Reflections on the ICC Prosecutor’s Recent “Selection Decisions”

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Taking the starting point in an assessment of three major “selection decisions” made by the ICC Prosecutor in the situation in Mali, this article provides for a discussion of the key challenges relating to explaining how the ICC Prosecutor undertakes its “selection decisions”. First, the article explores the Prosecutor’s justifications for acting positively on Mali’s self-referral to the ICC. Second, it examines how the Prosecutor justifies that some crimes, but not others, will be subject to further investigation. Third, it provides for a discussion of how the Prosecutor selects suspects for further investigation. These three “selection decisions” are examined in light of the governing law and policies as well as the Prosecutor’s earlier practice and the scholarly debate. Some of the broader legitimacy challenges facing the Court are also discussed. In contrast to what the Prosecutor suggests, the article concludes that the Office of the Prosecutor does appear to treat self-referrals as a special category of cases where different standards apply. The article also concludes that it is doubtful that the gravity concept provides a clear framework for making “selection decisions”.

Keywords

ICC; Self-referrals; Gravity; Selectivity; Mali

I. Introduction

On 16 January 2013, the Prosecutor of the International Criminal Court (ICC or Court) announced that a formal investigation had been opened into the situation in Mali. The decision – which took place only days after France had launched a military operation aimed at defeating the rebels and restoring the control of the Malian Government over the northern parts of the country1 – hardly came as a surprise, in part be-

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1 See L. Vinjamuri, “Is the International Criminal Court Following the Flag in Mali?”, <http://politicalviolenceataglance.org>.
cause the Government of Mali had itself requested the ICC Prosecutor to intervene in what has become known as a self-referral.²

With the decision to open an investigation into the situation in Mali, the total number of active investigations has reached eight. All of them are taking place in African states, a fact that has caused concern among some, including the African Union (AU).³ But because the situation in Mali is based on a self-referral it may seem unlikely that the AU and other actors who have frequently been critical of the Court’s focus on African states will raise their voices. Still, history shows that responses to the Court’s interventions may change significantly over time, depending in particular on whom the ICC Prosecutor decides to prosecute.⁴

Regardless of whether the investigation into the situation in Mali will prove politically controversial, the Prosecutor’s “selection decisions” raise a number of questions pertaining to the Prosecutor’s interpretation of key provisions in the Rome Statute,⁵ and the broader question of how the Prosecutor is addressing some of the major legitimacy challenges that the ICC is currently facing.

Taking as a starting point the so-called “Article 53 (1) Report”, issued by the Office of the Prosecutor in order to explain to the public why it decided to open an investigation into the situation in Mali and why it will investigate further certain crimes,⁶ this article sets out to ex-

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⁴ Most clearly, the AU changed its attitude towards the ICC’s intervention in Darfur following the Prosecutor’s decision to request an arrest warrant to be issued on Sudanese President Omar Al Bashir. See, e.g., S. Weldehai-manot, “Arresting Al-Bashir: The African Union’s Opposition and the Legitimalites”, African Journal of International and Comparative Law 19 (2011), 208 et seq.
⁶ International Criminal Court, Office of the Prosecutor, “Situation in Mali: Article 53 (1) Report”, 16 January 2013 (hereinafter “Article 53 (1) Report”). The 34 page Report – the first of its kind – sets out to explain why the Prosecutor believes that the statutory requirements for opening an investigation are satisfied in the situation in Mali. The Prosecutor explained the rationale of issuing the Report as follows, “Although the Office is not
amine the three major “selection decisions” made by the Prosecutor in this particular situation, and discusses them in light of the Office’s earlier practice as well as the broader legitimacy challenges facing the Court – in particular with respect to what Jean d’Aspremont and Eric De Brabandere refer to as the “legitimacy of exercise.”

As will be shown, the challenges relating to explaining the Prosecutor’s “selection decisions” correlate with the criticism raised by the AU and several African states that the Court is biased in that it overly targets Africans, while serious crimes committed by powerful states in the West remain unaddressed. This article does not suggest a final framework for how “selection decisions” should be made, but instead uses an analysis of the Prosecutor’s most recent “selection decisions” to identify key areas of concern, which, it is argued, the Court must address in order to offer a credible response to this criticism.

First, the Prosecutor’s justifications (or rather the absence thereof) for selecting the situation in Mali for investigation are explored, and the article elaborates on how these justifications correspond with the governing law and policies as well as earlier practice concerning the selection of situations for investigation. Second, the article examines the “selection decisions” made with respect to the specific crimes for investigation, and again discusses how these decisions compare to other recent cases investigated by the Court and the existing legal framework and policy guidelines. Third, the article provides for a preliminary discussion of how the Prosecutor selects suspects for further investigation, and contextualizes theses decisions to the preceding practice and scholarly debate.

required to publicise its report when acting pursuant to a referral under article 53 (1), it has decided to do so in the interests of promoting clarity with respect to its statutory activities and decisions”, ibid., para. 1.

7 J. d’Aspremont/ E. De Brabandere, “The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise”, Fordham Int’l L. J. 34 (2011), 190 et seq. (190) (noting that besides the conditions surrounding their origin, the legitimacy of actors that partake in global governance must be evaluated “in light of the way in which the actor exercises its power”).
II. Selection Decision One: The Situation

1. Does the Prosecutor have a Duty to proceed with an Investigation in all Situations where the Requirements of Article 53 (1) are satisfied?

Because the Government of Mali had referred the situation in the country to the Court, no judicial review of the Prosecutor’s decision to open an investigation is required. The question of whether the Prosecutor should open an investigation when a state referral – including a self-referral – has been made under article 14 (1) of the Statute, is guided by article 53 (1), according to which the Prosecutor shall take into account whether: 1.) the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; 2.) the case is or would be admissible under article 17; and 3.) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

Article 53 (1) grants the Prosecutor the discretion to decide whether there is a “reasonable basis to proceed” based on an assessment of the above mentioned standards. However, since the chapeau of article 53 (1) states that the “Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Stat-

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8 However, several scholars have argued that the legality of self-referrals is far from self-evident. Doing so, they tend to emphasize that the drafters never envisaged that State Parties refer a situation within their own jurisdiction to the Prosecutor. In a recent account, Darryl Robinson convincingly dismisses the claim that allowing self-referrals is based on a creative interpretation of the Statute, noting that all of the usual methods of interpretation, including an assessment of the preparatory work, support the legality of self-referrals, see D. Robinson, “The Controversy over Territorial State Referrals and Reflections on ICL Discourse”, Journal of International Criminal Justice 9 (2011), 355 et seq.

ute”, a textual interpretation of article 53 (1) could be seen to imply that there is a presumption in favor of proceeding – or even an obligation – unless the Prosecutor is given reasons to conclude that the requirements in article 53 (1) are not satisfied. While the “Article 53 (1) Report” issued in connection with the decision to open an investigation into the situation in Mali does not clarify whether the Prosecutor believes there is an obligation to proceed, the Office of the Prosecutor has in other contexts implied that the Office believes it has a “duty to proceed” insofar as the requirements of article 53 (1) are satisfied. In the Kenyan situation, for example, the Prosecutor issued a press statement, informing the political leadership in Kenya “that since all the statutory criteria are fulfilled it was his duty to open an investigation and requested the cooperation of the Kenya national authorities with the Court.”

However, this understanding of article 53 (1) is not without problems. Taking into account the low thresholds established with the provision, it must be assumed that a multitude of situations qualify under

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10 Author’s emphasis in citation.
11 The report simply cites article 53 (1), see “Article 53 (1) Report”, see note 6, para. 42.
13 According to the jurisprudence of the ICC, the “reasonable basis” standard, which is “the lowest evidentiary standard provided for in the Statute”, does not entail that the information available to the Prosecutor must be “comprehensive” nor “conclusive”. Noting that neither the Statute, the Rules, nor the Regulations of the Court define the “reasonable basis” standard, Pre-Trial Chambers have explained that the ordinary meaning of the term “reasonable” implies something which is “fair and sensible”, or “within the limits of reason.” Accordingly, the necessary basis to proceed with an investigation under article 53 (1) does not require that the conclusion reached by the Prosecutor that crimes have been committed is “the only possible or reasonable one.” Rather, it is sufficient at this stage to prove that it is a reasonable conclusion, alongside others (not necessarily supporting the same finding), that a crime within the jurisdiction of the Court has been committed. Accordingly, if this interpretation is endorsed all that is required for the Prosecutor to be obliged to commence an investigation is that there “exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed”, as well as a reasonable basis to believe that the other requirements in article 53 (1) concerning admissibility and the interest of justice
this provision. In practice, therefore, the Prosecutor cannot proceed with an investigation in all of the situations where the requirements of article 53 (1) are in principle satisfied, but – due to the Office’s limited resources – has to choose between them. Put otherwise, while an article 53 (1) analysis may support the legality of a decision to open an investigation, it is hard to see how such an analysis can explain how in the first place the Prosecutor chooses a given situation for investigation among several candidates which will satisfy the requirements of article 53 (1).

2. Is the Prosecutor abandoning the comparative Gravity Assessment as the Basis for selecting Situations for Investigation?

a. The Arguments in favor of a comparative Gravity Assessment of Situations

Most commentators assume that decisions concerning which situations, among several, should be selected for investigation must be made on the basis of an assessment of their comparative gravity. Kevin Heller, for...
example, argues that when selecting situations for investigations, the Prosecutor must compare their “situational gravity”, which should involve an analysis of “(1) whether the situation involves crimes that were committed systematically, as the result of a plan or policy; (2) whether the situation involves crimes that cause ‘social alarm’ in the international community; and (3) whether the situation involves crimes that were committed by States.”

While no provision in the Statute explicitly supports this view, the mentioning of the “gravity of the crime” in article 53 (1)(c) as a factor which the Prosecutor must take into account in a possible decision not to commence an investigation in the interest of justice as well as the requirement in article 17 (1)(d) whereby a case is rendered inadmissible insofar that it “is not of sufficient gravity to justify further action by the Court”, makes the comparative gravity approach plausible.

b. The Prosecutor’s Tendency to emphasize the Scale of Crimes

It was seemingly on the basis of a comparative gravity assessment, which emphasized the scale of the crimes, that the then Prosecutor Moreno-Ocampo decided not to open an investigation into the situation in Iraq. The former Prosecutor explained that although British troops appeared to have committed various war crimes, the number of victims was “of a different order than the number of victims found in other situations under investigation or analysis by the Office [that is, Uganda, DRC and Darfur].” Similarly, Moreno-Ocampo’s justifications for acting positively on the early self-referrals were based on something which resembles a comparative gravity assessment, with the Prosecutor stressing the extraordinary scale of crimes in these situations.

It was along these lines that, in a 2012 statement, current Prosecutor Bensouda responded to the critique that the Court is overly targeting African leaders, noting,

“The total number of individuals subject to proceedings before this Court is 23. All of them Africans, that is true. Why? Because the Rome Statute says that we should select the gravest situations under our juris-

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See Heller, see note 14.

See Heller, see note 14.

diction and there are also more than 5 million African victims displaced, more than 40,000 African victims killed, hundreds of thousands of African children transformed into killers and rapists, thousands of African victims raped.”

c. The Prosecutor’s Four-Tier Assessment of Gravity

However, with the Prosecutor’s recent “selection decisions” it has become clear that the Office no longer perceives the scale of the crimes as the only, or even main, factor relevant to take into account when justifying why a given situation satisfies the gravity test and should be subject to investigation. In the Kenyan situation, the Prosecutor justified the decision to open an investigation *proprio motu* with reference to a multitude of circumstances aside from the scale of the post-election violence, including the social and economic consequences of the post-election violence; its widespread nature; its ethnic or group-based nature; the cruelty with which it was carried out; its impact on victims; its broader impact on the local communities in terms of security, social structure, economy and persistence of impunity in the country; and its negative impact on Kenya’s economy as a whole.20

In the Prosecutor’s request for an authorization of an investigation into the situation in Côte d’Ivoire, the Prosecutor mentioned the four criteria for the gravity assessment – which had been named in Regulation 29 (2) of the Regulations of the Office of the Prosecutor21 and soon after endorsed by Pre-Trial Chamber II in the Kenyan situation – namely the scale, nature, manner of commission, and impact of the crimes.22

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19 Ibid.


22 Pre-Trial Chamber II seemed to endorse the broader understanding of gravity proposed by the Prosecutor in the Kenyan situation, noting that an assessment of gravity requires “a quantitative as well as a qualitative approach”, and that “it is not the number of victims that matter but rather the existence of some aggravating or qualitative factors attached to the commission of crimes, which makes it grave”, Kenya Investigation Authorization,
The Prosecutor had elaborated on these four standards in the October 2010 “Draft Policy Paper on Preliminary Examinations”:

(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 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);

(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.\(^23\)

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d. Gravity Assessment of the Situation as a whole, or of Specific Crimes?

In contrast to the approach taken in the situation in Kenya where the gravity of the situation as a whole was being assessed, in the situation in Côte d’Ivoire, however, the Prosecutor stated in clear terms that “the Prosecution’s submissions on gravity relates to an assessment of gravity of one or more potential cases, rather than the gravity of the entire situation.”

In its decision to open an investigation into the situation in Mali, the Office of the Prosecutor appears to further consolidate a policy whereby 1.) gravity is understood to encompass a number of factors aside from the scale of the crimes, specifically an analysis of the scale, nature, manner of commission of the crimes, and their impact; and 2.) there is no need to examine the gravity of the situation as a whole, because the relevant gravity assessment relates to the specific incidents and crimes considered for further investigation.

However, the “Article 53 (1) Report” significantly changes the manner in which this is done by making public detailed elaborations as to why the Office believes specific incidents and crimes selected for further investigation satisfy the gravity test, understood to entail an assessment of scale, nature, manner of commission, and impact of the crimes.

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25 “Article 53 (1) Report”, see note 6, para. 143.
26 Ibid., paras 142-170.
27 Ibid. In comparison, in the situation in Côte d'Ivoire, the Prosecutor simply noted, “[T]he information available indicates that serious crimes by their very nature such as murders, rapes, and enforced disappearances have been committed on a large-scale, as part of a plan or in furtherance of a policy, or in the context or association with an armed conflict. Many of these crimes were committed with cruelty and on ethnic, religious or politically discriminatory grounds”, see Côte d’Ivoire Investigation Request, see note 24, para. 50. The Prosecutor’s application to have opened an investigation included a “Confidential List of Incidents” as well as a “Confidential List of Persons appearing to be the Most Responsible.”
It is hard to see this silence concerning the gravity of the situation as a whole as anything but a final blow to the idea that the selection of situations for investigation will be based on their comparative gravity.

3. If not a Comparative Gravity Assessment, what then?

Several scholars have stated support for abandoning a comparative gravity assessment as the basis for selecting situations for investigations. Margaret deGuzman and William Schabas, for example, suggest that “gravity should be assessed not in relation to the gravity of other actual or potential cases before the Court, but rather in some absolute sense.”\(^{28}\) However, while such an approach could function for the purposes of the Chamber’s authorization of *proprio motu* request and for a judicial review of the admissibility of a specific case brought before a Pre-Trial Chamber (and thus the legality of pursuing the case),\(^{29}\) it does not necessarily answer the important question of how, in the first place, the Prosecutor should select one situation among several for investigation. Specifically, if the situation in Mali was not selected for investigation based on a comparative gravity assessment, what principles were then used to guide the selection process?

One might suggest that when a State Party, as was the case with Mali, makes a self-referral, the Office of the Prosecutor is actually not “selecting” the situation, but simply satisfying itself that the statutory requirements in article 53 (1) are observed before proceeding with an investigation. This approach might sound tempting to the Prosecutor, not only because it avoids delicate elaborations over how to select situations for investigation, but also because it allows the Office to appear objective, neutral and simply acting “according to the law.”\(^{30}\) By issuing

\(^{28}\) deGuzman/ Schabas, see note 15, 22.

\(^{29}\) And this is apparently the argument that deGuzman and Schabas use to justify their conclusions, noting that, “The Court’s limited jurisprudence on the content of the gravity requirement to date comports with this approach. In deciding to authorize investigation into the post election violence in Kenya, the Pre-Trial Chamber considered whether the ‘gravity threshold’ had been met. The Chamber held that the threshold is met if the investigation will likely capture those who may bear greatest responsibility for alleged crimes and the crimes likely to be at issue are both quantitatively and qualitatively serious”, ibid., 22.

\(^{30}\) The Office of the Prosecutor, both under Moreno-Ocampo and Bensouda, has frequently stated that situations are selected for investigation based on
the “Article 53 (1) Report” in the context of the situation in Mali, which sets out to describe in detail how the statutory requirements for opening an investigation are satisfied – including an assessment of the gravity of specific crimes and incidents (as discussed in further detail below) – the Prosecutor might be aiming at disseminating the picture that the Office did not “select” the situation in Mali, but simply proceeded with an investigation having established that there is a reasonable basis to proceed under article 53 (1).

However, the suggestion that investigations that are opened on the basis of state referrals constitute a special category of ICC situations which are not selected among a wider range of situations is not compatible with the Prosecutor’s own policies. These policies explicitly state that the standards in article 53 (1) apply in the same manner regardless of how the Court’s jurisdiction is being triggered, and that “no automaticity is assumed where the Prosecutor receives a referral from a State Party or the UN Security Council.”31 In other words, the Prosecutor asserts that all situations – whether they originate in a referral by a State Party, by the UN Security Council, or the Prosecutor’s use of the _proprio motu_ powers under article 15 of the Statute – are treated equally in terms of the assessment of whether there is a “reasonable basis to proceed.”32

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31 Policy Paper on Preliminary Examinations (Draft), see note 23. The Policy Paper notes as follows, “As set out in article 53 (1) (a) - (c), the Office will consider in all situations whether: (a) the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under article 17; and (c) an investigation would not serve the interests of justice. The Office will consider those factors irrespective of the way in which the preliminary examination is initiated. In particular, no automaticity is assumed where the Prosecutor receives a referral from a State Party or the UN Security Council”, ibid., paras 27-28.

32 The Prosecutor’s approach seems to be in line with the jurisprudence of Pre-Trial Chamber II, which has made it clear that the term “reasonable ba-
If this is true, one must assume that opening an investigation into the situation in Mali did indeed represent some kind of choice already because numerous situations would in principle qualify under article 53 (1). The fact that the “Article 53 (1) Report” simply leaves one guessing concerning what standards informed this choice can hardly be said to contribute to overcoming one of the ICC’s major legitimacy hurdles. So long as the Prosecutor cannot explain how situations are selected, the allegations that the Office overly targets African countries and/or intervenes only where it is politically expedient are likely to persist.

III. Selection Decision Two: The Crimes

1. Legal and Policy Standards for selecting Crimes for Investigation in a given Situation

The Rome Statute does not articulate how in a given situation under investigation the Prosecutor should select the incidents and crimes to be investigated. In the absence of law, the Prosecutor has developed various policies on the topic. Regulation 33 of the Regulations of the Office of the Prosecutor concerning selection of cases within a situation states as follows,

“The Office shall review the information analysed during preliminary examination and evaluation and shall collect the necessary information and evidence in order to identify the most serious crimes committed within the situation. In selecting potential cases within the situation, the Office shall consider the factors set out in article 53, paragraph 1 (a) to (c) in order to assess issues of jurisdiction, admissibility (including gravity), as well as the interests of justice.”

 sis to proceed” should be understood identically when used in the chapeau of article 53 (1) and when used in the context of the Prosecutor’s proprio motu powers in articles 15 (3) and (4), see Kenya Investigation Authorization, see note 9, paras 21-25.

33 Regulations of the Office of the Prosecutor, see note 21. Article 53 (1) states, “The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is
Further, the 2009-2012 Prosecutorial Strategy establishes a principle of “focused investigations and prosecutions”, according to which the Prosecutor commits to selecting cases inside a situation according to gravity, taking into account the four factors mentioned above in Section II, namely the nature, manner of commission, impact of the alleged crimes, and scale.\(^34\) According to the same policy, a “limited number of incidents” within each situation will be selected, in order to allow “the Office to carry out short investigations; to limit the number of persons put at risk by reason of their interaction with the Office; and to propose expeditious trials while aiming to represent the entire range of victimization.”\(^35\) Furthermore, the Prosecutorial Strategy notes that “[w]hile the Office’s mandate does not include production of comprehensive historical records for a given conflict, incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization.”\(^36\) Whereas the Office of the Prosecutor purports to take into account several factors, including practical circumstances, efficiency and a “sample approach” when selecting the incidents and crimes which will form the basis of future cases, the gravity of the crimes must thus play a critical role in making the selection decision.

2. The Crimes selected in the Situation in Mali

In the situation in Mali, the Prosecutor identifies a variety of incidents, which could amount to war crimes under article 8 (2)(c) and (e) of the Statute relating to a non-international armed conflict.\(^37\) Having clarified

\(^34\) Ibid.
\(^35\) Ibid.
\(^36\) Ibid.
\(^37\) Based on an analysis of these incidents, the Report concludes that the “information available indicates that there is a reasonable basis to believe that war crimes have been committed in the context of a non-international armed conflict in Mali since around 17 January 2012, namely: (1) murder constituting war crime under Article 8(2)(c)(i); (2) the passing of sentences and the carrying out of executions under Article 8(2)(c)(iv); (3) mutilation,
the Court’s jurisdiction over these crimes and established that no national proceedings currently deal with them, the Report explains why the Prosecutor believes the gravity requirement in article 17 (1)(d) is satisfied with respect to five main incidents, namely,

1.) The 24 January 2012 “Aguelhok incident”, where between 70 and 153 members of the Malian Armed Forces (hors de combat) were allegedly executed.39

2.) The imposition of severe punishments by armed groups in the North, including imposing sentences on civilians and Armed Forces hors de combat by detention, executions, amputations, stoning and flogging without previous judgment pronounced by a regularly constituted court.40

3.) The destruction of religious and historical sites in Timbuktu, including a series of attacks against at least nine mausoleums out of 16 mausoleums listed in the UNESCO’s World Heritage List, two great mosques out of three great mosques listed in the UNESCO’s World Heritage List, and two historical monuments in the city of Timbuktu.41

4.) Pillaging in the cities of Gao and Timbuktu by armed groups.42

5.) Rape (between 50-100 cases of rape).43

As mentioned above, the “Article 53 (1) Report” undertakes an assessment of the gravity of each of the incidents found to possibly constitute a war crime under the Statute, as opposed to the situation as a whole. In the “Article 53 (1) Report”, the assessment of gravity is undertaken with reference to the admissibility test stipulated in article 53 (1) (b), cf. article 17 (1) (d). Article 53 (1) (c) concerning “the interests of justice” also addresses gravity, but the Report does (for obvious reasons) not duplicate its findings made with respect to the admissibility test.

“Article 53 (1) Report”, see note 6, paras 144-148.
Ibid., paras 149-153.
Ibid., paras 154-160.
Ibid., paras 161-165.
Arguably, the most remarkable in the Prosecutor’s list of crimes selected for further investigation involves the decision to investigate as a war crime the destruction of religious and historical buildings in Timbuktu. While this triggers an interesting debate as to whether it is appropriate to “weep for buildings” in the face of the human suffering taking place in Mali, for the purposes of this article, the essential question is whether the Office of the Prosecutor is able to explain, with reference to the law and its own policies, why this and the other particular incidents mentioned above have been selected for further investigation. As follows from the discussions below, it is far from obvious that the Prosecutor’s four-tier gravity assessment of these incidents presents a logical and consistent explanation model for these “selection decisions”.

3. Difficulties associated with selecting Crimes for Investigation on the Basis of the Four-Tier Gravity Assessment

a. The Nature of the Crimes

The Prosecutor faces significant challenges dealing with the concept of the nature of the crimes in a consistent manner. On some occasions, the Prosecutor implies that this standard is satisfied because the crime in

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43 Ibid., paras 166-170.
44 The incident – which presents the first example of the Prosecutor publicly announcing that an investigation is carried out of a crime which is not linked to serious violations of a person’s or a group’s physical integrity or well-being, such as murder, rape, recruitment of child soldiers or displacement – is investigated with reference to article 8 (2)(e)(iv) of the Rome Statute, which stipulates that, “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”, constitutes a war crime in non-international armed conflicts.
45 For an interesting discussion of the decision to investigate the destruction of religious and historical buildings, see J. Sane, “Prosecuting crimes against cultural property in Northern Mali: Why it Matters”, 21 August 2012, <http://justiceinconflict.org> (concluding that the decision presents a positive development for international justice).
question constitutes a particularly serious war crime;\textsuperscript{46} whereas on other occasions the Prosecutor alleges that this standard is satisfied because the crime in question is equally serious to other war crimes;\textsuperscript{47} and on other occasions again, the Prosecutor simply deals with the nature of the crime by recalling that the conduct in question constitutes a war crime.\textsuperscript{48}

But if the nature of a particular crime is used as an argument that the gravity requirement is satisfied either because it is seen as a particularly serious war crime, because it is equally serious to other war crimes, or simply because it is a war crime, it is of course hard to imagine that there could be any circumstance where the nature of a war crime (or any other crime under the Court’s jurisdiction) is not compatible with a conclusion that its nature contributes to making it grave.

In other words, the inclusion of a standard for gravity relating to the nature of a crime is problematic in the sense that the Prosecutor is unlikely to suggest that a particular crime falling under the Court’s jurisdiction does not have a serious nature (or even a comparatively less serious nature). Accordingly it is difficult to see, how, in practice, this particular standard can offer a basis for undertaking a selection of specific crimes for further investigation.

\textsuperscript{46} With respect to the crime of rape, the Prosecutor notes as follows, “Alleged crimes constitute war crimes of rape under Article 8(2)(c)(vi) of the Statute. In the \textit{Akayesu} judgment, the Trial Chamber described rape and sexual violence as some of the ‘worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm’”, see “Article 53 (1) Report”, see note 6, para. 167.

\textsuperscript{47} With respect to the “Aguelhok incident”, the Prosecutor observes, “[T]he alleged crime constitutes the war crime of murder of combatants \textit{hors de combat} under Article 8(2)(c)(i). The killing of combatants \textit{hors de combat} is no less grave than the killing of civilians”, ibid., para. 145.

\textsuperscript{48} Concerning the punishments imposed by armed groups in the North, the Prosecutor describes the nature of the crimes, simply noting that the “alleged crimes constitute war crimes under Article 8(2)(c)(i) and Article 8(2)(c)(iv), i.e. a violation of Common Article 3 of the Geneva Conventions”, ibid., para. 150. Similarly, with respect to the crime of pillaging the Prosecutor simply states that the alleged crimes constitute war crimes under article 8(2)(c)(v), ibid., para. 162.
b. The Impact of the Crimes

Similarly, the Prosecutor is hardly consistent when addressing the issue of the impact of the crimes. In some instances, including the punishments imposed by armed groups in the North and the war crime of rape, the Prosecutor emphasizes the impact on victims and their families;\(^49\) in other instances, specifically the “Aguelhok incident”, the impact of the crimes is essentially equalized with the manner in which they were carried out and thus a separate standard for assessing gravity;\(^50\) and in other instances again, specifically the destruction of cultural property, the Report observes that the impact standard is satisfied because the crime “appears to have shocked the conscience of humanity.”\(^51\)

While this author has no particular reasons to disagree with the accuracy of these assessments concerning the various forms of impact of the crimes, again one is of course left wondering if there is any crime under the Court’s jurisdiction which will not satisfy one or more of the Prosecutor’s understandings of impact. In other words, whereas a standard for gravity relating to the impact of the crimes may sound reasonable in the abstract, unless a uniform approach to the term “impact” is adopted, there are no good reasons to believe that this standard offers a platform for distinguishing between the gravity of various crimes under the Court’s jurisdiction. Turned around, if one particular understanding of impact, such as the impact on victims’ physical integrity, is endorsed,

\(^{49}\) Concerning the punishments imposed by armed groups in the North, the Prosecutor describes impact as follows, “Punishments such as executions, stoning, amputations, flogging and beatings as well as the passing of sentences without due process by armed groups had a severe impact on victims and their families, who are left traumatized and stigmatized in their communities. These alleged crimes have also had an impact on local population, creating an atmosphere of fear in local communities, particularly for the reason that the population had been summoned to watch the imposition of punishments in public.” Concerning the crime of rape, the Prosecutor observes that, “The alleged acts of rape had a grave impact on victims, their family members and the local population”, ibid., paras 152, 169 (respectively).

\(^{50}\) The Prosecutor notes as follows, “A number of high ranking Malian officials as well as civil society representatives referred to the alleged summary executions of hors to combat in Aguelhok as one of the worst single crime committed due to the manner in which the soldiers were reportedly killed”, ibid., para. 147.

\(^{51}\) Ibid., para. 157.
this may lead to a conclusion that the Office of the Prosecutor should consistently prioritize investigating crimes such as rape and torture, but not other crimes, such as pillaging or forced displacement of a population, which will tend to have less serious consequences for the victims’ physical integrity. On the other hand, if impact is understood to relate to the impact on “local communities”, the conclusion might be the exact opposite.

c. The Manner of Commission

The Prosecutor appears to be less inconsistent in her approach to the standard of “manner of commission”, as this standard is consistently associated with the crime’s cruelty. Again, however, the Prosecutor faces some obvious challenges explaining exactly why an assessment of this standard gives weight to the argument that the gravity requirement is satisfied. Notably, the Prosecutor’s perception that the manner of commission should be equated with the crime’s cruelty becomes almost bizarre when this standard is applied to the destruction of the religious and historical sites in Timbuktu,

“The protected objects were intentionally damaged or destroyed, in some cases repeatedly and pursuant to the ideology of alleged perpetrators that these objects have had to be destroyed. The religious and

52 With respect to the “Aguelhok incident”, the Prosecutor notes that, “the crime was committed with particular cruelty: Some of the detainees were allegedly mutilated, disemboweled, tortured and/or had their throats slit, while others were allegedly executed by being shot in the head”, ibid., para. 146. Concerning the punishments imposed by armed groups in the North, the Prosecutor states that, “[r]eportedly, punishments including execution, amputation, flogging, stoning and beatings, are imposed against alleged wrongdoers either in the public or after a suspect is taken to a police station, military camp, or informal place of detention”, ibid., para. 151. With respect to rape, the Prosecutor notes, “The common modus operandi in cases of rape allegedly involved rebels jumping down from their vehicles, grabbing the girl as she was walking, lifting her into the car, covering her mouth to prevent her from screaming and abducting her. Often women and girls were taken to abandoned homes, hotels, and other buildings and sexually assaulted before being returned within 24 hours. In some cases, women and female minors were victims of gang-rape. It also appears from numerous witness accounts’ that sexual violence was accompanied systematically by insults, particularly racial insults”, ibid., para. 168.
historical sites were demolished with axes, hatches and picks, while the wooden parts of the objects were burned.\footnote{Ibid., para. 156.}

This obviously raises the question of whether the Prosecutor believes the destruction of religious and historical sites would have been less grave had the perpetrators destroyed them in some other way – say a neatly planned demolition – rather than using axes and fire. More generally, it is far from obvious that there could be a manner in which an international crime is carried out, which results that a crime that would otherwise have been seen as grave is no longer grave. For example, does the Nazi’s “clinical” use of gas chambers make the Holocaust a less serious genocide than the Rwandan genocide, where the victims were typically slaughtered with machetes? Few would be willing to compare or rate the relative gravity of genocide crimes, simply because they are all inherently very grave. Moreover, would the Prosecutor have seen the crimes as being less grave were the perpetrators not motivated by their ideology, but simply destroyed the buildings because they thought they were ugly, because they thought it was good fun, or simply because they could not find anything better to do? While many national criminal law systems perceive certain motives, such as opportunism, more grave than others, such as jealousy, it is not obvious that such standards for determining the seriousness of domestic crimes can be applied in the same manner with respect to international crimes.

d. The Scale of the Crimes

While the Report generally seems more confident and consistent assessing the standard concerning the scale of the crimes,\footnote{Ibid., paras 144, 149, 154, 161.} the inclusion of this standard in the four-tier assessment takes us back to the debate described above as to whether the number of victims should be seen as indicative of the gravity of a crime.

4. To what Extent is the Gravity of International Crimes comparable?

Although the Prosecutor should be lauded for making a sincere effort at explaining why the crimes under investigation in the situation in Mali satisfy the gravity requirement, a closer examination of these elabora-
tions points not so much to great conceptual clarity concerning the gravity concept, but more to the difficulties associated with applying the four-tier gravity assessment to specific crimes in a consistent and logical manner. The problem is thus two-fold.

a. If the Assessment of Gravity involves Multiple Standards, it must also involve a Prioritization of these Standards

First, as the Prosecutor’s explanations (unwittingly) reveal, it is no easy task to examine in a logical and consistent manner the gravity of specific crimes according to a decided understanding of gravity, especially to the extent this understanding entails multiple standards, both of qualitative and quantitative nature, which each can be understood in multiple, often conflicting, ways. Notwithstanding that the Prosecutor avoids engaging in the difficult task of weighting these standards against one another, the fact remains that some form of prioritization is inherent to any gravity analysis which relies on a variety of standards. As deGuzman observes, “[T]he prosecutor’s four gravity factors of scale, nature, manner of commission, and impact of crimes cannot be consistently applied as [the Office] suggests. Instead, in light of the volume of comparisons being made, some factors must be privileged over others, leading to disparate results. For example, if the prosecutor emphasizes the scale of the crimes he can justify prosecuting widespread illegal detention rather than more limited instances of rape or torture. He can reach the opposite result by highlighting the nature of the crimes, which would justify giving priority to rape or torture over illegal detention. Similarly, he can stress the manner of commission of crimes to select a small number of particularly brutal killings over large-scale persecution but the impact of the crimes might be much more severe for the latter.”55

b. Lack of Consensus concerning what Features make an International Crime particularly grave

Second, while the Prosecutor’s policies and practices might give the impression that there is some level of consensus concerning what features make an international crime particularly grave, the fact remains that there is little.

55 deGuzman, see note 14, 31.
Some argue that the most grave offences involve those where whole groups are being targeted on discriminatory grounds; that the more collective a crime is, the graver it is. Danner, for example, observes,

that “[a]s a formal category of crimes […] genocide poses more harm than crimes against humanity or war crimes because of the explicit intent to destroy a group, the discrimination animating the perpetrator’s action, and the implicit element of collective action inherent in the commission of the crime”, concluding that,

“defendant Y, convicted of genocide, should, all else being equal, receive a longer sentence than defendant R, convicted of persecution as a crime against humanity, defendant Q, convicted of a murder-type crime against humanity, and defendant Z, convicted of a war crime.”56

Others, however, suggest that what makes an international crime particularly grave is its systematic and state-sponsored nature along with the circumstance that it causes “social alarm”. With respect to the term systematic, Heller observes,

“The collective violence that underlies crimes against humanity and genocide is not simply violence committed by groups of individuals; more importantly, it is violence ‘committed by groups of individuals acting in pursuance of a common criminal design. That common design is what makes collective perpetration so dangerous: groups that coordinate their action are far more likely to commit crimes, and will cause far greater harm, than groups that act independently.”57

With respect to “social alarm”, Heller argues that,

“investigating socially alarming crimes regardless of their number of victims has far greater expressive value than investigating crimes that involve numerous victims but are not particularly socially alarming”,

concluding that ICC investigation of socially alarming crimes, such as torture, would,

“have significant expressive value, focusing the world’s attention on them and sending a clear message that impunity for their commission will no longer be tolerated.”58

With respect to the crimes’ state-sponsored nature, Heller argues that there is “a fundamental distinction between state and rebel crime:

57 See, e.g., Heller, see note 14.
58 Ibid.
although states can usually prosecute crimes committed by rebels, they can rarely prosecute crimes committed by their own officials and soldiers.”59 Because of this “impunity gap”, Heller suggests that “it makes no practical or theoretical sense” for the Prosecutor to determine which situations to investigate “solely on the basis of the number of victims, without regard to whether they involve state or rebel crimes.”60

Others again, however, argue that the graveness of international crimes relates to the crimes’ ability to undermine our character as “political animals”. With respect to the crimes against humanity, Luban notes,

“We are creatures whose nature compels us to live socially, but who cannot do so without artificial political organization that inevitably poses threats to our well-being, and, at the limit, to our very survival. Crimes against humanity represent the worst of those threats; they are the limiting case of politics gone cancerous. Precisely because we cannot live without politics, we exist under the permanent threat that politics will turn cancerous and the indispensable institutions of organized political life will destroy us. That is why all humankind shares an interest in repressing these crimes.”61

But even if we assume that in the abstract there is some form of agreement that one type of conduct is generally graver than another type of conduct, there are still significant problems associated with utilizing the gravity concept in order to select specific crimes for investigation but not others.

To illustrate: though most commentators agree that crimes against humanity should generally be considered a more serious crime than war crimes,62 few would suggest that a crime against humanity is always a more serious crime than a war crime, and thus that the Court should never focus on prosecuting war crimes simply on the grounds that a crime against humanity is unaddressed. With respect to specific offences: though murder is generally treated as the most serious of all offences, there is no way of saying that the war crime of summarily executing (up to) 153 members of the Malian Armed Forces (hors de com-

59 Ibid.
60 Ibid.
bat), as is alleged by the Prosecutor to have happened in Mali, is a more or a less grave crime than, say, the war crime of raping (up to) 100 civilians, as is also alleged to have happened in Mali. Accordingly, whereas the gravity threshold might justify a particular focus on certain types of crimes in general, it is difficult to see how the concept can be used as the sole basis for selecting one particular incident or crime for investigation in situations where many crimes are committed.

J.M. Coetzee points to part of the problem when observing that “moral theory has never quite known what to do with quantity, with numbers.” The problem becomes even more pronounced since a decision to focus on one particular crime in a given situation requires an assessment of both qualitative and quantitative factors, but the concept of gravity does not offer a model for neatly ordering a series of such crimes. At best, international crimes measured in terms of their gravity seem to constitute a partially ordered set. As a result – again with the words of Coetzee – the requirement in a wholly ordered set “that any given element must be either to the right of or to the left of any other given element does not hold.” Put simply: we cannot compare what is incomparable, and the gravity of international crimes is at least partially incomparable.

Although this does not mean that we should refrain from further discussing how the gravity standard should be constructed, it does indeed imply that it will be impossible to create perfectly objective – and widely accepted – standards for comparing the gravity of various crimes in practice.

IV. Selection Decision Three: The Suspects

1. Criticism of the Prosecutor’s Failure to pursue “Even-Handed” Justice

Similar to the other “selection decisions” discussed in this article, there is a lack of guidance in the Rome Statute concerning how, in a given situation where the Court’s jurisdiction has been triggered, the Prosecutor should select the suspects.

63 J.M. Coetzee, Diary of a Bad Year, 2008, 204.
64 Ibid., 205.
Although there is of course a close interplay between the policies concerning the selection of crimes for further investigation and the selection of suspects, it is also true that the Prosecutor will frequently face a choice concerning what actors should be prosecuted for specific incidents since international crimes are typically committed by a multitude of actors. Accordingly, the Office of the Prosecutor has developed policies which specifically address the issue of suspect selection. Notably, the 2009-2012 Prosecutorial Strategy commits the Office to “prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation.”65 This entails that the Prosecutor will “select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes.”66

However, the ICC case law does not necessarily support that the Prosecutor consistently selects the suspects on the basis of their seniority. In relation to the situation in the Democratic Republic of the Congo, the Appeals Chamber overturned the standards established by the Pre-Trial Chamber, according to which the gravity requirement entails that the ICC should focus on the “most senior leaders suspected of being the most responsible” for crimes within the jurisdiction of the Court. The Appeals Chamber held that it would be more logical to assume that the Court would maximize its deterrent effect if “no category of perpetrators is per se excluded from potentially being brought before the Court.”67

Furthermore, the Office of the Prosecutor has expressed commitment to conducting its selection process impartially and applying the same methodology and standards for all groups.68

While the Prosecutor’s policies seem to offer a sound foundation for promoting “even-handed” justice and targeting Government officials (since they must be assumed frequently to be among those who are situated at the “highest echelons of responsibility”), the Office has frequently been accused of being biased when selecting its suspects. Espe-

65 Prosecutorial Strategy 2009-2012, see note 34, para. 19.
66 Ibid.
68 See, e.g., Policy Paper on Preliminary Examinations (Draft), see note 23, para. 38.
cially with regard to the preceding self-referrals, commentators have argued that the Prosecutor focused on prosecuting rebel leaders in opposition to the incumbent, notwithstanding that the Government forces (or their proxies) were allegedly also responsible for large-scale atrocities. In a recent comment, Clark states this perception clearly, noting that “[f]rom the outset, the close working relationship between the ICC and the Ugandan and Congolese governments has allowed the latter to focus the court’s attention on atrocities committed by rebel leaders while insulating themselves from prosecution.”

However, in the more recently opened investigation into the situation in Kenya, the Prosecutor decided to equally target both sides to the post-election violence, including high-ranking Government officials and several prominent politicians in power.

2. The Prosecutor’s Selection of Actors for Investigation in Mali

a. Setting new Precedence for Self-Referrals?

The preliminary “selection decisions” made by the Prosecutor in the situation in Mali could possibly be seen as presenting at least a partial step away from the approach taken by her predecessor in the earlier self-referrals, perhaps laying the ground for more “even-handed” justice in situations where the Court’s jurisdiction is triggered by the state in which the crimes were committed. Although the Prosecutor’s “Article 53 (1) Report” focuses overwhelmingly on crimes committed by the

rebel groups,\textsuperscript{71} it is important to note that Government forces are also mentioned as possible authors of some of the crimes,

“Human Rights Watch (HRW) reported that on 2 April 2012, Malian government soldiers in Sévaré (570 km from Gao) detained and executed at least 4 Tuareg members of the Malian security services. According to FIDH and Amnesty International, on 18 April 2012, Malian soldiers allegedly killed 3 unarmed persons accused of spying for the MNLA in Sévaré. At this stage, the information is insufficient to establish whether these incidents amount to the war crime of murder.”\textsuperscript{72}

More importantly, with respect to another incident, the Report concludes there is indeed a reasonable basis to believe that Government forces committed war crimes,

“During the night of 8-9 September 2012, 16 unarmed Muslim preachers were reportedly shot dead by the Malian army at an army checkpoint while they were on their way to Bamako. There is reasonable basis to believe that the war crime of murder under Article 8(2)(c)(i) was committed by these forces.”\textsuperscript{73}

That the Prosecutor is committed to investigating the conduct of Government forces was reiterated shortly after the publication of the “Article 53 (1) Report” in a statement made by the Prosecutor on 28 January 2013,

“My Office is aware of reports that Malian forces may have committed abuses in recent days, in central Mali. I urge the Malian authorities to put an immediate stop to the alleged abuses and on the basis of the principle of complementarity, to investigate and prosecute those responsible for the alleged crimes. I remind all parties to the ongoing conflict in Mali that my Office has jurisdiction over all serious crimes committed within the territory of Mali, from January 2012 onwards. All those alleged to be responsible for serious crimes in Mali must be held accountable.”\textsuperscript{74}

\textsuperscript{71} See, e.g., “Article 53 (1) Report”, see note 6, para. 53 (noting that the crimes “are mostly attributed to armed groups such as MNLA, Ansar Dine, AQIM, MUJAO and various militias”).

\textsuperscript{72} Ibid., para. 96.

\textsuperscript{73} Ibid., para. 97.

\textsuperscript{74} See ICC, Office of the Prosecutor, “Statement by the ICC Prosecutor concerning Mali”, 28 January 2013. The assessment that in addition to the rebel groups, government forces have committed war crimes in the context of the
b. Possible Impact of a Decision to investigate State Crimes

Should the Prosecutor chose to prosecute members of Mali’s armed forces, this would set an important precedence as the first example of a self-referral, in which the Office of the Prosecutor does not restrict itself to prosecuting rebel leaders in opposition to the incumbent. If so, this could help challenge the perception that the Prosecutor is biased and protects Governments that decide to make a self-referral, in this way possibly advancing the Court’s credibility. On the other hand, there is of course a risk that there will be a flipside to such a decision in that State Parties in which crimes have been committed may become more reluctant to refer situations to the Prosecutor in the future out of fear that they may become the target of the Prosecutor’s Office.

Further, a possible decision to prosecute sitting Government officials may escalate the Court’s already tense relationship with the AU and African states. History tells us that the AU and African Governments rarely oppose the Court’s initial decision to open an investigation in African states. However, in those situations – including Sudan, Libya and Kenya – where the Prosecutor ultimately decides to target politicians in power, this usually leads to regional calls and lobbying for the Court’s exit. In the situation in Darfur, for example, none of the AU Member States with a seat in the UN Security Council at the time voted against S/RES/1593 (2005) of 31 March 2005 which referred the situation in Darfur to the ICC.75 In fact, the AU expressed its commitment to the ICC’s intervention in Sudan in March 2006, with the AU Peace and Security Council urging “the Government of the Sudan and the rebel movements, to cooperate with the Office of the Prosecutor of the [ICC].”76

However, AU support for the ICC process ended abruptly when then Prosecutor Moreno-Ocampo made it clear that he intended to add President Omar Al Bashir to the list of suspects. Soon after the Prose-


75 While Algeria abstained from voting, the resolution was supported by two AU Member States, Benin and Tanzania, <http://www.iss.co>.

When the Prosecutor made an application for an arrest warrant, the AU passed a resolution expressing “its deep concern at the indictment made by the Prosecutor of the [ICC] against the President of the Republic of The Sudan, H.E. Mr. Omar Hassan Ahmed Al Bashir”, and requesting the UN Security Council to defer the case. Dissatisfied with its refusal to order a deferral, the AU later made a decision that AU Member States must refrain from cooperating with the ICC with respect to the arrest warrant on Al Bashir, a decision that was later repeated with respect to the arrest warrant on Libya’s Muammar Gaddafi (against whom an arrest warrant was also issued while he was still in power).

Still, even if the tensions between African states and the ICC certainly pose a challenge for the effective functioning of the system of international justice, it would be incongruous were the Prosecutor to make “selection decisions” on the basis that State Parties (and the regional bodies in which they are represented) generally do not appreciate that their own officials are being subjected to the Office’s attention.

Further, pursuing “even-handed” justice is not only a matter of principle, but the announcements that the Office of the Prosecutor is committed to investigating Government forces even in situations where the investigation was opened on the basis of a self-referral is vital because it may have the ability to deter Government forces from committing additional crimes in ongoing conflicts. An important ramification of the Prosecutor’s decision to name the alleged authors of crimes in the

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80 Some have argued that the ICC’s deterrence capacity might be greater with respect to state actors, such as Mali’s armed forces, see M. Kersten, “The ICC might not deter Mali’s Rebels – but it might deter the Government”, 4 February 2013, <http://justiceinconflict.org>. On the difficulties associated with deterring rebels, see generally J. Ku/ J. Nzelibe, “Do international criminal tribunals deter or exacerbate humanitarian atrocities?”, Washington University Law Quarterly 84 (2006), 777 et seq.
“Article 53 (1) Report” (and the subsequent statements) is therefore that by providing transparency concerning the initial stages of the Prosecutor’s investigation, pressure is added on a variety of actors, including Government forces and officials, to comply with international humanitarian law.81

What is more, the Prosecutor’s statements concerning alleged Malian army crimes could possibly add pressure on the Government to commence national proceedings into these crimes and thereby render a future case relating to these crimes inadmissible before the ICC. Although there are currently no indications that a national accountability process is under way,82 with the Prosecutor’s statement the incentive for commencing national proceedings has at least been advanced.

In this regard, it is noteworthy that the “Article 53 (1) Report” issued by the Prosecutor avoids a discussion of whether these crimes meet the gravity threshold. Although this silence could be understood to imply that the Prosecutor believes that these crimes are of insufficient gravity to warrant further investigation at present, it seems more likely to be the result of a diplomatic effort by the Office to avoid the sensitive discussion of the nature and manner of commission of crimes allegedly committed by the forces of a Government that has referred a situation to the Prosecutor.

V. Conclusions

Notwithstanding the Prosecutor’s claim to the contrary, it seems clear that in reality self-referrals are perceived as a special category of situations which are acted on by the Prosecutor, not because they are necessarily seen as graver than other situations or for other principled reasons, but more likely because they are “easy to deal with”, and because

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81 Some have argued that the Court’s deterrent potential is greatest at this early stage of the proceedings. See, e.g., Vinjamuri, see note 1 (noting that “[t]he Court’s leverage will be dramatically reduced once it has issued arrest warrants. In Mali, the ICC should avoid a rush to judgment. Open-ended investigations will at least create a more permissive environment for the defections that military interventions sometimes spur”).

82 The “Article 53 (1) Report” observes, “At this stage there are no national proceedings in Mali or in any other State against individuals who appear to bear the greatest responsibility for crimes that the OTP would investigate”, “Article 53 (1) Report”, see note 6, para. 10. This observation is widely shared by other observers, see, e.g., Amnesty International, see note 74.
it is not practicable for the Prosecutor to turn down a State Party’s request to investigate crimes committed in its jurisdiction on the basis that crimes committed in other situations – which may or may not be under preliminary investigation – are possibly graver.83

As Schabas points out, self-referrals thus appear to “jump the queue” to where they would not necessarily belong if treated as a proprio motu situation.84 Whether this reality is acceptable depends for some part on how the Prosecutor approaches a self-referral, notably the choices made by the Office concerning what crimes and actors should be subjected to the investigation.

In this regard, this article has argued that the situation in Mali presents a step forward, especially due to the Prosecutor’s decision to announce that the Office is investigating crimes allegedly committed by Government forces. From this perspective, the increased transparency offered by the “Article 53 (1) Report” concerning the early “selection decisions” made by the Office of the Prosecutor holds potential for advancing the institutional goals of the Court, notably deterrence.

Still, this article has demonstrated that greater transparency concerning the Office’s “selection decisions” does not necessarily mean that there is clarity as to why and how these decisions were actually made. In particular, the Office of the Prosecutor faces serious challenges utilizing the four-tier gravity assessment with respect to particular crimes and incidents selected for further investigation, raising the question of whether, at all, it is possible to explain – and compare – the gravity of specific crimes in a logical and consistent manner. This problem is only greater because there is a lack of consensus as to what factors contribute to making an international crime particularly grave, and thus whether the standards currently used by the Prosecutor are acceptable.

As a consequence of these inherent challenges to utilizing the gravity test, there are reasons to consider whether this test should be seen as the only decisive factor when making “selection decisions”. Notwithstanding the importance of further clarifying the meaning of the gravity concept, it would be useful if the Prosecutor, in consultation with the

83 The Office of the Prosecutor has itself stated that self-referrals tend to offer the Prosecutor significant advantages, including enhancing the prospects for states’ cooperation with the Court, see, e.g., ICC, Office of the Prosecutor, “Annex to the Paper on some Policy Issues before the Office of the Prosecutor”, 2003.

key audiences of the ICC, commences a process aimed at clarifying how “selection decisions” can be made in a manner that best promotes the institutional goals of the Court. Doing so, one must realize that promoting deterrence and the expressive value of international justice is contingent on the level of diversity in the types of situations, crimes and actors under investigation.

From this perspective, the Malian investigation presents a major step forward in that the Prosecutor has expressed commitment to investigating alleged war crimes committed by the same Government which had requested the Office’s intervention. Still, of course, one could question whether the continued focus on African civil wars is the best way of advancing the goals of the ICC.