



BRILL
NIJHOFF

INTERNATIONAL CRIMINAL LAW REVIEW 15 (2015) 1-39

International
Criminal Law
Review

brill.com/icla

The Selection of Situations by the ICC: An Empirically Based Evaluation of the OTP's Performance

Alette Smeulers

Tilburg University, Tilburg; University of Groningen,
Groningen, The Netherlands

Maartje Weerdesteijn

Tilburg University, Tilburg, The Netherlands

Barbora Hola

VU University, Amsterdam, The Netherlands

Abstract

The main aim of the International Criminal Court (ICC) is to prosecute the most serious crimes of concern to the international community. One of the most valued features of the ICC is the independent position of the Prosecutor in selecting situations and cases to investigate. The Prosecutor, however, has been heavily criticized for his selection policy and countries from the African Union even threatened to withdraw from the ICC because of its alleged bias and unfair focus on African political leaders. In this article we present the results of our explorative study in which we empirically evaluate the situations selection policy of the ICC Prosecutor. We conclude that given the ICC's limited jurisdictional reach, the Prosecutor is generally focusing on the gravest situations where international crimes are supposedly committed.

Keywords

International Criminal Court (ICC) – situational gravity – selection policy – prosecutor

1 Introduction

The International Criminal Court (ICC) was established by the Rome Statute in 1998 and began to function in 2002 after 60 states had ratified the Statute.¹ Its main aim is to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished” as such crimes “threaten the peace and security and well-being of the world”.² By putting an end to impunity the ICC aims to “contribute to the prevention of such crimes”.³ To this end the ICC has jurisdiction over genocide, crimes against humanity and war crimes when committed after its entry into force on 1 July 2002 (Article 5–8 ICC Statute).⁴

As opposed to the ICC, the jurisdiction of the other international criminal tribunals such as the International Military Tribunals in Nuremberg and Tokyo, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the Extra-ordinary Chambers of the Courts of Cambodia is limited in a temporal and territorial sense by their Statutes. Consequently, ‘situations’, in which these courts can exercise their jurisdiction, are pre-determined by their founders. The ICC, however, has a potentially global jurisdictional reach and can theoretically exercise jurisdiction in any situation around the world, where international crimes are being committed, if conditions provided for in the Statute are met.

The ICC Statute stipulates three ways in which investigations into a particular situation might be triggered: by a referral of a state party (Article 14 ICC Statute), by a referral of the United Nations Security Council (UNSC) (Article 13 ICC Statute) and by the Prosecutor *proprio motu* (Article 15 ICC Statute). Obviously, the ICC is unable to deal with all situations and cases around the world in which international crimes are committed. It is by nature highly selective and the Prosecutor is the primary organ of the Court making the selection decisions and thus plays a crucial role in this important selection process.⁵ The

1 See the full text of the Rome Statute and ratification status: www.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx, 20 May 2014.

2 See preamble and Article 1 of the ICC Statute.

3 *Ibid.*

4 In 2010 the state parties also agreed on the definition of aggression (Article 8bis ICC Statute), but the ICC will only have jurisdiction for this crime after 1 January 2017 and only if at least 30 states accepted or ratified the amendment.

5 It has been argued that the initiation of investigations and selection of situations and cases is among the most critical tasks of the ICC since such decisions directly influence the legitimacy of the Court and judgments as to its effectiveness and ultimate success. M.M. deGuzman and W.A. Schabas, ‘Initiation of Investigation and Selection of Cases’, in G. Sluiter (ed.),

selection process can be divided into two main steps: (i) selection of situations (territorially and temporarily distinguished spaces where international crimes might have taken place) and (ii) selection of cases (including one or more perpetrators) from these situations.⁶ The independence of the Prosecutor and his powers to decide which situations (and cases) to investigate has been hailed as one of the major accomplishments in the negotiations of the Rome Statute as this allows for a selection policy based on judicial rather than political reasoning.⁷

The ICC's jurisdiction is limited to the most serious crimes of international concern (i.e. there is a jurisdictional gravity threshold) but apart from that the ICC Statute offers rather limited legal guidance regarding the selection criteria for investigations and prosecutions. The ICC Prosecutor consequently enjoys a broad discretion in deciding on which situations and potential cases to focus his limited resources. Over time, the Office of the Prosecutor (OTP) developed policies regarding its selection policy and elaborated upon the concept of (situational) gravity which has become one of the core criteria for the selection of situations.⁸

The strategy of the Prosecutor, however, has been highly contentious. As noted by DeGuzman:

[n]o aspect of the ICC's work has been more controversial to date than its decisions about which situations and cases to prosecute. Every decision the Court makes is scrutinized, and many have given rise to strong criticisms. Such expressions of disapproval have come from [...] states, NGOs, communities most affected by the ICC's work, academics, and the global community generally.⁹

Most notably the ICC has been accused of having an 'African bias'. Yet while scholars for the most part based their criticism of the selection strategy of the ICC Prosecutor and of the Prosecutorial interpretation of situational gravity

Towards Codification of General Rules and Principles of International Criminal Procedure (Oxford University Press, Oxford, 2012).

6 ICC-OTP, Report on the activities performed during the first three years (June 2003-June 2006), The Hague and K. Ambos and I. Stegmiller, 'Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy', 58 *Crime, Law and Social Change* (2012) 391-413, at p. 395.

7 W.A. Schabas, 'The International Criminal Court at Ten', 22 *Criminal Law Forum* (2011) 503-504.

8 ICC-OTP, Draft Policy paper on preliminary examinations (The Hague 2010).

9 M.M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the ICC', 33 *Michigan Journal of International Law* (2012) 265-320 at p. 271, available at ssrn.com/abstract=1780446, 11 June 2013.

on theoretical and/or doctrinal arguments, an empirical assessment has been missing.¹⁰ Did the Prosecutor indeed follow the criteria of situational gravity developed in his policies? Did he focus on the most serious situations? Can we claim that his selection decisions are reflecting empirical reality on the ground when it comes to situational gravity?

In this contribution we aim to open up this discussion, and present a descriptive analysis on the basis of secondary sources that forms an initial empirical assessment of the Prosecutor's selection policy. In our analysis we will look at the first ten years of the ICC's functioning and limit ourselves to the selection of situations and not the selection of cases as the latter would require a completely different analysis.¹¹ In section 2 we will further analyse the concept of situational gravity by looking at the ICC Statute, Prosecutorial policy papers and the relevant ICC case-law. The academic discussion regarding the issue of situational gravity will briefly be touched upon. In section 3 we will describe our methodology and discuss the empirical data used to assess the prosecutorial strategy of the OTP. We will explain the manner in which we used different publicly available datasets to create a seriousness index allowing us to get an impression of the extent to which the OTP is focusing on the countries it should be focusing on, given its own selection criteria. In section 4 we will compare our results with the situations the ICC is indeed focusing on and will

10 Cf. M.R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court', 2 *Journal of International Criminal Justice* (2004) 71–95; A.M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *Am.J.Int'l L.* (2003) 510–552; M.M. deGuzman, 'How Serious Are International Crimes? The Gravity Problem in International Criminal Law', Research Paper No. 2012–2013, 13/4/2012 available at ssrn.com/abstract=2014987, 8 June 2012; J.A. Goldstone, 'More candour about criteria - the exercise of discretion by the prosecutor of the International Criminal Court', 8 *Journal of International Criminal Justice* (2010) 383–406; A.K.A. Greenawalt, 'Justice without politics? Prosecutorial discretion and the International Criminal Court', Pace Law Faculty Publications, Paper 340 (2007), available at digitalcommons.pace.edu/lawfaculty/340, 29 May 2013; M. O'Brien, 'Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court, The Big Fish/Small Fish Debate and the Gravity Threshold', 10 *Journal of International Criminal Justice* (2012) 525–545; W.A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', *Journal of International Criminal Justice* (2008) 731–76; W.A. Schabas, 'Victor's Justice: Selecting situations at the International Criminal Court', 32 *J. Marshall L. Re.* (2009–2010) 535.

11 For a compiled volume on the selection of cases see M. Bergsmo (ed), *Criteria for Prioritizing and Selecting Core international Crimes Cases*, FICHL (PRIO, Oslo, 2010), and especially the chapter by P. Seils, 'The selection and prioritization of cases by the Office of the Prosecutor of the International Criminal Court', in this edited volume, pp. 69–78.

thus make an assessment of the OTP's performance in these first ten years. In our final section we will discuss our findings and subsequently set out our conclusions and discuss the limitations of our study and methodology.

2 Situational Gravity at the ICC

As already stated a situation can be referred to the Prosecutor by a state party or by the Security Council acting on the basis of Chapter VII of the UN Charter. The ICC Prosecutor can also initiate proceedings *proprio motu* (see Articles 13 and 15 ICC Statute). When a case is referred to the ICC by a state party or the Prosecutor starts an investigation, the Court is bound by the jurisdictional limitations as stated in Article 12 ICC Statute. The Court only has jurisdiction when the crimes are committed on the territory of a state party or the accused is a national of a state party. The UNSC is not bound by these restrictions, it can refer any situation to the ICC as long as it is acting on the basis of Chapter VII of the UN Charter and the situation can be qualified as a threat to international peace and security. However, when a situation is referred to the Court the Prosecutor is not obliged to proceed. Regardless of whether the situation concerns a referral of the Security Council or is a referral from a state party, the Prosecutor maintains the discretion to determine whether it is appropriate to move forward with such a situation.¹²

In determining whether there is a reasonable basis to proceed under Articles 15 and 53 the Prosecutor shall consider whether (i) there is a reasonable basis to believe that international crimes were committed (jurisdiction assessment); (ii) the case would be admissible under Article 17 (admissibility assessment) and (iii) "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" (interests of justice assessment).¹³ The admissibility assessment is governed by Article 17, which stipulates three requirements: (i) complementarity (the Court cannot proceed with a case that is being investigated or prosecuted by a state with jurisdiction); (ii) *ne bis in idem* (the Court cannot proceed if a person has already been tried for the conduct at hand); and finally (iii) crimes must be of sufficient gravity. Article 15 stipulates that when the Prosecutor started an

12 The Pre-Trial Chamber may review a decision of the Prosecutor not to proceed. J. Trahan, 'The relationship between the International Criminal Court and the UN Security Council: parameters and best practices', 24 *Criminal Law Forum* (2013) 422–424.

13 See ICC-OTP, Policy paper on the interests of justice (The Hague, 2007).

investigation *proprio motu* and believes that there is a reasonable basis to proceed he has to submit a request for authorization to investigate to the Pre-Trial Chamber, which then authorizes investigations on the basis of the same above-mentioned criteria.

Gravity is thus at the centre of the admissibility assessment conducted by the Prosecutor (and the judges), whereby situations and cases of insufficient gravity are to be deemed inadmissible. The ICC Statute, however, does not give any indication how to assess gravity of a particular situation, and the Prosecutor enjoys a large amount of discretion in making this determination. Articles 17 and 53 both address gravity solely at the level of individual cases. The Pre-Trial Chambers, however, interpreted the Statute by taking a contextual approach and decided that these provisions are also applicable while assessing the situational gravity.¹⁴

The concept of gravity occupies a prominent place in the Prosecutor's policy statements and his pronouncements on individual cases and situations.¹⁵ In September 2003 the Office of the Prosecutor of the ICC published its first policy paper. In this paper it clearly indicated that the aim of the ICC is to (1) focus on the most serious crimes of international concern and (2) focus on the leaders who bear most responsibility for these crimes.¹⁶ The concept of situational gravity as one of the selection criteria, however, was not elaborated upon. In its report of 2006 the Prosecutor clarified the four criteria taken into account when judging the gravity of a particular situation. These criteria are both (i) quantitative such as the scale of the crimes; and (ii) qualitative such as the nature of the crimes; the manner of their commission; and their impact.¹⁷ In the draft Paper on Preliminary Examinations of 2010 the Prosecutor further elaborated upon these four criteria:

- a. The scale of the crimes may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the

14 ICC, Situation in Kenya: Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09 (31 March 2010) paras. 41–50; ICC, Situation in the Republic of Côte D'Ivoire: Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Côte D'Ivoire, ICC-02/11 (3 October 2011) para. 18.

15 This was actually not the case in the past where the emphasis on gravity in prosecutorial statements was not so apparent. Cf. W.A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', 6 *Journal of International Criminal Justice* (2008) 731–761, at p. 736.

16 ICC-OTP, Paper on some policy issues before the Office of the Prosecutor (September 2003).

17 See ICC-OTP Report on the activities performed during three years (June 2003–June 2006), p. 6.

- crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread (intensity of the crimes over a brief period or low intensity violence over an extended period);¹⁸
- b. The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, or the imposition of conditions of life on a community calculated to bring about its destruction;
 - c. The manner of commission of the crimes may be assessed in light of, *inter alia*, the means employed to execute the crime, the degree of participation and intent in its commission, the extent to which the crimes were systematic or result from a plan or organized policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying communities;
 - d. The impact of crimes may be assessed in light of, *inter alia*, their consequence on the local or international community, including the long term social, economic and environmental damage; crimes committed with the aim or consequence of increasing the vulnerability of civilians; or other acts the primary purpose of which is to spread terror among the civilian population.¹⁹

The Pre-Trial Chambers confirmed this interpretation of situational gravity in both decisions authorizing the investigation of the two situations brought by the Prosecutor *proprio motu*- in Kenya and Côte D'Ivoire.²⁰ The Chambers stated that the gravity threshold in Article 17 forms an additional safeguard that prevents the Court from investigating, prosecuting and trying peripheral cases.²¹ At the stage of preliminary investigation gravity should be assessed against the backdrop of the likely set of cases or 'potential cases' that would arise from the investigation of the situation.²² There is thus an interplay

18 In this respect Heller criticizes the OTP that it has exclusively focused on number of victims when selecting situations for preliminary examinations and investigations. He argues that "the OPT should privilege systematicity, social alarm, and State criminality instead, because crimes that exhibit those features are inherently more serious than crimes that simply involve numerous victims". See K.J. Heller, 'Situational Gravity under the Rome Statute', in C. Stahn and L. van den Herik (eds.), *Future Directions in International Criminal Justice* (Cambridge University Press, Cambridge, 2009), pp. 227–253.

19 ICC-OTP, Draft Policy paper on preliminary examinations (2010), pp. 13–14.

20 Kenya authorization decision, Côte d'Ivoire authorization decision, *supra* note 14.

21 Kenya authorization decision, *supra* note 14, para. 56.

22 *Ibid.*, para. 58.

between the crimes and the context in which they are committed - gravity of crimes shall be assessed in the context of their *modus operandi*.²³ According to the Chamber, “gravity may be examined following a quantitative as well as qualitative approach” whereby not only the number of victims is relevant but also “the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave”.²⁴

The situational gravity thus seems to be understood as a *de minimis* requirement for the admissibility assessment based on 4 main indicators/factors: scale, nature and impact of the crimes and their manner of commission. The Prosecutor has included the relative gravity assessment among different situations in this analysis and emphasised his focus on the gravest situations.²⁵ The question remains whether in practice these criteria are applied consistently and the Prosecutor has indeed focused on the gravest possible situations where international crimes might have been committed as is often reiterated in his public statements. In the following sections we will proceed to assess which countries actually represent the gravest situations where international crimes might have been committed over the past ten years taking into account the four main indicators of situational gravity.

3 Methodology

In order to determine on an empirical basis which countries should have warranted the attention of the OTP in accordance with its own criteria, we have made use of the data of three widely accepted databases, the Uppsala Conflict Database, Political Terror Scale and Failed State Index.

3.1 *The Uppsala Conflict Data Program*

The Department of Peace and Conflict Research of the University of Uppsala together with the International Institute of Peace Research in Oslo (PRIO) has compiled the Uppsala Conflict Data Program (UCDP) on armed conflicts consisting of a variety of data. The UCDP data is one of the most accurate and well-used data-sources on global armed conflicts and its definition of armed conflict is becoming a standard in how conflicts are systematically defined and studied in political and social sciences. For our purposes, we have used the data indicating the number of casualties resulting from one sided violence

23 *Ibid.*, para. 61.

24 *Ibid.*, para. 62.

25 De Guzman, *supra* note 9, p. 1432.

inflicted either by a government or by an organized group. One sided violence is defined as: “The use of armed force by the government of a state or by a formally organised group against civilians which results in at least 25 deaths in a year”.²⁶ In order to be able to rank countries according to the number of casualties we recoded the data as follows:

- > 1000 casualties recorded = 1 (extremely serious)
- 500–1000 casualties recorded = 2 (very serious)
- 100–500 casualties recorded = 3 (serious)
- <100 casualties recorded = 100 (other)²⁷

3.2 *Political Terror Scale*

The Political Terror Scale (PTS)²⁸ measures levels of political violence and terror that a country experiences in a particular year based on a 5-level ‘terror scale’. The data used in compiling this index comes from two different sources: the yearly country reports of Amnesty International (AI) and the U.S. State Department Country Reports on Human Rights Practices. The ‘political terror’ in the PTS refers to state-sanctioned killings, torture, disappearances and political imprisonment within a state’s borders.²⁹ For our purposes, we focused on countries that have been ranked as the worst instances of political terror by the AI, by the US State Department or by both in a particular year, i.e., countries that ranked either 4 (i.e., indicates a situation where civil and political rights violations have expanded to large numbers of the population. Murders, disappearances, and torture are a common part of life. In spite of its generality, on this level terror affects those who interest themselves in politics) or 5 (i.e. indicates a situation where terror has expanded to the whole population. The leaders of these societies place no limits on the means or thoroughness with which they pursue personal or ideological goals’).³⁰ In order to rank the countries according to the degree of political terror we recoded the data as follows:

26 See www.pcr.uu.se/research/ucdp/definitions/, 23 April 2014.

27 It has to be taken into account that these figures are very conservative estimates because of the stringent coding rules in which only reported deaths are coded; the cause of death has to be identified as political rather than criminal and the group responsible has to be identified.

28 See www.politicalterror scale.org/, 23 April 2014; and M. Gibney, L. Cornett and R. Wood, ‘*Political Terror Scale 1976–2006*’. Date Retrieved, from the Political Terror Scale Website: www.politicalterror scale.org/.

29 See www.politicalterror scale.org/, 23 April 2014. More information on how PTS codes information from AI of USSD can be found at www.apsanet.org/media/PDFs/TerrorTFGibneyandDalton.pdf, 23 April 2014.

30 *Ibid.*

Countries indexed as 5 based on both AI and the US SD = 1 (extremely serious)

Countries indexed as 5 either by AI or US SD = 2 (very serious)

Countries indexed as 4 based on both AI and the US SD = 3 (serious)

Countries indexed otherwise = 100 (other)

3.3 *Failed States Index*

The Failed States Index is an aggregate measure of state vulnerability developed by the Fund for Peace.³¹ It is based on twelve different indicators detailing the existing social, economic and political pressures faced by 178 countries included in the database. It covers a broad range of state failure risk elements such as mounting demographic pressures (disease or natural disasters), massive movement of refugees and internally displaced persons, uneven economic development along group lines, progressive deterioration of public services or external intervention. The empirical data forming the basis for the indicators are collected via content analysis of a large number of documents ranging from news and magazine articles, essays, published speeches, to governmental and non-governmental reports. The findings are then triangulated by incorporating data from international governmental and non-governmental organizations such as United Nations High Commissioner for Refugees (UNHCR), World Health Organization (WHO), United Nations Development Programme (UNDP), Freedom House or Transparency International and by qualitative review of each indicator for each country.³²

The sum of the twelve indicators that together make up the Failed State Index, form an aggregate measure of the risk of state failure.³³ For the purposes of this article we decided not to rely on the overall index score but rather on four selected, arguably most relevant, indicators:

1. Indicator of Suspension or Arbitrary Application of the Rule of Law and Widespread Human Rights Abuse, which includes measures related to press and political freedoms, civil liberties, human trafficking, political prisoners, incarceration, religious persecution, torture and executions;
2. Indicator of Legacy of Vengeance-Seeking Group Grievance or Group Paranoia, which includes measures related to discrimination, powerlessness, ethnic violence, communal, sectarian or religious violence;

³¹ See global.fundforpeace.org/, 23 April 2014.

³² See ffp.statesindex.org/faq, 23 April 2014.

³³ C.T. Call, "The Fallacy of the 'Failed State'", *Third World Quarterly* (2008) 1491–1507, at p. 1495.

3. Indicator of Massive Movement of Refugees or Internally Displaced Persons, which includes measures related to displacement, refugee camps, internally displaced persons (IDP) camps, disease related to displacement and refugees and IDPs per capita;
4. Indicator of Weakening of Force Monopoly of State Security Apparatus, which includes measures related to internal conflict, small arms proliferation, riots and protests, fatalities from conflict, military coups, rebel activity, militancy, bombings and political prisoners.

Values of each indicator range from 0–10 (0-least serious; 10-extremely serious). In order to create an aggregate measure and be able to compare countries across different years, we summed up the four indicators to get one overall measure of state performance regarding HR violations, group violence, refugee movements and weakening of state monopoly per year. Thereafter, we recoded this measure in order to get an ordinal ranking of countries per year³⁴ as we did for the other databases:

40–36,68 = 1 (ALERT 1: extremely serious)
 36,67–33,32 = 2 (ALERT 2: very serious)
 33,31–30 = 3 (ALERT 3: serious)
 <30=100 (other)

The data derived from these databases thus indicate scale, nature and impact of the human rights violations as well as governmental involvement in these violations and their systematic character relating to the manner of commission in the following manner:

1. *The number of civilian deaths in one-sided violence inflicted by the government recorded in the Uppsala Conflict Database.*
 This relates to the scale of human rights violations and assesses government involvement. The fact that governmental forces are involved also indicates that there is a potential abuse of power and possibly a plan or policy, thus pertaining to the manner of commission as well. It is also

34 This distinction reflects distinction/ranking by the Fund for Peace in their overall Failed State Index where the top 25 per cent countries are classified as ALERT (the category of ALERT is further distinguished into three subcategories: 1 dark red/2 red/3 light red (each constituting 8,6 per cent of the listed countries). In our scale we followed these distinctions but adjusted the computations to the fact that our scale ranges only to 40.

a useful indicator to assess the nature of the crimes since killings are listed as one of the criteria.

2. *The number of civilian deaths in one-sided violence inflicted by a formally organized group recorded in the Uppsala Conflict Database.*
This relates to the scale of human rights violations and also indicates potentially systematic character of crimes being committed by a formally organized group related to the manner of commission. Similar to the above, it is also an indicator of the nature of the crimes.
3. *The ranking of each country by the Political Terror Scale*
This is informative about the scale of the human rights violations, their manner of commission because of governmental involvement, their nature (indicator of level of killings, torture and disappearances) and their impact since it is indicative of the spread of terror and fear among the population.
4. *The ranking of each country by the Failed State Index based on the four selected indicators described above.*
This relates to the scale indicating the extent to which abuse of human rights is widespread, the impact of human rights violations looking at the measure of the massive movement of refugees and internally displaced persons and manner of commission taking into account the level of discriminatory violence.

In analysing our data we have calculated the four indicators for each country per year between 2002 and 2011.³⁵ On their basis, we have created an index indicating the seriousness of a situation in each country per year (the yearly seriousness index (YSI)). The YSI was created by summing up the rankings from all databases per country per year. As a first step we compiled lists of the ten worst countries representing the gravest situation per year (see Table 1 below).

This table is however only a preliminary result. In order to come to our final results we computed an aggregate seriousness index (ASI) over the entire period of 2002–2011 for each country. The ASI was determined by taking into account the position a country held on the yearly top ten list in each year. A country would get a ten when it was listed first, nine when it was second down to one when it was listed tenth. By summing up these values we could calculate the ASI for the period of 2002–2011. In our analysis we focused on the top twenty countries based on the ASI. We distinguished four clusters of countries with 25 per cent interval each: (1) The gravest situations are those with an ASI

35 There is not yet a list for 2012 as the data on the PTS and one sided violence for this year were still missing when we gathered all the data.

TABLE 1 *The yearly seriousness index from 2002–2011*

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
1. DRC		1. Sudan	1. Sudan	1. Sudan	1. Iraq	1. Iraq	1. Iraq	1. DRC	1. Pakistan	1. Cote d'Ivoire
2. Liberia		2. Liberia	2. DRC	2. Nepal	1. Sudan	2. DRC	2. DRC	2. Afghanistan	1. DRC	2. Sudan
3. Burundi		3. Indonesia	3. Nepal	3. Iraq	3. DRC	3. Myanmar	3. Sudan	2. Iraq	3. Afghanistan	2. Syria
4. Nepal		4. Burundi	4. Iraq	4. DRC	3. Afghanistan	4. Chad	4. Zimbabwe	2. Sri Lanka	3. Iraq	4. Pakistan
5. Cote d'Ivoire		5. Nepal	4. Colombia	5. Myanmar	5. Myanmar	5. Ethiopia	5. Sri Lanka	5. Guinea	5. Sudan	5. Yemen
6. Colombia		6. DRC	6. Uganda	6. Afghanistan	6. CAR	6. Sudan	5. Pakistan	6. Pakistan	6. Myanmar	5. Myanmar
6. Israel		7. Colombia	6. Burundi	7. Cote d'Ivoire	7. Sri Lanka	6. Somalia	7. Nigeria	7. Sudan	6. CAR	7. CAR
6. Uganda		8. Cote d'I	8. Ethiopia	7. Colombia	8. Chad	8. Sri Lanka	7. Kenya	8. Somalia	6. Somalia	8. Somalia
9. India		8. Ethiopia	8. Thailand	7. Burundi	8. Zimbabwe	8. Afghanistan	9. Somalia	8. Chad	9. Yemen	8. Afghanistan
9. Algeria		8. Israel	8. Russia	7. Uzbekistan	8. Pakistan	9. Zimbabwe	9. Chad	10. Myanmar	9. Sri Lanka	10. DRC
		8. Uganda	8. Philippines	7. Togo	8. Uganda	9. CAR		10. N.Korea	9. Nigeria	
					8. Colombia	9. Cote d'Ivoire		10. Israel	9. N. Korea	
					8. Nepal				9. Chad	

index between 100–75;³⁶ (2) the extremely grave are in the interval 75–50; (3) the very grave situations are in the interval 50–25 and (4) the other countries which have an ASI between 25–0 are in the rest category.

In order to complement our results we did an additional qualitative analysis on the countries at the top of our list. We analysed reports by NGOs such as Human Rights Watch, Amnesty International and the Coalition against the Use of Child Soldiers. In order to assess whether a situation in a particular country was of international concern, we also looked at whether the Security Council has expressed its concern over a particular situation and whether it explicitly addressed sexual violence or the use of child soldiers in these situations. This qualitative analysis provided additional information on the scope, nature, manner and impact of human rights violations supplementing our quantitative assessment.

3.4 Results

The final result of our analysis of the ASI for the period 2002–2011 is presented in Table 2. One country qualifies as by far the gravest situation in the world, this is the Democratic Republic Congo (DRC) which is at the top of our list with an ASI of 78. The DRC was in our top ten in each year in our YSI-tables and ranked

TABLE 2 *The Aggregate Seriousness index (ASI) 2002–2011*

Rank	Country	ASI	Rank	Country	ASI
1	DRC	78	11	Somalia	23
2	Sudan	73	12	Uganda	18
3	Iraq	62	13	Liberia	18
4	Afghanistan	36	14	Chad	17
5	Nepal	33	15	CAR	16
6	Myanmar	32	16	Columbia	12
7	Pakistan	31	17	Ethiopia	12
8	Cote d'Ivoire	28	18	Zimbabwe	12
9	Sri Lanka	24	19	Syria	9
10	Burundi	24	20	Israël, Yemen, Indonesia	8

36 Since the ASI is computed by taking into account a position of a country on the top ten list (i.e. range from 1 to 10) each year and the ASI is created taking into account a period of 10 years, the ASI ranges from 1 to 100 (the value of 100 would be ascribed to a country, which consistently over the 10 years ranked as the most serious).

first three times. Next we have two countries which fall within the second interval and qualify as extremely grave. They are Sudan with an ASI of 73 and Iraq with an ASI of 62. Sudan appeared in our top ten list nine times and ranked first four times, while Iraq is seven times in our yearly top ten list and ranked first three times. The third cluster of states can be qualified as very grave situations. They have an overall ASI between 50–25. These are the states which figure on the overall list on the positions four to eight. These countries were in the top ten at least five times and in the top three at least once. They are: Afghanistan, Nepal, Myanmar, Pakistan and Côte d'Ivoire. Next we can identify a fourth cluster of states which do not belong amongst the top eight of grave situations. Countries like Sri Lanka, Burundi and Somalia fall short of just 1–2 points to make it into the third cluster of grave situations. Countries like Uganda, Liberia, Chad and the Central African Republic (CAR) also fall short of making it into cluster 3 of very grave countries but according to the ASI index nevertheless represent grave situations. With the exception of Liberia they all were in the yearly top ten list at least 4 times. Liberia only ranked in the top ten list twice (in the years 2002 and 2003) but in these years it ranked second in the list ending up just below DRC and Sudan.

From our analysis we can thus conclude that there are eight countries which stand out representing the 75% gravest situations within the period 2002–2011. These eight countries are in order of gravity: DRC, Sudan, Iraq, Afghanistan, Nepal, Myanmar, Pakistan and Côte d'Ivoire. We, however, also note that the ASI is a gradual scale representing relative gravity. Given the limited resources and proclamations to focus on the most serious situations around the world, it can be argued that the ICC should be focusing on these top eight countries.

As the ICC's jurisdiction is not universal and in general the OTP can *proprio motu* initiate investigations only into situations within state parties we have added a third table in which we list the gravest situations amongst the state parties only (see Table 3). If it wants to start investigations in non-state parties it is fully dependent on a referral by the UNSC acting under Chapter VII of the UN Charter. In our assessment of the OTP's selection policy we need to take this into account.

4 Assessment of ICC Prosecutor's Selection Policy

In this section we will assess the Prosecutor's selection policy by comparing the eight countries at the top of our list representing the gravest situations in the world with the situations which the ICC is investigating. The ICC is

TABLE 3 *Aggregate Seriousness index (ASI) 2002–2011 of state parties only*

Rank	Country	ASI	Ratification
1	DRC	78	2002
2	Afghanistan	36	2003
3	Cote d'Ivoire	28	2013
4	Burundi	24	2004
5	Uganda	18	2002
6	Liberia	18	2004
7	Chad	17	2006
8	CAR	16	2001
9	Colombia	12	2002
10	Guinea	7	2003

currently conducting investigations in eight situations and preliminary investigations in seven others. In section 4.1 we will discuss the countries on our list which the ICC is investigating. In section 4.2 we will discuss the countries which are in our top eight list but which the ICC is not investigating. In section 4.3 we will discuss the countries which are not on our list but which the ICC is nevertheless investigating. In our discussion we will focus on each country and will discuss our findings from the quantitative as well as the qualitative analysis in order to assess whether the ICC is indeed focusing its attention of the gravest situations. For each country we will furthermore describe as to whether and when the ICC has started investigations and discuss possible reasons for its action or inaction.

4.1 *Countries in our Top Eight List which are Investigated by the ICC*

The ICC is conducting investigations in three countries (DRC, Sudan and Côte d'Ivoire) which are on our top eight list and is conducting preliminary investigations in one more country (Afghanistan). In this section we will describe the type of conflict and crimes committed in these countries and will briefly indicate when and on whose initiative the ICC started its investigations.

4.1.1 Democratic Republic Congo (DRC)

The DRC has been conflict-ridden ever since its independence in 1960 but the fighting intensified in 1998 and has led to mass victimization, tremendous suffering and huge refugee flows. Many different rebel forces were active in this

period committing atrocious crimes and the conflict was intertwined with past and ongoing conflicts in neighbouring African countries, most prominently Rwanda and Uganda. It is estimated that over 5.4 million people died - the vast majority of them not due to violence but as a result of hunger, thirst and illnesses while being on the run.³⁷ Next to the enormous scale on which crimes were committed, the nature of the crimes and the manner of commission have ensured that the impact of the crimes which have been committed by government forces and rebels alike is tremendous. It is estimated that 30,000 child soldiers were active on all sides within the conflict and that sexual violence was widespread.³⁸ The conflict became a concern for the international community soon after its start thus indicating that its impact stretched beyond the territory of the country itself. The first time the Security Council used its powers under Chapter VII in relation to the DRC was in resolution 1234 (1999) when it expressed:³⁹

-
- 37 V. Hawkins, *Stealth Conflicts - How the World's Worst Violence Is Ignored* (Ashgate, Aldershot, 2008), 12. See also B. Coghlan et al., 'Mortality in the Democratic Republic of Congo: a nationwide survey', *Lancet* (2006) 44–51. These figures are based on research in 2006 and 2008 and the number is probably even a lot higher now as the conflict continued beyond 2008. See amongst others reports of Human Rights Watch (HRW): HRW, *Renewed Crisis in North Kivu* (2007); HRW, *You will be punished - attacks on civilians in Eastern Congo* (2009), and HRW, *Always on the Run - the vicious cycle of displacement in Eastern Congo* (2010). See UN High Commissioner of Human Rights (2010, 15–16). See also HRW, *Soldiers who rape, commanders who condone - sexual violence and military reform in the Democratic Republic of Congo* (2009). See also Amnesty International, *No End to War on Women and Children* (2008). See also K. Johnson and J. Scott, B. Rughita, M. Kisielewski, J. Asher, R. Omg and L. Lawry, 'Association of sexual violence and human rights violations with physical and mental health in territories of the Eastern Democratic Republic of the Congo', 304 *JAMA* (2010) 553–562, www.lawryresearch.com/553.full.pdf, 23 March 2014. Report of the Special Rapporteur on the situation of human rights in the DRC (A/55/403). See Press statement by Mr. Phillip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, Mission in the DRC from 5 to 15 October 2009. The organization child soldiers international focuses on DRC as one of its priority countries as the problem of child soldiers is persistent and all parties in the conflict use child soldiers, www.child-soldiers.org/our_work.php, 27 April 2014. The Global Reports by the Coalition to Stop the Use of Child Soldiers in the years 2004, 2008 and 2012 all report of the use of child soldiers by the government. The report can be retrieved at: www.child-soldiers.org/, 15 December 2013. See also Human Security Centre, *Human Security Report 2005 - War and peace in the 21st Century* (Oxford University Press, Oxford, 2005), p. 114.
- 38 Global Report of the Coalition to Stop the Use of Child Soldiers 2008, *ibid*.
- 39 Following the assessment of P. Johansson, 'The Humdrum Use of Ultimate Authority: Defining and Analysing Chapter VII Resolutions', 78 *Nordic Journal of International Law* (2009), p. 341.

its concern at all violations of human rights and international humanitarian law in the territory of the Democratic Republic of the Congo, including acts of and incitement to ethnic hatred and violence by all parties to the conflict, ... [and stressed] that the present conflict in the Democratic Republic of the Congo constitutes a threat to peace, security and stability in the region.⁴⁰

The Security Council furthermore explicitly voiced its concern about the pervasive sexual violence and use of child soldiers during the conflict⁴¹ and peacekeeping forces with Chapter VII mandates have been active in the DRC.⁴² Our qualitative analysis confirms the extreme nature of the conflict in the DRC which can without doubt be considered one of the worst in the world. It is

40 Subsequent concerns were raised in S/RES/1234 (1999); S/RES/1258 (1999); S/RES/1279 (1999); S/RES/1291 (2000); S/RES/1304 (2000); S/RES/1316 (2000); S/RES/1323 (2000); S/RES/1332 (2000); S/RES/1341 (2001); S/RES/1355 (2001); S/RES/1376 (2001); S/RES/1417 (2002); S/RES/1445 (2002); S/RES/1457 (2003); S/RES/1468 (2003); S/RES/1484 (2003); S/RES/1489 (2003); S/RES/1493 (2003); S/RES/1499 (2003); S/RES/1501 (2003); S/RES/1533 (2004); S/RES/1552 (2004); S/RES/1555 (2004); S/RES/1565 (2004); S/RES/1592 (2005); S/RES/1596; S/RES/1616 (2005); S/RES/1621 (2005); S/RES/1635 (2005); S/RES/1649 (2005); S/RES/1693 (2006); S/RES/1698 (2006); S/RES/1711 (2006); S/RES/1736 (2006); S/RES/1756 (2007); S/RES/1768 (2007); S/RES/1771 (2007); S/RES/1794 (2007); S/RES/1799 (2008); S/RES/1807 (2008); S/RES/1843 (2008); S/RES/1856 (2008); S/RES/1857 (2008); S/RES/1896 (2009); S/RES/1906 (2009); S/RES/1925 (2010); S/RES/1952 (2010); S/RES/1991 (2011); S/RES/2021 (2011); S/RES/2053 (2012); S/RES/2076 (2012); S/RES/2078 (2012); S/RES/2098 (2013).

41 The UN Security Council explicitly addressed sexual violence and the use of child soldiers in S/RES/1332 (2000); S/RES/1341 (2001); S/RES/1355 (2001); S/RES/1468 (2003); S/RES/1493 (2003); S/RES/1592 (2005); S/RES/1698 (2006); S/RES/1771 (2007); S/RES/1794 (2007); S/RES/1807 (2008); S/RES/1843 (2008); S/RES/1856 (2008); S/RES/1896 (2009); S/RES/1906 (2009); S/RES/1925 (2010); S/RES/1952 (2010); S/RES/1991 (2011); S/RES/2021 (2011); S/RES/2053 (2012); S/RES/2076 (2012); S/RES/2078 (2012) and S/RES/2098 (2013).

42 S/RES/1258 (1999); S/RES/1273 (1999); S/RES/1279 (1999); S/RES/1291 (2000); S/RES/1304 (2000); S/RES/1316 (2000); S/RES/1332 (2000); S/RES/1341 (2001); S/RES/1355 (2001); S/RES/1376 (2001); S/RES/1417 (2002); S/RES/1445 (2002); S/RES/1468 (2003); S/RES/1484 (2003); S/RES/1489 (2003); S/RES/1493 (2003); S/RES/1501 (2003); S/RES/1555 (2003); S/RES/1565 (2004); S/RES/1592 (2005); S/RES/1621 (2005); S/RES/1628 (2005); S/RES/1635 (2005); S/RES/1669 (2006); S/RES/1671 (2006); S/RES/1693 (2006); S/RES/1711 (2006); S/RES/1736 (2006); S/RES/1742 (2007); S/RES/1751 (2007); S/RES/1756 (2007); S/RES/1794 (2007); S/RES/1843 (2008); S/RES/1856 (2008); S/RES/1906 (2009); S/RES/1925 (2010); S/RES/1991 (2011); S/RES/2053 (2012). Its mandate currently is scheduled to end on 31 March 2014 in accordance with S/RES/2098 (2013).

consequently fully justified that the ICC is investigating the situation in the DRC. The DRC is a party to the ICC as of 2002 and self-referred the situation to the ICC on 3 March 2003 after some pressure from the ICC Prosecutor who indicated that he would otherwise start investigations *proprio motu*. The investigation into the DRC started in 2004 and so far has led to six arrest warrants, two convictions and one acquittal.

4.1.2 Sudan

Sudan is listed second in our overall list. Sudan has been a conflict ridden and war torn country since it gained its independence in 1956. There are several conflicts going on within the country and these conflicts are intertwined with the conflicts in neighbouring countries. There are many different armed militias active next to the government forces. Some of these groups are armed by the government, others are fighting the government. A cease fire was reached in 2002 but the fighting nevertheless continued. There are two main conflict areas: South Sudan and Darfur. According to Hawkins the fighting in South Sudan led to 2 million deaths⁴³ - most of them can be considered indirect deaths and include people who died from illnesses and malnutrition while on the run for violence. During the violence in Darfur where armed rebellion groups fought the government an estimated 300,000 people lost their lives.⁴⁴ There has been an extensive debate as to what extent the violence in Darfur amounted to genocide.⁴⁵ In 2011 the country split after a referendum into South Sudan and Sudan. Shortly thereafter violence between the countries over disputed borders broke out again. A lot of violence was directed against civilians and there is widespread use of sexual violence.⁴⁶ There are allegedly 20,000 child soldiers active in the conflict and they are used by the government and government backed militias like the Janjaweed and rebel forces like the SPLA.⁴⁷

43 Estimate by Hawkins, *supra* note 37, p. 14.

44 Hawkins, *ibid.*, p. 16.

45 J. Hagan and W. Rymond-Richmond, *Darfur and the Crime of Genocide*, (Cambridge University Press, Cambridge, 2009). *See also* the Cassese report: report of the International commission of Inquiry on Darfur to the United Nations secretary general (2005).

46 *See* HRW, *Darfur in the shadows - the Sudanese government's ongoing attacks on civilians and human rights* (2011); HRW, *There is no protection - Insecurity and human rights in Southern Sudan* (2009); HRW, *Five years on - no justice for sexual violence in Darfur* (2008); HRW, *Sexual violence and its consequences among displaced persons in Darfur and Chad* (2005); HRW, *Targeting the Fur: Mass killings in Darfur* (2005); AI, *No end to violence in Darfur* (2012).

47 *See* Global Reports by the Coalition to Stop the Use of Child Soldiers in 2004, 2008 and 2012, *supra* note 37.

Alarm about the conflict in Darfur started to be expressed by states, NGOs and international organizations in 2003 and in 2004.⁴⁸ In a presidential statement in May 2004 the Security Council expressed its ‘grave concern’ and a month later in June the Security Council also adopted a resolution in which it expressed its “utmost concern at the consequences of the prolonged conflict for the civilian population of Sudan” and called for an immediate halt in the fighting in Darfur.⁴⁹ Subsequently in July 2004 the Security Council adopted a resolution where it condemned the attacks on civilians, explicitly mentioning rapes and forced displacements.⁵⁰ In this resolution the Security Council also noted the situation in Sudan constitutes a threat to international peace and security.⁵¹ In the years that followed the Security Council reiterated its concern about the situation in Darfur numerous times, often also expressing its concern about the use of child soldiers and the sexual violence which formed part of the conflict.⁵² After the United States and the European Parliament labelled the violence in Darfur genocide, or tantamount thereof, a resolution was adopted which called for an inquiry whether the violence in Darfur could be qualified as genocide.⁵³ In 2004 the United Nations Advance Mission in Sudan (UNAMIS, later UNMIS) was established and the African Union committed itself to a peacekeeping mission (the African Union Mission in Sudan, AMIS) which would eventually be transformed into the African Union/United Nations Hybrid Operation in Darfur (UNAMID).⁵⁴ Overall we can conclude that the situation in Sudan is without doubt extremely grave considering its particular characteristics relating specifically to the nature of the crime (widespread sexual violence), manner of commission (government involvement) and impact (both domestically as well as internationally).

48 F. Grünfeld and W. Vermeulen, ‘Failures to Prevent Genocide in Rwanda (1994), Srebrenica (1995), and Darfur (since 2003)’, 4 *Genocide Studies and Prevention* (2009), p. 229.

49 S/PRST/2004/18; S/RES/1547 (2004).

50 S/RES/1556 (2004).

51 *Ibid.*

52 *Ibid.*; S/RES/1574 (2004); S/RES/1590 (2005); S/RES/1591 (2005); S/RES/1663 (2006); S/RES/1706 (2006); S/RES/1709 (2006); S/RES/1713 (2006); S/RES/1714 (2006); S/RES/1755 (2007); S/RES/1769 (2007); S/RES/1779 (2007); S/RES/1784 (2007); S/RES/1812 (2008); S/RES/1828 (2008); S/RES/1841 (2008); S/RES/1870 (2009); S/RES/1881 (2009); S/RES/1891 (2009); S/RES/1919 (2010); S/RES/1935 (2010); S/RES/1945 (2010); S/RES/2003 (2011); S/RES/2035 (2012); S/RES/2063 (2012); S/RES/2091 (2013); S/RES/2113 (2013).

53 Grünfeld and Vermeulen *see supra* note 48, pp. 229–230; S/RES/1564 (2004).

54 S/RES/1547 (2004); extended in S/RES/1574 (2004); S/RES/1585 (2005); S/RES/1588 (2005); S/RES/1590 (2005); S/RES/1627 (2005); S/RES/1663 (2006); S/RES/1679 (2006); S/RES/1706 (2006); S/RES/1709 (2006); S/RES/1714 (2006); S/RES/1755 (2007);

Sudan is not a party to the ICC. The UNSC however referred the situation of Darfur to the ICC on 31 May 2005 in SC Resolution 1593. This was the first time the UNSC used its powers on the basis of Chapter VII to refer a situation to the ICC. Taking the tremendous violence and suffering into consideration this seems fully justified. It has to be noted however that the ICC only referred the situation of Darfur to the ICC and that the ICC consequently does not have jurisdiction for the crimes committed in other areas within Sudan. The ICC has issued six arrest warrants amongst which one against Al-Bashir the president of Sudan.

4.1.3 Afghanistan

Afghanistan is listed fourth on our overall list and second when we take into account only the state parties to the ICC. Afghanistan has been a war torn country for many years. After 9/11 the US launched an attack against the country in order to remove the Islamic Taliban, which allegedly supported and harboured Al Qaeda suspects, from power. Under auspices of the UN an interim government was installed but the Taliban regrouped as insurgent groups and as of 2005 an armed conflict started. It had a violence peak in 2006 and 2009–2010. In this conflict civilians have been systematically targeted.⁵⁵ According to Hawkins in the entire period of conflict over 500,000 people died.⁵⁶ Child soldiers are not used by the national army but are used by other elements of state armed forces, government backed forces and insurgent groups.⁵⁷ Women are discriminated but there are no specific reports of sexual violence.

The Security Council expressed its concern about the situation in Afghanistan already in 1999. In a Chapter VII resolution it expressed its “deep concern over the continuing violations of international humanitarian law and of human rights, particularly discrimination against women and girls, and over the significant rise in the illicit production of opium” and deplored the fact that Taliban was providing Osama Bin Laden with a safe haven.⁵⁸ After the attacks against the US on 9/11 the Security Council followed through by noting it was “determined to combat by all means threats to international peace and security caused

S/RES/1769 (2007); S/RES/1784 (2007); S/RES/1812 (2008); S/RES/1828 (2008); S/RES/1870 (2009); S/RES/1881 (2009); S/RES/1919 (2010); S/RES/1935 (2010); S/RES/1978 (2011); S/RES/1997 (2011); S/RES/2003 (2011); S/RES/2063 (2012); S/RES/2113 (2013).

55 HRW, *Troops in contact - Airstrikes and civilian deaths in Afghanistan* (2008) and HRW, *The human costs - the consequences of insurgent attacks in Afghanistan* (2007); HRW, *Blood stained hands - past atrocities in Kabul and Afghanistan's legacy of impunity* (2005).

56 Hawkins, *supra* note 37, p. 15.

57 See Global Reports Coalition to Stop the use of Child Soldiers 2004, 2008, 2012.

58 S/RES/1267 (1999).

by terrorist acts” and “*expresse[ed]* its readiness to take all necessary steps to respond to the terrorist attacks”.⁵⁹ The concern of the Security Council was focused on but not limited to the concern caused by terrorism. The SC also expressed its concern “about all civilian casualties” and called on the parties to comply with international humanitarian law and human rights law and to ensure civilians would be protected.⁶⁰ In this resolution it also explicitly expressed its concern about the recruitment and use of child soldiers by the Taliban.⁶¹ In December 2001 resolution 1386 established the International Security Assistance Force (ISAF). NATO assumed the leadership over ISAF in 2003 and is currently still operative in Afghanistan.⁶² In 2002 the Security Council created the United Nations Assistance Mission in Afghanistan (UNAMA).⁶³ The situation within the country is grave and the concern of the international community is clear.

Afghanistan became a party to the Statute in 2003. The ICC started investigations into Afghanistan in 2006 but according to the OTP these investigations are hampered by the lack of cooperation, security issues and financial constraints.⁶⁴ This investigation is consequently still in its preliminary phase and no arrest warrants have been issued yet.

4.1.4 Côte d’Ivoire

The situation in Côte d’Ivoire has been persistently grave throughout the last ten years. It does not make it to the yearly lists of the gravest countries from 2008–2010 but re-appears in 2011 on the top of the list with a heightened death toll at the hands of both government and non-governmental forces. It is listed as eighth on the overall list and the third when only the ICC state parties are considered. Côte d’Ivoire was a prosperous country until the economy started

59 S/RES/1368 (2001).

60 The Security Council continued by recognizing “the robust efforts taken by ISAF and other international forces to minimize the risk of civilian casualties” S/RES/1806 (2008).

61 S/RES/1806). This concern was reiterated for instance in S/RES/1868 (2009); S/RES/1917 (2010); S/RES/1974 (2011); S/RES/2011 (2011); S/RES/2041 (2012); S/RES/2069 (2012); S/RES/2096 (2013).

62 www.isaf.nato.int/history.html, 27 April 2014; S/RES/1413 (2002); S/RES/1444 (2002); S/RES/1510 (2003); S/RES/1563 (2004); S/RES/1623 (2005); S/RES/1659 (2006); S/RES/1707 (2006); S/RES/1776 (2007); S/RES/1833 (2008); S/RES/1890 (2009); S/RES/1943 (2010); S/RES/1974 (2011); S/RES/2011 (2011); S/RES/2069 (2012).

63 S/RES/1401 (2002); extended with resolution S/RES/1471 (2003); S/RES/1536 (2004); S/RES/1589 (2005); S/RES/1662 (2006); S/RES/1746 (2007); S/RES/1806 (2008); S/RES/1868 (2009); S/RES/1917 (2010); S/RES/1974 (2011); S/RES/2041 (2012); S/RES/2096 (2013).

64 See ICC-OTP Report on preliminary examinations.

to recede and political upheaval started in the 1980s. In 1999 the first coup d'état was committed and in 2000 Gbagbo took over power using force and violence to fight off his opponents. In 2002 a rebellion started leading to an armed conflict between the government and the rebels which officially ended in December 2003 with the signing of a peace agreement but violence continued in the years 2005–2007 until a new power sharing agreement was signed. After he lost the elections in 2010 Gbagbo initiated a new spray of violence in which civilians were attacked and the use of sexual violence was widespread.⁶⁵ The violence was in many cases committed by government forces.⁶⁶ Child soldiers have been used by all parties in the conflict.⁶⁷

In 2003 the Security Council qualified the situations as “a threat to international peace and security in the region” and supported the deployment of a peacekeeping force by the Economic Community of West African States (ECOWAS) and France.⁶⁸ It also established a political mission with a military component, United Nations Mission in Côte D'Ivoire (MINUCI), in 2003 and has reiterated its concerns about the Côte d'Ivoire in subsequent resolutions often explicitly condemning the use of child soldiers and sexual violence.⁶⁹ In 2004 the Council authorized, while acting under Chapter VII, to send troops to Côte d'Ivoire and established the United Nations Operation in Côte d'Ivoire (UNOCI).⁷⁰ After elections resulted in violence, the Security Council decided

65 HRW, *They killed them like it was nothing - the need for justice for Côte d'Ivoire post-election crimes* (2011).

66 See AI, *Côte d'Ivoire: Targeting Women: The Forgotten Victims of the Conflict* (2007).

67 See Global Reports by the Coalition to Stop the Use of Child Soldiers in 2004, 2008 and 2012, *supra* note 37.

68 S/RES/1464 (2003); S/RES/1498 (2003); S/RES/1527 (2004); S/RES/1528 (2004).

69 S/RES/1479 (2003); S/RES/1514 (2003); S/RES/1527 (2004); S/RES/1528 (2004); S/RES/1572 (2004); S/RES/1603 (2005); S/RES/1609 (2005); S/RES/1633 (2005); S/RES/1643 (2005); S/RES/1657 (2006); S/RES/1682 (2006); S/RES/1721 (2006); S/RES/1726 (2006); S/RES/1727 (2006); S/RES/1739 (2007); S/RES/1826 (2008); S/RES/1842 (2008); S/RES/1865 (2009); S/RES/1880 (2009); S/RES/1893 (2009); S/RES/1911 (2010); S/RES/1933 (2010); S/RES/1946 (2010); S/RES/1962 (2010); S/RES/1967 (2011); S/RES/1975 (2011); S/RES/1980 (2011); S/RES/2000 (2011); S/RES/2045 (2012); S/RES/2062 (2012); S/RES/2101 (2013); S/RES/2112 (2013).

70 S/RES/1528 (2004); S/RES/1584 (2005); S/RES/1594 (2005); S/RES/1600 (2005); S/RES/1603 (2005); S/RES/1609 (2005); S/RES/1652 (2006); S/RES/1657 (2006); S/RES/1726 (2006); S/RES/1739 (2007); S/RES/1763 (2007); S/RES/1765 (2007); S/RES/1795 (2008); S/RES/1826 (2008); S/RES/1880 (2009); S/RES/1911 (2010); S/RES/1924 (2010); S/RES/1933 (2010); S/RES/1942 (2010); S/RES/1951 (2010); S/RES/1962 (2010); S/RES/1967 (2011); S/RES/1968 (2011); S/RES/1981 (2011); S/RES/1992 (2011); S/RES/2000 (2011); S/RES/2062 (2012); S/RES/2112 (2013).

in resolution 1962 that Ouattara had won the elections which was subsequently affirmed in resolution 1975 which authorized UNOCI to “use all necessary means” to protect the civilian population.

Côte d’Ivoire became a party to the ICC Statute in 2013 but on 18 April 2003 it had already filed a declaration that it would accept the jurisdiction of the Court as of 19 September 2002. An investigation into this situation was triggered by the Prosecutor *proprio motu* in June 2011. On 3 October 2011 the Prosecutor received authorization from the Pre-Trial Chamber to open investigations. Three arrest warrants have been issued so far amongst which one against former president Laurent Gbagbo and one against his wife Simone Gbagbo.

4.2 *Countries on our List which the ICC Is not Investigating*

In this section we will discuss the countries which are in our top eight list but which are not investigated by the ICC. Next to describing the situations and crimes committed in the country we will search for the possible reasons as to why the ICC has not started investigations into these countries.

4.2.1 Iraq

Since 1979 Iraq had been under the rule of Saddam Hussein, an authoritarian dictator who used extensive force and violence during his period in power. In March 2003 an alliance of the US, UK and Australia invaded Iraq and toppled Saddam Hussein. A new government was installed but insurgencies and civil war plagued the country. The project Iraq Body Count estimates the number of direct civilian deaths between 114,000–125,000 with a clear peak in the period 2006–2007.⁷¹ Others estimate that the total death toll (including battle related deaths and non-battle related deaths as well as indirect deaths) to be between 150,000–650,000.⁷² A number of rebellious armed groups as well as the government itself are responsible for the numerous deaths.⁷³ Child soldiers were used by insurgent groups but not by the government and overall the problem of child soldiering is far less widespread than in DRC and Sudan.⁷⁴

⁷¹ See www.iraqbodycount.org/, 27 April 2014.

⁷² Hawkins, *supra* note 37, p. 16. See also estimates by Coghlan et al, *see supra* note 37.

⁷³ See for instance AI Public Statement: Amnesty International greatly concerned by rising toll of civilian killings, including for discriminatory motives, statement 10 August 2006. See also HRW, *At a crossroads - human rights in Iraq eight years after the US-led invasion* (2011); HRW, *They want us exterminated* (2009); HRW, *The silent treatment - fleeing Iraq, surviving in Jordan* (2006); HRW, *A face and a name - civilian victims of insurgent groups in Iraq* (2005).

⁷⁴ See Global Report of the Coalition to Stop the Use of Child Soldiers in 2004, 2008, 2012.

The situation in Iraq has been a concern for the Security Council since the early 1990s.⁷⁵ Despite the Chapter VII resolution 1441 from 2002 which “warned Iraq that it will face serious consequences as a result of its continued violations of its obligations” the Security Council never went as far as to authorise the use of force against Iraq.⁷⁶ Several resolutions after the invasion of Iraq stressed the importance that the parties abide by international law and in particular the Geneva Conventions.⁷⁷ In 2003 the United Nations Assistance Mission for Iraq (UNAMI) was created and in a subsequent resolution “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq”.⁷⁸ The humanitarian situation in Iraq, however, remained troubling and the Security Council has repeatedly expressed its concern.⁷⁹

Next to Sudan and DRC, Iraq is clearly the gravest situation within the world over a long period of time and should in principle be investigated by the ICC. Iraq however is not a party to the ICC and starting investigations into Iraq would therefore only be possible if the UNSC would refer the situation to the ICC. The UNSC can only do so when it acts under Chapter VII of the UN Charter and there is a threat to international peace and security. Since Iraq has been a major concern of the UNSC since the 1990s and the UNSC has frequently acted under Chapter VII to address the situation in Iraq, the situation certainly seems grave enough. However, unlike the ICC, the UNSC is first and foremost a political institution and a referral of the situation in Iraq to the ICC is for this reason unlikely to materialize. The United States has been unwilling to risk subjecting its citizens to the jurisdiction of the ICC which has led to a sceptical attitude towards the ICC by the US in general.⁸⁰ The permanent members of the Security Council are first and foremost concerned with their

75 For a list of Chapter VII resolutions see Johansson, *supra* note 39, p. 339.

76 Ronald C. Kramer and Raymond J. Michalowski, ‘War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq’, 45 *British Journal of Criminology* (2005), p. 450.

77 S/RES/1472 (2003); S/RES/1483 (2003).

78 Concerning UNAMI: S/RES/1500 (2003); S/RES/1511 (2003); S/RES/1557 (2004); S/RES/1619 (2005); S/RES/1700 (2006); S/RES/1770 (2007); S/RES/1830 (2008); S/RES/1883 (2009); S/RES/1936 (2010); S/RES/2001 (2011); S/RES/2061 (2012); S/RES/2110 (2013). Concerning the multinational force: S/RES/1546 (2004); S/RES/1637 (2005); S/RES/1723 (2006); S/RES/1790 (2007).

79 S/RES/1770 (2007); S/RES/1830 (2008); S/RES/1883 (2009).

80 Elizabeth C. Minogue, ‘Increasing the Effectiveness of the Security Council’s Chapter VII Authority in the Current Situations Before the International Criminal Court’, 61 *Vand. L. Rev.* (2008) 677–679.

respective national interest and this is no different when it comes to their decisions regarding the ICC.⁸¹ Forsythe finds a double standard has been guiding the choices of the US. He argues the US advocates international criminal justice for others “while shielding Americans from the very same process”.⁸²

Not all crimes committed within Iraq are however out of the ICC’s reach. The ICC does have jurisdiction for the crimes committed in Iraq by nationals of state parties such as the UK. After numerous communications the ICC looked into allegations of British soldiers who had allegedly committed international crimes in Iraq. In February 2006 the Prosecutor however declared that the “requirements to seek authorization to initiate an investigation in the situation in Iraq have not been satisfied”.⁸³ The ICC decided not to investigate these crimes because the number of victims in Iraq *at the hands of British forces* was much less in comparison to its other cases. The ICC consequently declined to investigate these crimes given the lack of relative gravity. In doing so the “Prosecutor explicitly prioritized the number of victims over other factors such as the fact that the crimes were (arguably) committed as part of an aggressive war”.⁸⁴ The decision was criticized by a number scholars and raises the question as to whether the gravity assessment at this stage should be related to the situation (Iraq overall) or only individual cases for which the ICC has jurisdiction (the alleged crimes of the British soldiers in Iraq).⁸⁵ Very recently - on 13 May 2014- the Prosecutor of the ICC announced that she will re-open the preliminary investigations on the alleged crimes committed by the armed forces of the UK deployed in Iraq between 2003 and 2006 on the basis of new and additional information received by the Court.⁸⁶ Despite this new development, the fact that - apart from the crimes committed by the British military - Iraq stays out of the reach of the ICC, is a severe shortcoming of the functioning of the international criminal justice system, but blame for this may not be attributed entirely to the ICC.

81 David P. Forsythe, ‘The UN Security Council and Response to Atrocities: International Criminal Law and the P-5’, 34 *Human Rights Quarterly* (2012) 850.

82 *Ibid.*, p. 843.

83 See www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf, 23 March 2014.

84 DeGuzman, *supra* note 9, p. 1461.

85 DeGuzman and Schabas, *supra* note 5.

86 See the Press Statement www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx, 21 March 2014.

4.2.2 Nepal, Myanmar and Pakistan

Nepal suffered from a civil war between 1995–2006 during which Maoist rebels fought the regime. Nepal was in the top five of our list between 2002 and 2005. Both the Communist rebellious party as well as the government forces were responsible for the violence. Civilians were attacked⁸⁷ and child soldiers were used in the conflict by the rebellious factions and as spies by the government forces.⁸⁸ The conflict was ended after the peace talks in 2006. The situation has calmed down and it did not reappear in the top 10 list after 2006. In relation to the crimes committed in this period there is still widespread impunity.⁸⁹ Strikingly, the Security Council only adopted resolutions from 2007 onwards when it decided to establish the United Nations political mission in Nepal (UNMIN).⁹⁰

Myanmar was a military dictatorship from 1962–2011 known to oppress all political opposition and in which ethnic cleansing took place.⁹¹ The country was also plagued by sectarian violence.⁹² Elections took place in 2010 and in 2011 a civil government was installed. Myanmar appears on our list as of 2005 and with the exception of 2008 was continuously in the top 10. In 2007 it was ranked third. Myanmar is one of the countries in which the problem of child soldiers (used by all parties) is considered to be one of the worst around the world.⁹³ The Security Council has done little in relation to the violence in Myanmar. There are no Security Council resolutions although there are some presidential statements in the period under review in this article.⁹⁴

87 HRW, *Between a rock and a hard place - civilians struggle to survive Nepal's civil war* (2004).

88 See Global Reports of the Coalition to Stop the Use of Child Soldiers 2004, 2008 and 2012, *supra* note 37 and HRW, *Children in the ranks - the Maoist use of child soldiers in Nepal* (2007).

89 HRW, *Adding insult to injury* (2011); HRW, *Indifference to duty* (2010); HRW, *Waiting for justice* (2008).

90 S/RES/1740 (2007); S/RES/1796 (2008); S/RES/1825 (2008); S/RES/1864 (2009); S/RES/1879 (2009); S/RES/1909 (2010); S/RES/1921 (2010); S/RES/1939 (2010).

91 HRW, *They came and destroyed our village - the plight of displaced persons in Karen State* (2005); HRW, *Crackdown - repression of the 2007 popular protest in Burma* (2007); HRW, *Burma's forgotten prisoners* (2009); HRW, *All you can do is pray - crimes against humanity and ethnic cleansing of Rohingya Muslims in Burma's Arakan state* (2013).

92 HRW, *The government could have stopped this - sectarian violence and ensuing abuses in Burma's Arakan state* (2012).

93 In the Global report of the Coalition to Stop the Use of Child Soldiers 2008, Myanmar is called the most notable offender - i.e. government using child soldiers, p. 5 summary. See also HRW, *My gun was as tall as me - Child soldiers in Burma* (2002).

94 S/PRST/2007/37; S/PRST/2008/13.

Pakistan has been under military rule for many years. Musharraf, who claimed power after a military coup in 1999, stayed in power until 2008 when parliamentary elections were held. The levels of violence are the consequence of repression, political violence against the government and territorial and regional disputes for which many different groups including the government are responsible. Pakistan appeared on the list in 2006 and even ranked first in 2010 (together with the DRC) and although the government is not using child soldiers, rebel forces are.⁹⁵ There are no Security Council resolutions explicitly on Pakistan in the period covered by this article.

All these countries are marked by periods of excessive violence which seem to warrant attention of the ICC. They rank in the positions five to seven on the basis of the ASI. Neither of these three countries are however party to the ICC Statute. The ICC consequently lacks jurisdiction over the crimes committed. Starting investigations in these three states would only be possible if the suspects are nationals of a state party, if the country itself would accept jurisdiction of the ICC on an ad hoc basis or if the UNSC would refer the situation to the ICC. This can only be done if the situation is considered a threat to international peace and security and the UNSC acts under Chapter VII of the UN Charter. Despite the fact that we can clearly conclude that the situation in all three of these countries is or was grave these countries do not, according to the UNSC, pose a threat to international peace and security.

4.3 *Countries not on our List but which the ICC is Nevertheless Investigating*

The ICC has started investigations in five situations which according to our list would not be amongst the eight gravest. These countries are Uganda, Central African Republic (CAR), Kenya, Libya and Mali. In addition, we will very briefly address the recent situation that was referred to the ICC by Comoros. The ICC furthermore started preliminary investigations into another six situations which do not appear in our top eight list: Colombia, Georgia, Guinea, Honduras, Korea and Nigeria. We will briefly discuss the violence within these states and the reasons why the ICC has started investigations into these situations.

4.3.1 Uganda

Uganda is party to the ICC since 2002 and the situation was referred to the ICC by the government of Uganda on 16 December 2003. Investigations started on 29 July 2004. Uganda ranks 12th on our overall list and 5th on the list of state parties to the ICC. There was a peak of violence in 2002–2006. Most of the

⁹⁵ Global Reports by the Coalition to Stop the Use of Child Soldiers in 2004, 2008 and 2012.

violence in Uganda is committed by the LRA but the government too is responsible for certain crimes.⁹⁶ The use of both sexual violence and child soldiers is widespread. According to the Human Security Report Uganda is next to DRC and Sierra Leone the country in which the problem of child soldiers is the gravest.⁹⁷ The LRA has 20,000 child soldiers within its ranks - most of whom have been abducted while the girls have often been subjected to sexual violence. Although the Security Council has not adopted any resolutions explicitly dealing with Uganda it has expressed its concern in resolutions on the Great Lakes region and the conflict in Sudan.⁹⁸ In resolution 1653 for instance it expressed

its deep concern at the devastating impact of conflict and insecurity on the humanitarian situation throughout the Great Lakes region and their implications for regional peace and security, especially where arms and armed groups move across borders, such as the long-running and brutal insurgency by the Lord's Resistance Army (LRA) in northern Uganda which has caused the death, abduction and displacement of thousands of innocent civilians in Uganda, the Sudan and the Democratic Republic of the Congo.⁹⁹

The fact that the ICC started investigations seems fair - many crimes have been committed and the situation can without doubt be described as grave according to the OTP standards and it ranks high on the list of gravest situations (5th) of the ICC state parties.

4.3.2 Central African Republic (CAR)

The CAR ratified the Rome Statute in 2001 and referred the situation to the ICC in 2004. The decision to open investigations, however, was not made until 2007,¹⁰⁰ at which time the country had been among the most serious situations according to our data. Overall the CAR ranks 15th on our list of gravest countries

96 HRW, *Get the Gun - Human Rights violations by Uganda's national army in law enforcement operations in Karamoja region* (2007). HRW, *Uprooted and forgotten - impunity and human rights abuses in Northern Uganda* (2005) and HRW, *State of pain - torture in Uganda* (2004).

97 Human Security Report, *supra* note 37, p. 115.

98 S/RES/1812 (2008). See www.securitycouncilreport.org/un-documents/lra-affected-areas/, 27 April 2014.

99 S/RES/1653 (2006).

100 ICC press release: Prosecutor opens investigation in the Central African Republic. www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2007/Pages/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic.aspx, 27 April 2014.

and 8th on the ICC state parties list. CAR is known for ethnic tensions since 1990. In 2001 the situation grew worse but calmed down after Bozize seized power in 2003 but violence resumed in 2006. Many violations were committed by the government forces and violence was directed against civilians.¹⁰¹ Sexual violence was also widespread and severe.¹⁰² Child soldiers are used but mainly by non-state parties in the conflict.¹⁰³

The Security Council has not made use of its Chapter VII powers concerning the violence which swept over the country in the early 2000s and there has been a remarkable lack of Security Council resolutions about CAR during this time.¹⁰⁴ The Security Council addressed the conflict in CAR mostly in resolutions dealing with the entire sub-region, specifically in relation to Chad and the consequences of the conflict in Darfur.¹⁰⁵ In 2007 the Security Council determined that the “situation in the region of the border between the Sudan, Chad and the Central African Republic constitutes a threat to international peace and security”.¹⁰⁶ It therefore decided to establish the United Nations Mission in the Central African Republic (MINURCAT) which was to pay particular attention to sexual and gender-based violence and the recruitment and use of child soldiers and authorized the deployment of a European Union operation.¹⁰⁷ Only two more recent resolutions relate explicitly to CAR and the United Nations Integrated Peacebuilding Office in the Central African Republic (BINUCA).¹⁰⁸ In resolution 2031 from 2011 the Security Council

strongly condemned the continued violations of international humanitarian and human rights law, including the recruitment and use of children, killing and maiming, rape, sexual slavery and other sexual violence and abductions perpetrated by armed groups, and specifically the LRA that threaten the population as well as peace and stability in the Central

101 HRW, *State of anarchy - rebellion and abuses against civilians* (2007). Amnesty International, *Central African republic: Civilians in peril in the wild north* (2007).

102 HRW, *supra* note 101.

103 See Global reports on the Coalition of the use of child soldiers 2004, 2008, 2012, *supra* note 37.

104 There are no resolutions explicitly and exclusively dealing with CAR between 2002–2010 although the situation is incorporated into some overarching resolutions. www.securitycouncilreport.org/un-documents/chadcar/, 17 March 2014.

105 S/RES/1834 (2008).

106 S/RES/1778 (2007). Other resolutions where it was confirmed that it constituted a threat to international peace and security include S/RES/1834 (2008); S/RES/1861 (2009); S/RES/1913 (2010); S/RES/1922 (2010); S/RES/1923 (2010).

107 S/RES/1778 (2007).

108 S/RES/2031 (2011); S/RES/2088 (2013).

African Republic and the sub region and *calls on* BINUCA to report on human rights violations perpetrated by armed groups particularly against children and women.

Overall we can state that the violence was severe and according to the OTP's standards it definitely qualifies as grave and the fact that the ICC is investigating this situation seems justified also taking into account that CAR figures in the top ten of the ICC state parties list.

4.3.3 Kenya

Kenya had been party to the Statute as of 2005. Investigations started on the initiative of the Prosecutor (*proprio motu*). On 31 March 2010 the Pre-Trial Chamber II decided that the Prosecutor could open investigations into the election violence which had taken place in Kenya in 2007–2008.¹⁰⁹ Kenya does not appear on our top eight list and does not rank within the top twenty of the overall period. Kenya however emerges from our databases as a serious concern in 2008 when it was seventh in our yearly top-ten list but this is the only time it appeared. Its impact domestically is likely to have been extensive with 1300 people killed and an estimated 35,000 displaced.¹¹⁰ Internationally, concern was evident through an extensive mediation process led by the African Union¹¹¹ but the Security Council remained rather silent and there has not been a resolution that was explicitly focused on Kenya between 2007 and 2012.¹¹²

Some criticism and doubt was voiced when the Prosecutor started his investigation *proprio motu*.¹¹³ However, part of the reason why Kenya does not appear on our final list, is based on our coding ASI over 10 years period: countries with a short and intensive period of violence are not likely to end in the top twenty list. Nevertheless the decision of the Prosecutor to start

109 Pre-Trial Chamber II Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya No.: ICC-01/09.

110 S. Brown and C.L. Sriram, 'The Big Fish won't Fry Themselves: Criminal accountability for post-election violence in Kenya', 111 *African Affairs* (2012) 248.

111 M.K. Juma, 'African mediation of the Kenya post-2007 election crisis', 27 *Journal of Contemporary African Studies* (2009) 407–430.

112 There was a statement of the president and a council briefing on the topic S/PRST/2008/4 and S/PV.5845. In its presidential statement the Security Council expressed "its deep concern that ... civilians continue to be killed, subjected to sexual and gender based violence and displaced from their homes" but welcomed the diplomatic efforts of a.o. Kofi Annan and the African Union.

113 M.C. Nmaju, 'Violence in Kenya: Any Role for the ICC in the Quest for Accountability', 3 *Afr. J. Leg. Stud.* (2009) 78–95.

investigations into Kenya is one of the most criticized and from our data it becomes clear why.

4.3.4 Libya

Libya is not a party to the ICC but the situation in Libya was referred to the ICC by the Security Council in February 2011. Even though the country was given the most severe ranking on the Political Terror Scale in 2011 it does not rank among the ten situations which are most grave in 2011 when all the data are taken into account. The impact internationally was nevertheless very high. Libya was expelled from the Human Rights Council and the Security Council referred the situation to the ICC while acting under Chapter VII.¹¹⁴ The Gulf Cooperation Council furthermore called upon the Security Council to “take all necessary measures” to protect the population in Libya and the League of Arab States requested the Security Council put in place a no fly zone and safe areas.¹¹⁵ In resolution 1973 the Security Council subsequently affirmed that the crisis constituted a threat to peace and security and acting under Chapter VII, demanded a cease fire and authorized “all necessary measures ... to protect civilians and civilian populated areas under threat of attack ... while excluding a foreign occupation force of any form on any part of Libyan territory”.¹¹⁶ The situation in Libya is obviously of great concern to the international community. Also with regards to the nature of the crimes involved, the UNSC noted its “deep concern about reports of sexual violence during the conflict in Libya against women, men and children ... and the recruitment and use of children in situations of armed conflict”.¹¹⁷ The fact that the UNSC referred the case to the ICC brings an interesting dilemma to the fore as Libya according to our data would not even rank amongst the ten gravest situations in its worst years (2010 and 2011) - but compared to some other countries was clearly more of an international concern as demonstrated by attention dedicated to Libya by the UNSC.

¹¹⁴ S/RES/1970 (2011); General Assembly Suspends Libya from Human Rights Council. www.un.org/News/Press/docs/2011/ga11050.doc.htm, 25 April 2014. In addition an arms embargo, travel ban and freezing of assets was also set up in S/RES/1970 (2011).

¹¹⁵ A.J. Bellamy and P.D. Williams, ‘The New Politics of Protection? Côte d’Ivoire, Libya and the responsibility to protect’, in *African Affairs* (2011), pp. 839–841; S/RES/1973 (2011).

¹¹⁶ S/RES/1973 (2011); In S/RES/2009 (2011) it was thereafter also decided to establish a United Nations Support Mission in Libya (UNSMIL) and extended the mandate in resolutions S/RES/2022 (2011), S/RES/2040 (2012) and S/RES/2095 (2013). It has remained actively seized of the manner ever since: S/RES/2009 (2011); S/RES/2016 (2011); S/RES/2017 (2011); S/RES/2022 (2011); S/RES/2040 (2012); S/RES/2095 (2013).

¹¹⁷ S/RES/2040 (2012). This concern was reiterated in S/RES/2095 (2013).

4.3.5 Mali and Comoros

The self-referral from Mali is too recent to assess on the basis of our data but it did not appear to have been among the gravest situations in the last ten years. There has been nevertheless significant international concern for the crisis in Mali. According to Security Council Resolution 2085 the impact of the conflict in Mali for the international community has been alarming and it determined the conflict constituted a threat to international peace and security. In its resolution it emphasized

that the situation and entrenchment of terrorist groups and criminal networks in the north of Mali continue to pose a serious and urgent threat to the population throughout Mali, and to the stability in the Sahel region, the wider African region and the international community as a whole.¹¹⁸

The Security Council also explicitly condemned the sexual violence against women and the use of child soldiers and stressed that some of the acts may amount to crimes under the Rome Statute.¹¹⁹ The Security Council even welcomed forceful action by French troops to stabilize the situation and authorised the deployment of an African-led International Support Mission in Mali (AFISMA).¹²⁰

On 14 May 2013 Comoros referred a situation to the ICC. It relates to the Israeli raid on 31 May 2010 on the Humanitarian Aid Flotilla which was bound for the Gaza strip. The attack on the flotilla incident including the attack on the Mavi Marmara of Comoros, was condemned by the Security Council during its 6325th and 6326th session.¹²¹ In addition, a panel of inquiry was welcomed by the Security Council which released their report in September 2011.¹²² If the

118 Other resolutions that qualified the conflict a threat to international peace and security include S/RES/2056 (2012); S/RES/2071 (2012); S/RES/2100 (2013).

119 S/RES/2056 (2012); S/RES/2071 (2012); S/RES/2085 (2012); S/RES/2100 (2013).

120 S/RES/2085 (2012); later transformed into the United Nations Multidimensional Integrated Stabilization Mission in Mali in (MINUSMA) S/RES/2100 (2013).

121 S/PRST/2010/9.; SC/9940 at www.un.org/News/Press/docs/2010/sc9940.doc.htm, 23 March 2014.

122 SC/10001 www.un.org/News/Press/docs//2010/sc10001.doc.htm, 23 March 2014; G. Palmer, A. Uribe, J.C. Itzhar, S.O. Sanberk, Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (2011), www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf, 23 March 2014. General Assembly (2010) Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian Assistance. A/HRC/15/21. Israel and Turkey

Prosecutor decides to investigate the situation in Comoros, this will also likely raise concerns considering its limited number of victims, and the marginal scope of the violence.¹²³

4.3.6 Preliminary Investigations

The ICC has started preliminary investigations in seven more situations. Next to Afghanistan which has already been discussed above these are: Colombia, Georgia, Guinea, Honduras, Korea and Nigeria. These countries are all state parties. Colombia is the only country which figures in the top twenty (rank sixteen). Looking at the list of gravest situations amongst state parties to the ICC, Colombia and Guinea would be the only states within the top ten occupying the two last places within this ranking.

Colombia can be qualified as a conflict-ridden country for over 50 years now in which government forces and rebel forces, such as most prominently the FARC, fight each other. The conflict was the most intense in the period 2002–2005. Child soldiers are used in the Colombian conflict by guerrilla and paramilitary forces.¹²⁴ There are no Security Council resolutions explicitly dealing with Colombia between 2002 and 2013. The OTP started preliminary investigations in June 2004 after it received over a hundred communications related to crimes committed in Colombia but as the Colombian authorities are conducting their own investigations the ICC has not initiated investigations. Colombian efforts are closely monitored by the ICC and as the jurisdiction of the ICC is complementary to domestic prosecutions there seems no need to issue arrest warrants at this point. Of the other countries which are under preliminary investigation only Georgia and Guinea were of some concern to the Security Council.¹²⁵ Georgia, Honduras and South Korea have not appeared once in our yearly top ten lists - Guinea has appeared once (ranked fifth in

also investigated the manner. The former concluding it acting lawfully the latter reaching the opposite conclusion www.turkel-committee.com/files/wordocs/7896summary-eng.PDF, 23 March 2014 Press release from Turkey Ministry of Foreign Affairs No 29 23 January 2011 www.mfa.gov.tr/no_-29_-23-january-2011_-press-statement-by-the-national-inquiry-and-investigation-commission-instituted-upon-israel_s-attack-on-the-international-humanitarian-aid-convoy.en.mfa, 25 March 2014.

123 Heller thinks it is very unlikely considering the limited scope and victims that the Prosecutor will initiate an investigation. K.J. Heller, 'Could the ICC Investigate Israel's Attack on the Mavi Marmara?', *Opinio Juris* (2013), available at opiniojuris.org/2013/05/14/could-the-ICC-investigate-the-mavi-marmara-incident/.

124 HRW, *You'll learn not to cry - child combatants in Colombia* (2003).

125 On Georgia: S/RES/1393 (2002); S/RES/1427 (2002); S/RES/1462 (2003); S/RES/1494 (2003); S/RES/1524 (2004); S/RES/1554 (2004); S/RES/1582 (2005); S/RES/1615 (2005); S/RES/1666

2009), while Nigeria appeared twice in our top ten list (seventh in 2008 and ninth in 2011). One might nevertheless wonder if the ICC should continue investigating these situations as they seem to lack relative gravity compared to many other far more serious situations. It consequently does not surprise that the decision to start preliminary investigations are in some cases harshly criticized.¹²⁶ On the other hand we have to remember that these are just preliminary investigations and thus these investigations are at the stage at which the gravity assessment still needs to be conducted.

Conclusion

In this contribution we tried to empirically evaluate the OTP's performance in relation to its situation selection policy. The discretion of the Prosecutor to select situations to be investigated is at the same time one of the most cherished and most criticized features of the Court. The critique is often dogmatic and therefore we presented an initial empirically based assessment of the Prosecutor's situation selection practice. The ICC does not have a universal and unlimited jurisdiction. It can only prosecute crimes which fall under its jurisdiction and which have been committed on the territory or by nationals of a state party, unless the UNSC refers a situation to the ICC. Although more than 60 percent of the countries of the international community are party to the ICC Statute (122 out of 193 countries) this still leaves 40 percent of the countries which have not ratified the Statute amongst which some of the worst human rights violators.¹²⁷ Of the eight countries qualified by us as representing the gravest situations only three ratified the Statute. The ICC is conducting investigations into two of them (DRC and Côte d'Ivoire) and preliminary investigations in one (Afghanistan). For five situations which can be considered to be amongst the gravest the ICC does not have jurisdiction unless the situation would be referred to it by the UNSC. The UNSC used this right in order to refer the situations of Darfur and Libya to the ICC. This would have been warranted in the case of Iraq which is within our top three of grave situations during the last ten years. As long as the UNSC does not act it is out of the reach of the ICC. The fact that many countries which are in our top eight have not ratified

(2006); S/RES/1716 (2006); S/RES/1752 (2007); S/RES/1781 (2007); S/RES/1808 (2008); S/RES/1866 (2009) and on Guinea: S/PRST/2009/27 explicitly condemning the sexual violence; S/PRST/2010/3.

126 See for instance DeGuzman, *supra* note 9, p. 26.

127 See for an updated list: www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx, 23 May 2014.

the ICC Statute is the main reason that the ICC has not started investigations: it simply lacks jurisdiction and the ICC nor the Prosecutor can be blamed for this. Nevertheless it can and should be considered a failure of the international criminal justice system that some of the gravest situations within the world and especially the crimes committed in Iraq are not investigated by the ICC. It is also notable that the human rights violations committed within Nepal, Myanmar and Pakistan are out of reach of the ICC. In these situations the UNSC has not even qualified these situations as constituting a threat to international peace and security. Here too the lack of jurisdiction shows a shortcoming in the international criminal justice system, showcasing its selective nature.

If we take into consideration only the top ten list of the state parties to the ICC Statute, we see that the ICC is conducting investigations in four out of ten countries (DRC, Côte d'Ivoire, Uganda and CAR) and preliminary investigations in three more (Afghanistan, Colombia and Guinea). It is not conducting investigation in Burundi, Liberia and Chad. In relation to Burundi and Liberia it has to be mentioned though that the peak of violence in both countries occurred before the Statute was ratified and thus the ICC does not have jurisdiction in relation to the most violent periods within these countries. Merely in the case of Chad it might be considered questionable that the ICC has not even started preliminary investigations as the Statute was ratified in 2007, the year in which the violence was most extreme. In addition, it should be noted that the investigation into Afghanistan has not reached beyond the preliminary phase as Afghanistan ranks fourth on our overall list and can be qualified as a very grave situation.

On the one hand, it can be concluded that the ICC has looked into and investigated most situations which can be considered grave and for which it has jurisdiction. The fact that it has not conducted investigations in a number of other countries can be explained by the fact that it does not have jurisdiction. On the other hand, given the emphasis on the relative gravity by the OTP and its pledge to focus on the gravest situations around the world, it might be questioned why the scarce resources of the OTP are dedicated to situations such as Kenya, where a relatively limited period of violence occurred and why it has not focused on countries such as Burundi, Liberia and Chad which are amongst the top ten of gravest situations within state parties.

5 Discussion and Limitations of Our Study

In our study we tried to empirically assess the gravity of country specific situations by using secondary data from some of the most authoritative empirical databases on human rights violations. This was complemented by a qualitative

analysis of various NGO reports, academic literature and UNSC resolutions. Since we relied on existing databases on human rights violations to derive the seriousness indexes, limitations of empirical studies on human rights violations must be kept in mind when interpreting our results. Gathering reliable data on human rights violations is extremely difficult especially in war torn countries, in which authorities sometimes try to prevent access to available data. Since the databases we used are generally based on an assessment of a human rights situation in a country and do not specifically focus on international crimes, our data gives an indication on the level of violence and terror within a country but cannot provide details about the commission of international crimes. This is related to another limitation of our study - the present research focuses on the gravity of a situation in its broadest sense (on a country level). The ICC judges, however, seem to interpret the term "situation" more narrowly. According to the ICC Pre-Trial Chamber gravity should be assessed against the backdrop of the likely set of cases or "potential cases" defined as (i) groups of persons likely to be the focus of an investigation and (ii) crimes allegedly committed during the incidents that are likely to be the focus of an investigation.¹²⁸ Since there are no empirical databases readily available relating to 'sets of potential cases' or 'incidents', the presented analysis is conducted on the country level. The country level is the closest approximation of "the context in which crimes are committed"¹²⁹ for which empirical data are available. It might be argued that the fact that a country ended at one of the top places in any of the databases used for our analysis can be indicative of "incidents" involving international crimes were/are taking place in that country. The assessment of gravity at the country level and at the smaller scale level of a set of potential cases/incidents will arguably differ only in a limited number of instances. For example, countries which have known a short but intense period of mass violence are less likely to end up in our list. Libya is one such example of a country with a relatively short period of extreme violence. Libya is already being investigated by the ICC after the referral of the UNSC. Also since our analysis focuses on the time period 2002–2012 one country currently very much discussed in relation to the ICC - Syria - is also not included in our list. The outbreak of violence has been only relatively recent and Syria made it to our yearly list only in 2011 when it ranked second.

Another limitation is that we only discussed the ICC's role in relation to selecting situations rather than selecting cases (individuals and specific crimes). In some instances the ICC can indeed be criticized for selecting

128 Kenya authorization decision, *supra* note 14.

129 *Ibid.*, para. 61.

certain cases within a particular situation. In relation to the DRC the investigation in the first finalized case (*Lubanga*) was limited to child soldiering whereas sexual violence was committed on a widespread scale. A second example is that the indictments related to the situation in Uganda are limited to the LRA while the governments too has committed crimes. A third example is the case of CAR. According to our data the CAR entered the yearly top ten list in 2006 and was in the top ten during four years (2006, 2007, 2010–2011) but the focus of the only case within this situation (against Bemba) is on crimes committed in the period 2002–2003 and thus prior to the more extreme episodes of violence in 2006 and 2007. In the years 2002–2003 the country does not appear on our top ten list. A fourth example is related to Sudan - our data take the entire country into account and the data refer to all conflicts which raged within Sudan (the Darfur region as well as North-South conflict), while the ICC is only focusing on the crimes committed in the Darfur region as the UNSC only referred this situation to the ICC. We deliberately focused our article on the selection of situations and not cases but do explicitly note that in some instances there might be a mismatch between our conclusion that the selection of a situation is fully justified whereas the selection of a case within a situation might not be.

In addition, assessing “the international concern about a situation” by analysing the resolutions of the UNSC may seem imperfect due to the fact that only a small number of countries are represented therein. On the other hand, the UNSC is the only organ that can determine a situation to be a threat to international peace and security and the drafters of the ICC Statute gave it a special role in the ICC system.

Despite these limitations, we do believe that our results provide an initial empirical basis for further discussions on situational gravity and the OTP selection policies.

Based on our results we cannot but conclude that the ICC seems to have picked the gravest situations for which it has jurisdiction. The ICC cannot be blamed for the fact that it has not selected some of the most extreme situations (especially the situation in Iraq) for the simple reason that it lacked jurisdiction. We thus can only conclude that the criticism that the Court has not selected the most serious situations seems often unfair and the currently dominant criticism that the Court is unfairly biased and targeting only African countries seems to be exaggerated.

We are not arguing, however, that the ICC or the OTP is completely unaffected by the political environment in which they operate. Firstly, the ICC is dependent on UNSC referrals to gain jurisdiction over any serious situations where the state is not party to the Rome Statute. The national interest of especially the permanent five is the primary determinant of whether a situation

will be referred to the ICC, and consequently consistency in its choices has been lacking.¹³⁰ This inconsistency inevitably results in selectivity regarding the situations that are being investigated by the ICC as it lacks jurisdiction over some of the gravest situations. Secondly, the ICC is dependent on the cooperation of other states to enforce its decisions and pragmatism to ensure cooperation may at times be required.¹³¹ Considering as well the political impact that its proceedings are likely to have, the intermingling of law and politics in this respect seems to be inevitable.¹³²

However, while our results seem to indicate that the UNSC has not always referred the most serious situations, political considerations do not seem to have prevented the Prosecutor from focusing on the most serious situations over which she/he has jurisdiction. The fact that there are many African countries amongst the situations investigated by the Court can be explained by the combination of two factors. First of all twelve of the countries in our top twenty list are located on the African continent and thus Africa indeed is one of the major trouble spots within the world¹³³ next to Asia and the Middle East which has nine countries amongst the top twenty. Secondly - many African countries including countries which can be qualified as grave have ratified the ICC Statute, unlike for instance, many Asian countries which can be qualified as grave.¹³⁴ Eight of the twelve African countries ranked in the top twenty have ratified the Statute compared to just one of the nine Asian countries within the top twenty. Many of the countries representing the worst situations in Asia (such as Iraq, Nepal, Myanmar and Pakistan) have not ratified the Rome Statute and are thus out of reach of the ICC. This becomes even clearer when looking at table 3 in which we enlisted the gravest situations amongst state parties. In this list eight out of the ten enlisted countries are African countries. Consequently, Africa seems to be “targeted” for the simple reason that many African countries in which international crimes are likely to have been committed are party to the ICC Statute unlike many countries in other regions of the world.

130 Forsythe, *supra* note 81, p. 853.

131 Micheal J. Struett, ‘Why the International Criminal Court Must Pretend to Ignore Politics’, 26 *Ethics & International Affairs* (2012) 83–92 at p. 84 and 89.

132 Sarah M.H. Nouwen and Wouter G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, 22 *The European Journal of International Law* (2011) 941–965; Struett, *supra* note 131, p. 83.

133 The Human Security Report 2005, *supra* note 37, p. 4 concluded: “At the turn of the 21st century more people were being killed in wars in this region than in the rest of the world combined.”

134 34 African countries have ratified the Statute which is more than half of all African countries whereas only 18 countries within the Middle East and Asia have ratified the Statute which is less than one third of the countries.