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INTERPRETING “SUFFICIENT GRAVITY” UNDER ARTICLE 17(1)(D) OF THE ROME STATUTE: A LITERAL, CONTEXTUAL, AND TELEOLOGICAL ASSESSMENT OF THE ICC’S THREEFOLD AND TWOFOLD TESTS

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Abstract

While the International Criminal Court (ICC) can determine admissibility on its own motion, parties can challenge the admissibility of the case pursuant to Article 17(1)(d) of the Rome Statute (RS) which requires “sufficient gravity to justify further action by the Court”. The ICC may even determine the admissibility of the case solely on the basis of gravity. Despite the centrality of the gravity assessment, “gravity” alone is not defined or exemplified anywhere in the RS or even the later-adopted Rules of Procedure and Evidence; let alone the threshold of what would constitute “sufficient” gravity. Within the active operation of the ICC, the Court has applied two tests to determine “sufficient gravity”, pursuant to the requirement espoused in Article 17(1)(d) RS. First, the threefold test introduced in the Situation in Congo necessitates the fulfillment of three elements, (1) being conducted in a large-scale or systematic context (2) creating social alarm, and (3) involving the most senior leader. Second, the twofold test subsequently introduced in the Situation in Côte d’Ivoire considers two factors, (i) the presence of aggravating factors revolving scale, nature, manner and impact, and (ii) involving person(s) bearing the greatest responsibility. This research paper aims to review the implications of both tests in light of their compatibility with the ICC’s intended prosecutorial focus using a literal, contextual, and teleological interpretation of the RS. On the one hand, an unduly restrictive approach that could exclude legitimate cases from prosecution. On the other hand, an overly broad approach risks expending its limited resources on proceedings against low level or incidental perpetrators.

Keywords: Gravity, ICC, Threefold Test, Twofold Test



A. Introduction

The assessment of gravity to determine the admissibility of cases before the ICC was introduced by Professor James Crawford during a meeting of the International Law Commission in 1994. At the time, the underlying sentiment behind the inclusion of such a requirement was to protect the ICC's scarce resources from being used to pursue minor offenses that can be handled elsewhere,¹ and instead, to focus on the prosecution of only the most serious offenders.² The draft provision capturing the aforementioned intent first appeared in the Bureau Discussion Paper at the Rome Conference and was retained without any change,³ before finally being permanently enshrined by virtue of Article 17(1)(d) of the Rome Statute (RS).⁴

The assessment of gravity by the Court itself is carried out at various stages, starting from preliminary examinations and extending to investigations, and may even form the main basis for the admissibility of the case. In addition, the Office of the Prosecutor (OTP) is required to conduct its own assessment during preliminary examinations or investigations before commencing actual prosecutions under Article 53(2)(b) RS. As such, the assessment of gravity is a cornerstone of the ICC system, namely in providing guidance for the OTP's discretion in selecting situations and cases,⁵ as the additional safeguard against the risk of the ICC being overwhelmed with "less serious cases".⁶

In 2006, after some years during which gravity was not assessed by the OTP, the OTP took a predominantly quantitative approach, namely whether the scale of the alleged crimes was able to confer the case sufficient gravity in order to render it admissible before the ICC. To further elucidate the term "gravity" prescribed under Article 17(1)(d) RS, for the first time ever, the ICC's Pre-Trial Chamber (PTC) determined that described the assessment as threefold, requiring (i) the systematic or

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- 1 ILC, "Summary Record of the 2330th Meeting" (1994) YB Intl L Commission vol I, p. 9.
 - 2 ILC, "Summary Record of the 2333rd Meeting" (1994) YB Intl L Commission vol I, p. 33.
 - 3 Bureau Discussion Paper, UN Doc. A/CONF. 183/C.1/L.53, article 15(1)(d), 6 July 1998; Bureau Discussion Paper, UN Doc. A/CONF. 183/C.1/L.59/Corr.1, article 15(1)(d), 11 July 1998.
 - 4 Bureau Discussion Paper, UN Doc. A/CONF. 183/C.1/L.53, article 15(1)(d), 6 July 1998; Bureau Discussion Paper, UN Doc. A/CONF. 183/C.1/L.59/Corr.1, article 15(1)(d), 11 July 1998; Report of the Committee of the Whole, art 17[15](1)(d) UN Doc A/CONF.183/8 (17 July 1998); S SáCouto, K Clearly, 'The Gravity Threshold of the International Criminal Court' (2008) 23 American U Intl L Rev 807, p. 817-823.
 - 5 MM deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 Fordham Intl L J 1400, p. 1405-1416.
 - 6 ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/07, Annex II Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, 10 February 2006, para. 42; UN, A/CN.4/SER.A/1992/Add. 1(1992), Volume II, Part II, p. 66, para. 58. (Report of the Commission to the General Assembly on the Work of its Forty-Fourth Session).



large-scale commission of crimes within the Court's jurisdiction and (ii) the social alarm caused in the international as well as (iii) the fact that the person whomst the case is charged against is or are the most senior leader(s) in the given investigation.⁷ The approach was well-meant and appeared sound under the support of three interpretative methods. First, under a literal interpretation, the term "shall" under the chapeau Article 17(1)(d) reads as mandating the application of the gravity threshold, leaving no discretion once a case was found not to be of sufficient gravity.⁸ Second, applying a contextual interpretation, the PTC reasoned that the gravity threshold must require features rendering the conduct especially grave, namely that it be systematic or largescale and cause social alarm within the international community. In its view, because crimes under Articles 5 to 8 already incorporate gravitydriven elements — such as the "widespread or systematic" requirement for crimes against humanity or the "in particular" largescale or policybased commission requirement for war crimes — the PTC concluded that the admissibility threshold must demand something *additional* to justify the Court's intervention at the case level.⁹ It therefore held that the conduct in question must have particular features making it "especially grave," which it identified as, first, being either systematic in nature or committed on a large scale, and second, generating significant "social alarm" within the international community.¹⁰ This would ensure that the Court's limited resources are devoted to prosecuting conduct that stands out as exceptionally serious even within the category of crimes already deemed the "most serious," thereby reinforcing the purpose of Article 17(1)(d). Third, through a teleological interpretation, it emphasized that the Statute's overarching aim is prevention, not merely retribution, and that the additional gravity threshold should maximize deterrence by focusing prosecutions on those at the highest levels — the most senior leaders suspected of being most responsible — whose roles and authority give them the greatest capacity to prevent or halt such crimes.¹¹

However, this position was later rejected by the Appeals Chamber (AC) that opined the test to be considerably flawed for several reasons. First, the "largescale" or "systematic" requirement conflicted with the literal interpretation of RS, effectively adding an extra contextual element not expressly required under the crimes within the ICC's jurisdiction.¹² The sole instance a "large scale" or "policy"-based

7 ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/07, Annex II Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, 10 February 2006, paras. 46-53.

8 *ibid*, para 44.

9 *ibid*, paras 45-46.

10 *ibid*, para 47.

11 *ibid*, paras 48-55.

12 ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor's



commission is mentioned is in Article 8(1) (whereas “systematic” appears only in the crimes against humanity definition in Article 7), which regards the features as being illustrative rather than mandatory.¹³ Accordingly, criteria compulsory under the gravity assessment would blur the line between jurisdiction and admissibility. Second, the “social alarm” requirement lacked any basis in the Statute and was inherently subjective, solely depending on public reaction rather than the objective gravity of crimes.¹⁴ Third, the “most senior leader” requirement was overly restrictive, excluding many perpetrators who may wield significant influence yet lack toplevel status on paper.¹⁵ Taken together, these issues could seriously hamper the ICC’s retributive and deterrent functions.¹⁶ As Professor Schabas aptly states, “The history of criminal law, and not just international criminal law, is one of plugging loopholes as they arise”.¹⁷ As such, when specific concerns arise, the ICC will be prepared to implement changes, as it is not bound by its previous decisions and has demonstrated willingness to deviate from past jurisprudence.

Following this, the Pre-Trial Chambers developed a new twofold approach in 2010 consisting of the assessment which accounts for (i) if the suspect(s) are those bearing greatest responsibility for the commission of the crime, and (ii) a non-exhaustive list of aggravating factors, both quantitative and qualitative, found present within the commission of crimes.¹⁸ Lending guidance from rule 145(l)(c) and (2) (b)(iv) of the Rules of Evidence and Procedures, these “aggaravating factors’ could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families.¹⁹

Now, although the AC’s holding procedurally overrides the PTC’s ruling,

appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006, paras. 69-71.

13 *ibid.*

14 *ibid.*, para 72.

15 *ibid.*, 73-79.

16 ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006, paras. 69-82.

17 William Schabas, “Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes.” *Leiden Journal of International Law* 23.4 (2010) p. 850.

18 ICC, *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras. 60-62.

19 *ibid.*, para 61.



both interpretations of the Article 17(1)(d) gravity threshold rest on reasoned legal and policy grounds. The PTC's threefold test was grounded in literal, contextual, and teleological interpretative methods, while the AC's rejection was based on textual fidelity, avoidance of undue restriction, and the need to preserve the Court's broader preventive and retributive functions. This research seeks to fill that gap by assessing the compatibility of each test with the ICC's mandate and objectives, particularly with regard to its exercise of retributive and preventive functions, as well as their respective merits and shortcomings in balancing prosecutorial focus with inclusivity. Against this backdrop, the central research question is: To what extent do the PTC's older threefold test and the newer twofold test each align with the intended purpose of the ICC in determining "sufficient gravity" under Article 17(1)(d) of the Rome Statute? To carry out this assessment, this research will apply a literal, contextual, and teleological interpretation of the RS which shall be informed by ICC jurisprudence and the drafting history of the RS.

B. Analysis

In assessing the PTC's older threefold test and the newer twofold test, this research applies the three principal methods of treaty interpretation recognised in international law, namely (i) literal, (ii) contextual, and (iii) teleological interpretation.²⁰ A literal interpretation focuses on the ordinary meaning of the provision's language, ensuring fidelity to the statutory text and avoiding the importation of requirements not expressed in it.²¹ A contextual interpretation examines the provision within the framework of the treaty as a whole, considering how it relates to other provisions and fits within the Rome Statute's procedural and substantive structure.²² A teleological interpretation looks to the object and purpose of the treaty, as reflected in its preamble, drafting history, and policy aims, to ensure that the interpretation advances the ICC's core retributive and preventive functions.²³ These three methods provide complementary perspectives for determining which approach to "sufficient gravity" under Article 17(1)(d) better aligns with the Statute's language,

20 ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/07, Annex II Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, 10 February 2006, para 43.

21 *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Merits) [1994] ICJ Rep 6, para 41: [T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.

22 Matthias Herdegen, 'Interpretation in International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2013) paras 12-13.

23 *ibid*, paras 14-15.



structure, and purpose.

1. **Literal interpretation:**

From a purely textual standpoint, the PTC’s threefold test strains the language of Article 17(1)(d) RS. While its reliance on the word “shall” in the chapeau correctly signals that the Chamber has no discretion to overlook the gravity threshold, its subsequent move to operationalise the gravity assessment through cumulative elements — “systematic or largescale,” “social alarm,” and “most senior leader” — goes beyond what the statutory text provides.²⁴ Nowhere does Article 17(1)(d) or the definitions of crimes in Articles 6–8 require all three. However, the PTC’s threefold test would effectively turn its considerations of “particular features” that render a case gravity into hard jurisdictional criteria, as the ICC would be unable to prosecute the case by virtue of the admissibility test even when material jurisdiction has been fulfilled.

The AC underscored this incompatibility with a literal interpretation, noting that by requiring conduct to be either systematic or large scale, the PTC introduced admissibility criteria that blur the distinction between the jurisdictional elements for war crimes and crimes against humanity as set out in the Statute.²⁵ In particular, it observed that for war crimes, the requirement of large-scale commission is an *alternative* to commission as part of a policy, and that both are qualified by the phrase “in particular,” rather than being absolute requirements.²⁶ Moreover, “systematic” commission appears *only* in Article 7 on crimes against humanity, not in Article 8 on war crimes.²⁷ It held that imposing a fixed “large-scale or systematic” requirement under Article 17(1)(d) would render Article 8(1) inutile and contradict the drafters’ express intent in rejecting such a mandatory condition, leading to the untenable result that certain war crimes outside a plan, policy, or large-scale commission could never reach the ICC solely due to the gravity requirement.²⁸

By contrast, the newer twofold test keeps closer to the text. It retains the obligation to assess “sufficient gravity” but refrains from prescribing extrastatutory, mandatory conditions. Instead, it uses “persons bearing the greatest responsibility” and a mix of qualitative and quantitative aggravating factors as flexible, nonexhaus-

24 ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/07, Annex II Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, 10 February 2006, para 64.

25 ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006, para 70.

26 *ibid.*

27 *ibid.*

28 *ibid.*, para 75.



tive guides. This is a cleaner fit with the Statute's drafting history, which contains no evidence that the negotiators intended to crystallise "systematic," "largescale," or "senior leader" status as threshold elements for admissibility.

From the perspective of literal interpretation, the twofold test therefore aligns more closely with the Rome Statute. The formulation of the threefold test could be defended as giving content to an otherwise vague provision, but its prescriptive and cumulative approach risks violating the principle that treaty interpretation cannot add conditions absent from the text. This is particularly important in the ICC context, where the court must maintain credibility by applying its foundational treaty faithfully.

2. Contextual interpretation:

Contextually, the PTC's support for the threefold test has some persuasive force. The PTC argued that Article 17(1)(d) must serve as an additional, higher-level filter at the admissibility stage to prevent the Court from being overwhelmed with peripheral cases, and in this sense, the threefold test finds support under a contextual interpretation of the Rome Statute as it seeks to incorporate the "gravity-driven elements" outlined in Articles 7(1) and 8(1) in assessing "sufficient gravity."²⁹ These gravity-driven elements are *firstly*, "widespread or systematic" enshrined under Article 7(1) which defines acts that qualify as crimes against humanity, and *secondly*, "as part of a plan or policy" enshrined under Article 8(1) which defines acts that qualify as war crimes.

However, the AC identified the danger of this approach: the extra features under the threefold test are not merely "additional" filters but can effectively collapse the jurisdiction/admissibility distinction. If "systematic or largescale" is mandatory, then smaller-scale but qualitatively grave crimes (e.g., targeted political assassinations, destruction of irreplaceable cultural heritage, or emblematic cases involving systematic torture of a few victims) might never be prosecuted, even though they could have substantial moral and legal significance.

The newer twofold test responds to these concerns by making scale and public impact relevant but nonmandatory, allowing the Chamber to calibrate admissibility casebycase. This flexibility means the ICC can prosecute smaller-scale incidents when their qualitative features — such as extreme cruelty, symbolic significance, or particular vulnerability of victims — render them especially grave. By draw-

29 ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/07, Annex II Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, 10 February 2006, para 47.



ing inspiration from Rule 145 which elaborates on the factors used to assess “gravity” under Article 78 which dictates the determination of sentencing,³⁰ the twofold test does not only reinforces the contextual interpretation of the Rome Statute but also enhances legal certainty by providing a clear and consistent approach to evaluating “gravity” in both admissibility and sentencing stages.

3. Teleological interpretation:

The threefold test’s teleological approach is rooted in a strong policy intuition: the ICC’s deterrent impact is maximised when it prosecutes those at the very top — “most senior leaders suspected of being most responsible.”³¹ These individuals not only have the greatest power to orchestrate and perpetuate atrocities, but they also often enjoy political or military protection that makes domestic prosecution unlikely. Targeting them sends a highlevel deterrent signal and aligns with the Court’s complementary nature, reserving ICC intervention for cases domestic systems are least likely to handle. This was consistent with ICTY/ICTR completionstrategy practice, where prosecutions in the final years were reserved for senior leaders.³² The intention is not for the Court to claim jurisdiction over as many cases as possible just because they fall within its material scope. Ultimately, the exercise of the ICC’s jurisdiction is one of last resort.³³ Recourse to the RS’ drafting history clearly in-

30 ICC, *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 62: “In making its assessment, the Chamber considers that gravity may be examined following a quantitative as well as a qualitative approach. Regarding the qualitative dimension, it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave. When considering the gravity of the crime(s), several factors concerning sentencing as reflected in rule 145(1)(c) and (2)(b)(iv) of the Rules, could provide useful guidance in such an examination. These factors could be summarized as: (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families. In this respect, the victims’ representations will be of significant guidance for the Chamber’s assessment.”

31 ICC, *Situation in the Democratic Republic of Congo*, ICC-01/04-01/07, Annex II Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, 10 February 2006, paras 49-55.

32 *ibid*, para 56; With relation to ICTY practice, even cases concerning charges of genocide and persecution have been rejected when they did not concern the highest authorities, to maximize prosecution in light of limited budget and time (See, ICTY, *Prosecutor v. Ljubičić*, IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina pursuant to Rule 11 bis, 12 April 2006, paras. 19-20; ICTY, *Prosecutor v. Trbić*, IT-05-88/1-PT, Decision on Referral of Case under Rule 11 bis with Confidential Annex, 27 April 2007, paras. 23, 24.)

33 Markus Benzing, “The Complementarity Regime of the International Criminal Court: Inter-



dicates that the ILC did not intend for the ICC to replace national criminal courts.³⁴ This assessment would be more consistent with Professor James Crawford's initial considerations about the inclusion of what became Article 17(1)(d) RS—amongst which is to “prevent the ICC to be swamped by peripheral complaints involving minor offenders.”³⁵ Given the principle of complementarity, placing emphasis on “seniority” can serve as a valuable framework for international criminal law to operate in harmony with domestic or regional criminal law.

The AC, however, took a broader view of prevention and retribution. It cautioned that excluding all but the most senior leaders ignores the fact that midlevel commanders or political operatives can be central drivers of atrocities.³⁶ In many decentralised or networkbased armed groups, the operational architects of crimes may not be the titular heads. Moreover, narrowing the focus risks perverse incentives: leaders could insulate themselves from liability by delegating operational control to deputies, who would then be shielded from ICC jurisdiction under the PTC's approach.³⁷ From a teleological standpoint, true prevention requires that any perpetrator whose role is pivotal to the commission of grave crimes — whether or not they hold the highest office — can face prosecution. In attempting to maximize its deterrent effect by focusing solely on senior leaders, the threefold test risks undermining the ICC's core purpose — preventing the most serious crimes under international law — by excluding mid-level perpetrators who can also be pivotal in committing such crimes. The support by a teleological interpretation for the threefold test conflicts with a contextual interpretation of the RS, as various provisions suggest that the RS applies to individuals beyond just the most senior leaders. For instance, Article 33 addresses superior orders, implying that the Statute pertains to a broader range of perpetrators. Article 27(1) further reinforces this by stating that the Statute applies equally to *all* persons, regardless of official capacity. Additionally, the Preamble to the Rome Statute refers to “perpetrators” and “those responsible for international crimes” without distinguishing them

national Criminal Justice between State Sovereignty and the Fight against Impunity”, 7 Max Planck Yearbook of United Nations Law (2003) p. 599.

34 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), para. 29.

35 ILC, “Summary Record of the 2330th Meeting” (1994) YB Intl L Commission vol I, p. 9.

36 ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor's Application for Warrants of Arrest, Article 58”, 13 July 2006, paras. 76-77.

37 *ibid.*



as “most serious” or “most responsible.” This absence of qualifying language indicates that the Statute was not intended to be limited solely to senior leaders, and had the drafters wished to impose such a restriction, they could have done so explicitly.

Furthermore, the AC also criticizes the “social alarm” requirement which is dependent on subjective reactions to the case, hence shaping an “unreliable guide”.³⁸ This approach would politicize the ICC’s actions, as the crimes the international community fixates upon may not meet the threshold of gravity for investigation, while crimes that are overlooked may very well be of significant gravity.³⁹ A common criticism against “social alarm” is also that there is an increased chance that the international community is oblivious about events happening in the “more” remote places in the world, or when the crimes are committed by superpowers.⁴⁰ While international forums and tribunals are undoubtedly not exempt from political considerations, the ICC’s consistent emphasis on “impartiality” within the framework of the RS (such as in Article 36 on the election of judges) underscores its commitment to avoid imposing excessively subjective criteria as such that will reflect ICC’s own political considerations to the public—masking bias or hostility and thus making admissibility appearing to be of a “popularity contest”.⁴¹ It is very unclear as to what can be said to constitute the reaction of the international community—specifically, whose reaction matters and prevails over the other; considering that different international CSOs focus on a variety of diversified issues that they would consider to be of paramount importance. International society, as reflected in General Assembly pronouncements, has often been entirely unconcerned about some of the African conflicts that the Court has dealt with.⁴² Conversely, the political climate of a State can significantly impact the level of social alarm elicited by the events of crimes. When media freedom is restricted, there arises a potential for the international community’s reactions to be susceptible to manipulation, increasing the likelihood of an inaccurate comprehension of the gravity of crimes perpetrated within a specific State.

38 ICC, *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, 13 July 2006, para. 72; ICC, *Situation in the Republic of the Philippines*, ICC-01/21, Philippine Government’s Observation on the Office of the Prosecutor’s Request, 8 September 2022, para. 42.

39 Kevin J Heller, “The Most Distressing Paragraph in the Comoros Review Decision” 19 July 2015 <http://opiniojuris.org/2015/07/19/the-most-distressing-paragraph-in-the-comoros-review-decision/>.

40 Mohamed M El Zeidy, ‘The Gravity Threshold under the Statute of the International Criminal Court’ (2008) 19 *Criminal Law Forum*, p. 35, 45.

41 Eugene Kontorovich, “When Gravity Fails:* Israeli Settlements and Admissibility at the ICC.” *Israel Law Review* 47.3 (2014) p. 398.

42 *ibid.*



The newer twofold test accommodates this by retaining “[bearing] greatest responsibility” as a guiding criterion without rigidly equating it to formal rank.⁴³ This allows the ICC to pursue *de facto* powerholders, shadow leaders, or key enablers whose prosecution may deter future crimes more effectively than a formalistic focus on titular leadership. In doing so, it better aligns with the Rome Statute’s dual aims: ending impunity for the gravest crimes and preventing their recurrence. Furthermore, it retains the incentive captured by the “social alarm” requirement through its comprehensive impact assessment, which does not only considers the broader societal reactions, such as the level of attention or outrage generated by the crime, but also includes a more granular evaluation of the specific consequences of the alleged crimes, including the economic damages caused, the direct impacts on victim families, and the broader social or environmental harm inflicted by the criminal acts.⁴⁴ Taken together, the twofold test better fulfills the teleological purpose of the Rome Statute by ensuring that prosecution targets all pivotal perpetrators and that gravity is assessed comprehensively, thereby enhancing the ICC’s preventive and retributive functions without the distortions created by an exclusive focus on senior leaders or subjective social alarm.

C. Conclusion

In light of the comparative analysis, it is evident that the Pre-Trial Chamber’s threefold test, while well-intentioned in seeking to protect the ICC’s limited resources and emphasize high-level deterrence, ultimately imposes extraneous and overly rigid criteria that risk undermining the Court’s mandate. By requiring cumulative elements such as “systematic or large-scale” commission, “social alarm,” and involvement of the “most senior leader,” the threefold test effectively conflates jurisdictional and admissibility standards, excludes pivotal mid-level perpetrators, and relies on subjective considerations divorced from the Statute’s text. This interpretation, although supported by certain teleological arguments, fails to align consistently with the Rome Statute’s language, structure, and broader object and purpose.

Conversely, the Appeals Chamber’s twofold test represents a more balanced and faithful approach to interpreting Article 17(1)(d) of the Rome Statute. By grounding admissibility on a flexible combination of qualitative and quantitative factors alongside the criterion of “greatest responsibility,” it preserves fidelity to

43 ICC, *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 60.

44 *ibid.*, para 61.



the Statute's drafting history, enhances contextual coherence with sentencing provisions, and ensures that gravity can be assessed comprehensively rather than through rigid thresholds. Most importantly, it allows the Court to prosecute both senior leaders and other pivotal actors whose roles are indispensable to the commission of international crimes, thereby better advancing the ICC's dual aims of retribution and prevention. In this sense, the twofold test not only secures the Court's legitimacy and effectiveness but also embodies a more pragmatic teleological vision of international criminal justice.

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