emily Haslam, 'Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?' in Dominic McGoldrick et al (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart 2004) 315, 319 ('[I]nternational criminal justice should accord victims "their rightful place" which if not "at the heart of the international criminal justice system" is very close to it.'); Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes' (2002) 35 Vand J Transnl L 1399, 1427 (arguing that international criminal law could benefit from a more victim-focused point of view).
[122] Sergey Vasiliev, 'Victim Participation Revisited: What the ICC is Learning About Itself' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 73.
[123] Ibid.

Another example of conflict between the two visions concerns the selection of legal and moral norms the court should apply. Scholars who favor a local justice vision of the role of international criminal courts tend to promote pluralist approaches to the regime's legal rules and policies. A number of scholars argue, for instance, that the sentencing practices of international criminal courts should take into consideration the punishment norms of the societies most affected by the crimes at issue.[124] Advocates of global justice, on the other hand, believe that international courts should adopt and develop global norms.[125]

In resolving this debate it is first important to acknowledge that one size does not necessarily fit all. Some courts are more 'international' than others. For hybrid courts, which are established to address situations in particular states and comprise both national and international elements, it is probably appropriate to privilege local justice goals. Indeed, even the *ad hoc* tribunals should arguably adopt a significant focus on local justice given that they were established to address solely crimes affecting particular states.

The ICC, on the other hand, should privilege global justice goals. The ICC has a global mandate -- to end impunity for international crimes around the world. The states that established and support the ICC have a legitimate expectation that the Court will seek to serve their interests broadly rather than the more narrow interests of any state where it is operating.

Moreover, the ICC's global mandate must be accomplished with rather modest resources. The ICC has the capacity to investigate and prosecute only a small fraction of the crimes committed in any situation. Such limited prosecutions do little to address national justice goals, which usually require widespread accountability, restoration and so forth. On the other hand, a few exemplary prosecutions can achieve at least two important global justice goals.

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[124] Alexander KA Greenawalt, 'The Pluralism of International Criminal Law' (2011) 86 Ind LJ 1063, 1099; see also Stephanos Bibas and William W. Burke-White, 'International Idealism Meets Domestic Criminal Procedure Realism (2007) 59 Duke LJL J 637, 692-3; Woods, 'Moral Judgments and International Crime' (n 34) 672. But see Mark A Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 Northwest U L Rev 539.

[125] Steven C Roach, 'Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court' (2005) 4 J Hum Rts 475; see also Diane F Orentlicher, '"Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' (2007) 1 Intl J Transitional Just 10 (taking a position in the middle).

First, such prosecutions, indeed even the threat of such prosecutions, can stimulate local adjudication to foreclose further ICC action under the principle of complementarity. Such local prosecutions promote the global goal of eliminating impunity for serious crimes and thereby preventing their commission. Of course, local prosecutions will also further national justice goals in many situations, but this is a by-product of ICC action, not its primary purpose.[126] Second, exemplary ICC prosecutions can identify and express global norms regarding appropriate conduct. Such expression also serves to prevent conduct that violates the norms.[127]

To support the claim that the ICC's primary purpose is to pursue goals of the global justice community, it is necessary to establish that such a 'community' exists; that is, that all of the world's people share relevant common values. This question has long been a matter of debate in international legal theory.[128] At one extreme are those who deny the existence of a global community in any meaningful sense.[129] At the other are those who proclaim the beginnings of a world federation. For instance, Quincy Wright asserts:

> Regularly enforced world criminal law applicable to individuals necessarily makes inroads upon national sovereignty and tends to change the foundations of the international community from a balance of power among sovereign states to a universal federation directly controlling individuals in all countries on matters covered by international law."[130]

This thesis takes a position in the middle. Clearly, the world's people do not share all values related to justice. No community, however, shares all values. Rather, the concept

[126] Cf. William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 Harvard Intl LJ 53.
[127] I have elaborated this argument in 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 Michigan J Intl L 265.
[128] See eg Dino Kritsiotis, 'Imagining the International Community' (2002) 12 EJIL 961.
[129] Ibid 963 fn 14 (citing C de Visscher, *Theory and Reality in International Law* (1968) 94: 'There will be no international community so long as the political ends of the State overshadow the human ends of power').
[130] Quincy Wright, 'The Law of the Nuremberg Trial' (1947) 41 AJIL 38, 47; see also Bruno Simma and Andrea L Paulus, 'The "International Community": Facing the Challenge of Globalization' (1998) 9 EJIL 266, 274 ('But what the [UN] Charter undoubtedly did achieve was the translation of the concept of the "international community" from an abstract notion to something approaching institutional reality.').

of community is both aspiration and evolutionary.[131] With regard to international criminal justice, the global community is admittedly young and undeveloped. Many areas of normative and legal uncertainty remain.[132] Indeed, as explained above, the concept of gravity has played a role in promoting that uncertainty by masking dissent about underlying values.

Nonetheless, sufficient agreement about global justice values exists to justify a regime aimed at implementing those values.[133] Important proof of this was the adoption of the ICC Statute by the vast majority of the world's states in Rome. The Rome Statute's preamble indicates that a sense of shared values undergirds the Court when it says that: 'all peoples are united by common bonds'. If the ICC were merely, or even primarily, a tool of local justice, such statements would be out of place.

The rapid expansion of the international criminal law regime over the past several decades also attests to the existence of a global justice community, albeit a nascent one. The ICC has 163 states parties, including some, though not all, of the most powerful states. Moreover, in its early years the Court has not served a merely symbolic function as some predicted, but has instead become an important player on the world stage.

The close relationship between international justice and human rights further supports the claim that the international community shares values related to global justice. International human rights instruments and enforcement mechanisms have gained significant prominence and strength in recent decades. Indeed, the debates about cultural relativism of the late twentieth century have largely been resolved as more and more people and states accept that universal rights and values exist.[134] Kai Ambos traces the existence of a 'normative international order, based on certain values worthy of being

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[131] Cf Karen Kovach, 'The International Community as Moral Agent' (2003) 2 J Mil Ethics 99, 99 ('The international community is a community of the world's people, peoples, and states insofar as they take themselves to be part of a potentially universal agency.'); Georges Abi-Saab, 'Whither the International Community' (1998) 9 EJIL 248 (arguing that the critical question is not whether or not community exists but the degree to which community exists); Kenneth W Abbott and Duncan Snidal, 'Why States Act through Formal International Organizations' (1998) 42 J Conflict Res 3, 24 (explaining that international organizations 'develop and express community norms and aspirations').

[132] Mark Lattimer and Phillipe Sands (eds), *Justice for Crimes Against Humanity* (Hart Publishing 2003) 27; see also Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case' (1999) 10 EJIL 237, 271.

[133] Cf Abbott and Snidal, 'Why States Act through Formal International Organizations' (n 132).

[134] Kai Ambos, 'Punishment without a Sovereign: The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 OJLS 293, 307-14.

defended by ICL … back to the Kantian idea of human dignity as a source of fundamental human (civil) rights which, ultimately, must be enforced by a supra- or transnational criminal law'.[135] These developments signal a shift in thinking around the world toward a cosmopolitan vision of global justice.[136] The statism that dominated international relations until the end of the Cold War, and even the communitarian approaches to justice that animated the cultural relativism debates, are increasingly being replaced by a vision of justice that places the individual at the center of moral analysis.[137] Moreover, as John Finnis writes: 'it now appears that the good of individuals can only be fully secured and realized in the context of international community….'[138]

Many scholars of international criminal law support this cosmopolitan vision of the regime. Kai Ambos's review of the scholarship endorsing a cosmopolitan normative theory of international criminal law cites German as well as Anglo-American scholars who take this view.[139] Ambos himself concludes that the normative justification for the regime rests in both Kantian and cosmopolitan theory. He writes:

> A supranational *ius puniendi* can be inferred from a combination of the incipient stages of supranationality of a valued-based world order and the concept of a world society composed of world citizens whose law—the 'world citizen law' (Weltbürgerrecht)—is derived from universal, indivisible and interculturally recognized human rights predicated upon a Kantian concept of human dignity.[140]

This cosmopolitan vision of international criminal law is not without its critics. For instance, Martti Koskenniemi argues that international criminal law should be understood

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[135] Ibid 304 (emphasis omitted).
[136] Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach' in Robert J Beck and others (eds), *International Rules: Approaches from International Law and International Relations* (OUP 1996) 217-18.
[137] Steven R Ratner, 'From Enlightened Positivism to Cosmopolitan Justice: Obstacles and Opportunities' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 155-171 (Ratner distinguishes three starting points for discussions of global justice: cosmopolitan, communitarian, and statist); Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Philosophy & Public Affairs 113, 133.
[138] John Finnis, *Natural Law and Natural Rights* (OUP 1980) 149-150.
[139] Ambos, 'Punishment without a Sovereign' (n 134) 307-14.
[140] Ibid 314 (some emphasis omitted).

largely as an exercise in political power.[141] Others have made similar arguments.[142] Nonetheless, cosmopolitanism is increasingly coming to dominate the discourse of international criminal law.

If we accept that a global community exists that shares *some* values concerning global justice, the question becomes: What are those values? Ambos, as well as many of the cosmopolitan scholars he cites, simply asserts that the world agrees that international crimes should be punished because those crimes 'affect the international community as a whole'.[143] As the earlier chapters of this thesis sought to demonstrate, however, this claim is far more problematic than is generally recognized because there is no agreed understanding of what it means for a crime to concern the international community.

Nonetheless, the ambiguities surrounding the concept of gravity need not lead to the conclusion that no true community exists as Prosper Weil has suggested. According to Weil, the very notion of grave international crimes, along with other ordering efforts in international law, injects a degree of relative normativity into the international system that undermines the foundations of that system.[144] As John Tasioulas points out, Weil's theory 'posits … a dubious and, in the context of international law, ultimately debilitating, dichotomy between law and inspiration'.[145] Instead, the very concept of international community requires recourse to the 'natural law paradigm'.[146] States and international organizations must be able to identify and implement universal norms in order to build the global community.[147]

The ICC's task, therefore, is to build on its normative foundation in universal human rights to identify and implement norms of global justice. In linking gravity-related decisions to institutional goals, decision-makers should seek to identify goals they

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[141] Martti Koskenniemi, 'Between Impunity and Show Trials' in JAJ.A. Frowein and& R. Wolfram (eds), *Max Planck Yearbook of United Nations Law* (6th edn, Kluwer Law International 2002).
[142] Christine Schwobel (ed), *Critical Approaches to International Criminal Law: An Introduction* (2014).
[143] Ambos, 'Punishment without a Sovereign' (n 134) 314. For discussion of the relevant scholarship see Chapter 3.
[144] Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 AJIL 413, 430 ('One can scarcely overemphasize the uncertainties inflicted on the international normative system by the fragmentation of normativity that the theories of *jus cogens* and international crimes have brought in their wake.').
[145] John Tasioulas, 'In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 OJLS 85, 119.
[146] Ibid 126.
[147] Ibid.

believe reflect such global norms of justice. A number of scholars have urged the ICC to adopt a largely retributive understanding of its goals and priorities.[148] This would mean, among other things, selecting cases according to the amount of retribution they would achieve and inflicting punishment according to the offender's desert without regard to whether any utility would be achieved.[149] The ICC should reject such calls for several reasons.

Most importantly, many people view retribution as indistinguishable from vengeance and thus immoral. Although retributive theory is popular among punishment theorists in the United States, in other parts of the world retribution is viewed as a violation of human rights norms.[150] For international criminal courts to privilege retribution would therefore harm the institutions' sociological legitimacy, at least with some audiences.

Second, societies differ drastically in their views as to what constitutes deserved punishment. For instance, in much of Europe and Latin America, terms of imprisonment are limited and must be accompanied by the possibility of parole. In contrast, in the United States, China, and some Middle Eastern countries, life sentences are common, sometimes even for nonviolent crimes. Nor is there any obvious way of determining how much punishment is deserved for international crimes. The practical difficulties of this task with regard to 'ordinary' crimes are magnified when decision-makers must also take into account the contextual elements of international crimes, such as the widespread or systematic attack of crimes against humanity. No theories have emerged to explain whether, for instance, a war crime inflicting large-scale harm is worse than a crime against humanity involving the persecution of one person. Indeed, the question of culpability for such crimes is complicated by the context in which they occur, which often renders violence 'normal'. Finally, even assuming an appropriate measure of desert

[148] Jens David Ohlin, 'Towards a Unique Theory of International Criminal Sentencing' in Goran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron May International Law & Policy 2009) 373, 382; Ambos, 'Punishment without a Sovereign' (n 134) 307 (citing scholars); Vasiliev, 'Victim Participation Revisited' (n 122) 73; Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 Mich J Intl L 79, 136; Haque, 'Group Violence' (n 112); Greenawalt, 'International Criminal Law' (n 81) 101.
[149] Greenawalt, 'International Criminal Law' (n 81).
[150] William A Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) 7 Duke J Comp Intl L 461.

could be found the ICC's very limited resources drastically impair its ability to achieve retributive goals, making it of comparatively little benefit in this regard.

Instead, the ICC should focus on developing global norms that prevent crimes. Crime prevention can take many forms including deterrence, incapacitation, rehabilitation and even economic development and peace building. However, the ICC's structure and limited resources render it relatively ineffective at accomplishing these goals on a global scale. Where the ICC has a comparative advantage, however, is in its ability to prevent crimes by expressing global norms of conduct. The ICC's global constitution and profile make it a particularly apt tool for global norm expression, and such expression can be achieved through exemplary prosecution of a small number of cases.[151] As such, while the ICC should seek to prevent crimes in whatever ways decision-makers believe it can, it should give priority to global norm expression.

A global expressivist agenda at the ICC would help to clarify how the Court should approach gravity-related decisions. First, for purposes of the legal rules governing jurisdiction and admissibility, gravity should remain a flexible concept that enables the Court to express as wide a range of relevant norms as possible. Second, with regard to gravity as a factor in discretionary selection decisions, the ICC's Prosecutor, and the judges who review such decisions, should focus resources on situations and cases that best express important global norms. Cases should not be selected, as one commentator has argued, according to whether they are most likely to promote deterrence.[152] Viewed in this way, the decision to pursue charges of recruiting child soldiers in some of the ICC's early cases may have been the right one in light of the relatively recent emergence of the norm, which rendered it especially in need of global expression. Finally, with regard to sentencing, the judges should adopt the lowest punishments they believe will adequately express the relevant global norms. Any additional punishment would be inefficient in the absence of clear evidence that it is needed to accomplish other preventive goals such as incapacitation or rehabilitation.

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[151] James F Alexander, 'The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact' (2008) 54 Vill L Rev 1; Julian Ku and Jide Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2006) 84 Wash U L Rev 777; William W Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement' (2002) 24 Mich J Intl L 1.

[152] Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 Intl J Transitional Just 434.

In sum, international criminal courts should endeavor to build the global justice community by selecting situations, cases and punishments that best express existing and emerging global norms. In making these decisions, international judges and prosecutors should be explicit and transparent about the goals they seek to pursue to enable relevant audiences to provide feedback that can be taken into account in future decisions. This approach to gravity-related decisions will help to promote the normative and sociological legitimacy of the international criminal law regime.

CONCLUSION

This thesis has sought to demonstrate that the concept of gravity plays a central role in determining the normative and sociological legitimacy of the international criminal law regime. This centrality was not a foregone conclusion at the regime's inception. International criminal law could have been organized, like many other international regimes, around the need for inter-state coordination to address problems that cross borders. The jurisdictions of international criminal courts could focus on such transnational crimes as drug trafficking, damage to the environment, and terrorism rather than on crimes defined significantly in terms of their gravity.

Gravity came to occupy the central justificatory role that it does today for several reasons. First, after World War II, and again in response to the conflicts in Former Yugoslavia and Rwanda, powerful international actors decided to establish international tribunals to adjudicate crimes that were universally regarded as some of the worst in human history. These moves promoted a growing global consensus that particularly serious crimes can legitimately be punished at the international level. Indeed, by the early 1990s, that consensus was strong enough that the ICTY and ICTR received much less sovereignty-based criticism than had their post-World War II predecessors. Moreover, the extreme gravity of the crimes committed in each of these situations seems to have obviated the need to examine in any detail what makes crimes sufficiently serious to merit international adjudication.

When the ICC was established, however, the Court's potentially global reach made it important for the Rome Statute to set forth the conditions under which the international community can legitimately exercise adjudicative authority. The drafters of the Rome Statute relied significantly on the concept of gravity to establish such legitimacy, enshrining it in the Statute's provisions regarding subject matter jurisdiction and the exercise of that jurisdiction.

Despite the importance of gravity to the legitimacy of international authority, particularly at the ICC, the concept has received remarkably little attention. The Rome Statute's drafters did not explain what they meant by 'sufficient gravity' for admissibility before the Court and the definitions of crimes within the Court's jurisdiction leave many unanswered questions about what makes them 'serious crimes of concern to the

international community as a whole'. For instance, it remains unclear how 'widespread' crimes must be to meet that element of crimes against humanity and what 'part' of a group a defendant must intent to destroy to commit genocide.

The omission to endow the concept of gravity with greater specificity probably stems in part from the difficulty of the task. A wide range of factors can contribute to gravity determinations, making the concept highly resistant to precise definition. Moreover, some regime actors probably consider it unnecessary to define gravity, believing that our intuitions tell us which crimes are sufficiently grave to justify international action. But the hesitation to engage more deeply with the concept of gravity may also relate to the constructive role that gravity's ambiguity has played in the regime's early development. Leaving gravity vague promoted consensus at the Rome Conference and encouraged political actors in the world's capitals to join the regime. Indeed, gravity's ambiguity continues to promote 'incompletely theorized agreements'[153] around regime decisions.

Gravity plays this constructive role by masking disagreement and conflict among competing goals and values. By agreeing that international adjudication is appropriate for 'atrocities', state actors avoid difficult questions about when international goals such as global norm promotion should be given priority over conflicting national goals such as local peace or reconciliation. By invoking gravity, international prosecutors purport to provide a value-neutral explanation for selection decisions that in fact require them to prioritize certain goals over others. Likewise, in citing gravity to justify punishment decisions, international judges avoid deep inquiry into how the punishments they inflict relate to the goals of international criminal adjudication.

As the practice of international criminal law expands, it is becoming more and more problematic for regime actors to seek to legitimate decisions by relying on vague notions of gravity. Gravity's malleability as a justificatory rationale is increasingly apparent, leading commentators to question whether the true motivations for some gravity-related decisions are improperly political or otherwise inappropriate. Such charges harm the sociological legitimacy of the international criminal law regime.

[153] Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 Harv L Rev 1733, 1735.

The normative theories that have been advanced to justify international prescriptive and adjudicative authority have largely failed to notice, let alone solve this problem. Virtually every theory of what makes a crime 'international' includes a gravity component, but most pay scant attention, if any, to what that component entails. Likewise, the theories seeking to explain the moral legitimacy of international and universal adjudication mostly rely on a gravity threshold without identifying the location of that threshold.

This thesis has set forth proposals to operationalize gravity in both the theory and practice of international criminal law. These proposals foreground the relationship between gravity-based decisions and the goals and priorities of international criminal courts. The complex theory of the moral legitimacy of international and universal adjudication incorporates gravity as a component of the comparative benefit and effectiveness of such adjudication. In doing so, it clarifies that gravity is not purely a matter of objective factors, but rather depends on what international criminal courts and national criminal courts exercising universal jurisdiction over international crimes seek to accomplish through adjudication.

Linking gravity to goals also helps to clarify what it means to say that some crimes concern the international community as a whole. International concern is not merely a matter of victim numbers or the nature of harm or the existence of threats to peace and security or whether the crimes were perpetrated by or against groups. While each of these factors may contribute to the international community's interest in adjudicating particular crimes that interest is ultimately a function of what the community hopes to gain through such adjudication.

Operationalizing gravity therefore requires regime actors to seek to identify the most appropriate goals and priorities for international criminal courts. To do this effectively decision-makers must engage in a dialogic process with constituents, expressing their value judgments and receiving feedback that they incorporate into future decisions. Over time, this process will lead to the development of global norms regarding which crimes merit international prosecution and why. This understanding will be dynamic, unlike many of the current theories of international criminal law. It will not limit the scope of international adjudication according to rigid rules about the elements of

crimes or requirements for admissibility. Instead, by promoting continual reassessment of goals and priorities, this approach to gravity's role in international criminal law will enable the regime to change as the nature and needs of the international community evolve. This dynamic process will promote the normative and sociological legitimacy of international criminal law's institutions, enabling them to serve as more effective tools in preventing all crimes that 'shock the conscience of humanity'.

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