



**Cour
Pénale
Internationale**
**International
Criminal
Court**

Le Bureau du Procureur
The Office of the Prosecutor



Draft
Policy Paper on Case Selection and Prioritisation

29 February 2016

TABLE OF CONTENTS

1. INTRODUCTION	3
2. CASE SELECTION PLAN	5
3. GENERAL PRINCIPLES	6
A) INDEPENDENCE	6
B) IMPARTIALITY.....	7
C) OBJECTIVITY	7
4. LEGAL CRITERIA	8
A) JURISDICTION	8
B) ADMISSIBILITY	10
C) INTERESTS OF JUSTICE	11
5. CASE SELECTION CRITERIA	11
A) GRAVITY OF CRIME(S)	12
B) DEGREE OF RESPONSIBILITY OF ALLEGED PERPETRATORS	13
C) CHARGES.....	14
6. CASE PRIORITISATION CRITERIA	14

DRAFT

1. INTRODUCTION

1. This policy paper sets out the considerations which guide the exercise of prosecutorial discretion in the selection and prioritisation of cases for investigation and prosecution. It describes the policy and practice of the Office of the Prosecutor (“Office”) in relation to the process of choosing the incidents, persons and conduct to be investigated and prosecuted within a given situation and across different situations. The paper is based on, *inter alia*, the Rome Statute (“Statute”), the Rules of Procedure and Evidence, the Regulations of the Court, the Regulations of the Office, prosecutorial strategy and policy documents of the Office, as well as the experience of the Office over its first decade of activities. It also draws from the jurisprudence of the International Criminal Court (“Court”), and international and national practice in this field.

2. This is an internal document of the Office and as such, it does not give rise to legal rights, and is subject to revision based on experience and in light of evolving jurisprudence and/or any relevant amendments to the legal texts of the Court.

3. The paper is made public in accordance with the practice of the Office to ensure clarity and transparency in the manner in which it applies the requisite legal criteria and exercises prosecutorial discretion in accordance with its mandate under the Statute.

4. The jurisprudence of the Court distinguishes between ‘situations,’ which may be defined in terms of temporal, territorial or personal parameters, and ‘cases,’ which comprise specific incidents within a given ‘situation’ during which one or more crimes within the jurisdiction of the Court may have been committed,¹ and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.² While the Office’s Policy Paper on Preliminary Examinations³ addresses the process for the opening of investigations into situations as a whole, this paper addresses how cases are

¹ *Situation in the Democratic Republic of the Congo*, “Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, [ICC-01/04-101-tEN-Corr](#), 17 January 2006, para. 65. *See also The Prosecutor v. Thomas Lubanga Dyilo*, “Decision concerning Pre-Trial Chamber’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo”, [ICC-01/04-01/06-8-Corr](#) (Annex I), 24 February 2006, para. 21.

² *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, [ICC-01/11-01/11-547-Red OA4](#), 21 May 2014, para. 1.

³ [Policy Paper on Preliminary Examinations](#), ICC-OTP, November 2013.

selected and prioritised within a given situation. Given their close correlation, the present policy paper draws from many of the same principles and criteria that are applied at the preliminary examination stage. Nonetheless, the Office has broad discretion in selecting individual cases for investigation and prosecution.

5. In the discharge of its mandate, the Office exercises its discretion in determining which cases should be selected and prioritised for investigation and prosecution. The purpose of this paper is to ensure that the exercise of such discretion in all instances is guided by sound, fair and transparent principles and criteria. It is not the responsibility or role of the Office to investigate and prosecute each and every alleged criminal act within a given situation, or every person allegedly responsible for such crimes. This would be both practically unfeasible and run counter to the notion of complementary action at the international and national level, as highlighted in the preamble⁴ and article 1 of the Statute.

6. In relation to cases not selected for investigation or prosecution, it should be recalled that the goal of the Statute, as expressed in its preamble, is to be achieved by combining the activities of the Court and national jurisdictions within a complementarity regime to combat impunity and prevent the recurrence of violence.⁵ As such, the Office will continue to encourage genuine national proceeding by relevant States with jurisdiction.⁶ It will also seek to cooperate with States whose nationals are involved in facilitating the commission of Rome Statute crimes through, for example, the illegal exploitation of natural resources, arms trafficking or providing other material assistance.⁷ The Office fully endorses the role that can be played by truth seeking mechanisms, reparations programs, institutional reform and traditional justice mechanisms as part of a broader comprehensive strategy.⁸

⁴ *Preamble*, paras. 4 and 10, Statute; see also [Paper on some policy issues before the Office of the Prosecutor](#), ICC-OTP, September 2003.

⁵ In particular, the preamble of the Statute affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”; expresses a determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”; recalls “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”; and emphasises that the ICC “shall be complementary to national criminal jurisdictions”.

⁶ [Paper on some policy issues before the Office of the Prosecutor](#), ICC-OTP September 2003.

⁷ [Strategic Plan, 2016-2018](#), ICC-OTP, 16 November 2015, paras. 92-98.

⁸ [Policy Paper on the Interests of Justice](#), ICC-OTP 2007, p. 7.

2. CASE SELECTION PLAN

7. Once a decision has been made to open an investigation into a situation or the commencement of an investigation has been authorised, the Office will develop a Case Selection Plan which identifies in broad terms the potential cases within the situation. Initially, the Plan will be based on the conclusions from the preliminary examination stage, including the potential cases identified therein.⁹ As investigations within a situation proceed, the Office will gradually develop one or more provisional case hypotheses that meet the criteria set out in this policy paper. The Case Selection Plan will be reviewed and updated accordingly.¹⁰

8. The Office will select cases for investigation and prosecution among the provisional case hypotheses identified in the Case Selection Plan. The selection of cases will be guided by the general principles, legal criteria and substantive case selection criteria set out below. Considering that there will normally be numerous cases that meet these criteria within any one situation or across several different situations, the Case Selection Plan will also be used to prioritise cases both within a given situation and across situations to manage the overall workload of the Office in the light of its overall basic size and capacity constraints.¹¹ Decisions on prioritisation of cases, which may also include either the simultaneous or sequenced investigation of cases, will consider the same factors that guide the selection of cases, together with the other operational criteria set out in this policy paper.

9. Given that the resources available to the Office limit the number of cases it can investigate and prosecute at any one time, the Case Selection Plan will also inform decisions on the appropriate number of cases to be pursued within any given situation, whether to proceed with further cases, or whether to end its involvement in a situation, as well as to prioritise amongst several identified cases deriving from the different situations under investigation.¹² The Case Selection Plan, due to its very nature, shall remain confidential.

10. The Case Selection Plan for each situation is dynamic and shall be regularly updated, and case hypotheses tested, taking into account additional information

⁹ [Policy Paper on Preliminary Examinations](#), ICC-OTP, November 2013, para. 43.

¹⁰ See regulations 33 and 34 of the [Regulations of the Office of the Prosecutor](#).

¹¹ *The report of the Court on the Basic Size of the Office of the Prosecutor*, [ICC-ASP/14/21](#), 17 September 2015.

¹² The criteria to be applied and the procedures to be followed for ending the Office's involvement in a situation will be the subject of a separate policy paper.

and evidence obtained during investigations and any ongoing criminality.¹³ In that process, new cases might be considered, and previously selected cases might be reviewed or deselected in accordance with the selection criteria. In addition, decisions regarding the prioritisation of cases for investigation and prosecution will be reviewed on an ongoing basis to reflect changes in the operational conditions that could impact the Office's ability to conduct successful investigations and prosecutions.

11. At least once a year, the Office will review the Case Selection Plan with a view to revisiting its decisions regarding selection and prioritisation of cases and to adjusting the Case Selection Plan to the current operational requirements as necessary.

3. GENERAL PRINCIPLES

12. The Office shall conduct its case selection and prioritisation on the basis of the overarching principles of independence, impartiality and objectivity.

a) Independence

13. Article 42 of the Statute provides that the Office of the Prosecutor shall act independently of instructions from any external source.¹⁴ Independence goes beyond not seeking or acting on instructions: it means that decisions shall not be influenced or altered by the presumed or known wishes of any external actor.

14. Where information is provided to the Office by a State Party in accordance with article 14(2), by the United Nations Security Council ("UNSC"), or from individual communications under article 15, the Office is not bound or constrained by the information contained therein for the purpose of determining whether specific incidents or persons should be investigated or prosecuted.¹⁵

¹³ See regulation 35(4) of the Regulations of the Office of the Prosecutor.

¹⁴ *See also* Code of Conduct for the Office of the Prosecutor, 5 September 2013 ([OTP2013/024322](#)), Chapter 2, Section 2.

¹⁵ Thus, for example, while article 14(2) of the Statute invites a referring State Party to specify as far as possible all relevant circumstances and provide available supporting documentation, article 14(1) emphasises that it is for the Prosecutor to determine whether one or more specific persons should be charged with the commission of crimes.

b) Impartiality

15. The principle of impartiality, which flows from articles 21(3) and 42(7) of the Statute,¹⁶ means that the Office will apply consistent methods and criteria irrespective of the States or parties involved or the person(s) or group(s) concerned. No adverse distinction may be made on grounds prohibited under the Statute. The Office shall apply its methods and criteria equally to all persons without any distinction based on official capacity pursuant to article 27(1) or other grounds referred to in article 21(3).

16. The Office will examine allegations against all groups or parties within a particular situation to assess whether persons belonging to those groups or parties bear criminal responsibility under articles 25 and/or 28 of the Statute. However, the Office will not seek to create the appearance of parity within a situation between rival parties by selecting cases that would not otherwise meet the criteria set out herein. Impartiality does not mean 'equivalence of blame' within a situation. It means that the Office will apply the same processes, methods, criteria and thresholds for members of all groups to determine whether crimes committed by them warrant investigations and prosecutions. This may in fact lead to different outcomes for different groups. Cases against specific persons will only be brought if they meet the substantive case selection criteria identified in this policy paper.

c) Objectivity

17. Case selection is an information-driven process. This means that the Office will select cases only if the information available or accessible to the Prosecution can reasonably justify the selection of a case for investigation and prosecution.

18. Before selecting a case, the Office will balance the strength of a case theory against its weaknesses. Pursuant to its duty under article 54(1)(a) of the Statute to "investigate incriminating and exonerating circumstances equally" when "establish[ing] the truth" and regulations 34(1) and 35(4) of the Regulations of the Office, any provisional case hypothesis will include both incriminating and potentially exonerating circumstances. The case hypothesis will be reviewed on a continuous basis taking into consideration the evidence collected. Both incriminating and exonerating evidence will be fairly and objectively evaluated

¹⁶ See also Code of Conduct for the Office of the Prosecutor, 5 September 2013 ([OTP2013/024322](#)), Chapter 2, Section 6.

and the case hypothesis may be adjusted or rejected on the basis of further investigations.

19. The Office will follow a standard analytical methodology, including methods for ongoing source evaluation and using consistent rules of measurement and attribution in its crime pattern analysis. Finally, at various stages in the process of investigating and prosecuting a case (particularly before applying for an arrest warrant or a summons to appear, and before submitting a Document Containing the Charges), the team will conduct a comprehensive evidence review involving staff external to the team, to scrutinise the sufficiency of the evidence.

4. LEGAL CRITERIA

20. The Office shall ensure that cases selected for investigation and prosecution fall within the jurisdiction of the Court,¹⁷ that they would be admissible in terms of complementarity and gravity;¹⁸ and that they would not be contrary to the interests of justice.¹⁹ However, the selection of cases for investigation within an existing situation should not be confused with decisions to initiate an investigation into a situation as a whole within the meaning of article 53(1) and rule 48.

21. The factors that the Office considers in relation to these legal criteria are set out in the Office's Policy Paper on Preliminary Examinations.²⁰ These factors apply *mutatis mutandis* at the case selection stage. However, by its nature, case selection requires the application of a more focused test than the one conducted at the situation stage. For each case selected for investigation and prosecution, jurisdiction, admissibility and the interests of justice will be considered in relation to identified incidents, persons and conduct.

a) Jurisdiction

22. In accordance with article 58(1)(a) of the Statute, the Office must determine whether there are reasonable grounds to believe that the person concerned has committed a crime within the jurisdiction of the Court. At the same time, pursuant to article 19, a case must fall within the scope of, or be sufficiently

¹⁷ Articles 19 and 58(1) of the Statute.

¹⁸ Article 17 of the Statute.

¹⁹ Article 53(2) of the Statute.

²⁰ [Policy Paper on Preliminary Examinations](#), ICC-OTP, November 2013, paras. 34-71.

linked to, a situation that has been referred by a State Party or the Security Council or which has otherwise been authorised by the Pre-Trial Chamber. This means that the case cannot exceed the temporal, territorial or personal parameters defining the situation under investigation.²¹ Crimes committed after the date of a referral or an authorisation decision will continue to fall within the jurisdiction of the Court if they are sufficiently linked to the particular situation.²²

23. In accordance with article 12(2) of the Statute, the exercise of the Court's jurisdiction over individuals may be based on the principles of territory or nationality. Where the Office proceeds on the basis of territorial jurisdiction, it can investigate all alleged crimes occurring in a particular territory or State, irrespective of whether the individual concerned is a national of a State Party or a non-State Party. Where jurisdiction is based on nationality, the Office can investigate crimes allegedly committed by nationals of a State Party or of a State which has accepted the exercise of jurisdiction by the Court under article 12(3) in any territory, including that of non-Party States.

24. Where a person holds two nationalities and falls within the personal jurisdiction of the Court under one nationality but not the other, the Office will consider investigating such a person if he or she falls within the scope of the Prosecution's strategy for case selection as set out in this paper.

25. The referral of a situation by the UNSC will enable the Court to exercise jurisdiction in relation to a situation irrespective of the territorial or nationality limitations set out in article 12, although it cannot exceed the temporal or subject-matter parameters of the Court's jurisdiction as contained in articles 5 and 11. The entire legal framework of the Statute is applicable to situations referred by the UNSC, including its complementarity and cooperation regimes.²³

²¹ *The Prosecutor v. Callixte Mbarushimana*, "Decision on the 'Defence Challenge to the Jurisdiction of the Court'", [ICC-01/04-01/10-451](#), 26 October 2011, para. 16.

²² *The Prosecutor v. Callixte Mbarushimana*, "Decision on the 'Defence Challenge to the Jurisdiction of the Court'", [ICC-01/04-01/10-451](#), 26 October 2011, paras. 21, 27; *Situation in the Republic of Côte d'Ivoire*, "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", [ICC-02/11-14-Corr](#), 15 November 2011, paras. 178-179.

²³ *The Prosecutor v. Saif al-Islam Gaddafi and Abdullah al-Senussi*, "Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute" [ICC-01/11-01/11-163](#), 1 June 2012, paras. 28-30; see also *The Prosecutor v. Saif al-Islam Gaddafi*, "Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council", [ICC-01/11-01/11-577](#), 10 December 2014, paras. 20-22; *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Decision on Defence Application pursuant to articles 57(3)(b) & 64(6)(a) of the 'Statute for an order for the preparation

b) Admissibility

26. As set out in article 17(1) of the Statute, admissibility requires an assessment of complementarity (subparagraphs (a)-(c)) and gravity (subparagraph (d)) in relation to a specific case.

27. In relation to complementarity, the Office will determine whether the State concerned is exercising jurisdiction in relation to the same person for substantially the same conduct as that alleged before the Court,²⁴ and if so, whether the national proceedings concerned are vitiated by an unwillingness or inability to investigate or prosecute genuinely.²⁵ An assessment must be made in the light of the proceedings as they exist at the national level at the time,²⁶ and is potentially subject to revision based on any change of facts.²⁷

28. If the national authorities are conducting, or have conducted, proceedings against the same person for substantially the same conduct, and such proceedings have not been vitiated by an unwillingness or inability to genuinely carry them out, the case will not be selected for further investigation and prosecution. Instead, the Office may consult with the authorities in question to share the information or evidence it has collected, pursuant to article 93(10) of

and transmission of a cooperation request to the Government of the Republic of the Sudan”, [ICC-02/05-03/09-169](#), 1 July 2011, para. 15.

²⁴ *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Judgment on the appeal of the RepubUc of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, [ICC-01/09-01/11-307 OA](#), 30 August 2011, para. 1; *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’”, [ICC-01/09-02/11-274 OA](#), 30 August 2011, para. 1.

²⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, [ICC-01/04-01/07-1497 OA8](#), 25 September 2009, para. 78.

²⁶ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, [ICC-01/09-02/11-96](#), 30 May 2011, paras. 56-65; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, [ICC-01/04-01/07-1497 OA8](#), 25 September 2009, para. 56.

²⁷ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, [ICC-01/04-01/07-1497 OA8](#), 25 September 2009, para. 56. See also article 19(4)-(5) and 19(10), Statute.

the Statute, or it may focus on other perpetrators that form part of the same or a different case theory, in line with a burden-sharing approach.²⁸

29. In relation to gravity as a criterion for admissibility under article 17(1)(d), the Appeals Chamber has dismissed the setting of an overly restrictive legal bar that would hamper the deterrent role of the Court.²⁹ The factors that guide the Office's assessment of gravity include both quantitative and qualitative considerations, relating to the scale, nature, manner of commission and impact of the crimes.³⁰

c) Interests of Justice

30. Pursuant to article 53(2)(c) of the Statute, the Prosecutor, upon investigating, may conclude that there is not a sufficient basis to proceed because it "is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime".

31. As set out in the Office's Policy Paper on the Interests of Justice,³¹ the interests of victims include the victims' interest in seeing justice done, but also other essential interests such as their protection, which the Court as a whole is obliged to ensure pursuant to article 68(1) of the Statute.

32. Bearing in mind the objectives of the Court to put an end to impunity for Rome Statute crimes and to ensure that these most serious crimes do not go unpunished, a decision not to proceed on the basis of the interests of justice should be resorted to only as a course of last resort.

5. CASE SELECTION CRITERIA

33. The Office will select cases for investigation and prosecution in light of the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges. The weight given to each criterion will depend on the facts and circumstances of each case and each situation, and the stage of development

²⁸ See para. 6 above.

²⁹ *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'", [ICC-01/04-169](#), 13 July 2006, paras. 69-79.

³⁰ Regulation 29(2) of the [Regulations of the Office of the Prosecutor](#); [Policy Paper on Preliminary Examinations](#), ICC-OTP November 2013, paras. 59-66; see also *Situation in Georgia*, "Decision on the Prosecutor's request for authorization of an investigation", [ICC-01/15-12](#), 27 January 2016, para. 51.

³¹ [Policy Paper on the Interests of Justice](#), ICC-OTP, 2007.

of the case hypothesis and investigation. Within any given situation, the Case Selection Plan will be reviewed as investigations proceed, by applying the same case selection criteria.³²

a) Gravity of crime(s)

34. Gravity of crime(s) as a case selection criterion refers to the Office's strategic objective to focus its investigations and prosecutions, in principle, on the most serious crimes within a given situation³³ that are of concern to the international community as a whole.³⁴

35. The Office's assessment of gravity includes both quantitative and qualitative considerations. As stipulated in regulation 29(2) of the Regulations of the Office, the factors that guide the Office's assessment include the scale, nature, manner of commission, and impact of the crimes.³⁵

36. Gravity of crime(s) as a case selection criterion is assessed similarly to gravity as a factor for admissibility under article 17(1)(d). However, to implement its strategic objective to focus, in principle, on the most serious crimes within a given situation, the Office may apply a higher threshold than that which is required for the admissibility test under article 17, when assessing gravity for the purposes of case selection and prioritisation.³⁶

37. 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 (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).

38. The nature of the crimes refers to the specific factual elements of each offence such as killings, rapes, other sexual or gender-based crimes,³⁷ crimes committed against children and persecution. Other examples include crimes that result in

³² See paras.7, 10-11 above.

³³ [Strategic Plan, 2016-2018](#), ICC-OTP, 16 November 2015, paras. 34-37, 104.

³⁴ *Preamble*, para. 4, Statute.

³⁵ *The Prosecutor v. Bahar Idriss Abu Garda*, "Decision on the confirmation of charges", [ICC-02/05-02/09-243-Red](#), 8 February 2010, para. 31; *Situation in the Republic of Cote d'Ivoire*, "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", [ICC-02/11-14-Corr](#), 3 October 2011, paras. 203-204.

³⁶ See para. 29 above.

³⁷ [Policy Paper on Sexual and Gender-Based Crimes](#), ICC-OTP, June 2014.

the destruction of cultural property, large-scale environmental damage and genocide or extermination.

39. 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 of the perpetrators, the extent to which the crimes were systematic or resulted from a plan or organised 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 or gender-based violence as a means of destroying groups.

40. The impact of the crimes may be assessed in light of, *inter alia*, the suffering endured by the victims and their increased vulnerability, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.

b) Degree of responsibility of alleged perpetrators

41. Regulation 34(1) of the Regulations of the Office and the Prosecution's Strategic Plan³⁸ direct the Office to conduct its investigations towards ensuring that charges are brought against those persons who appear to be the most responsible for the identified crimes. In order to perform an objective and open-ended investigation, the Office will first focus on the crime base in order to identify the organisations (including their structures) and individuals allegedly responsible for their commission. That may entail the need to consider the investigation and prosecution of lower level perpetrators to build the evidentiary foundations for case(s) against those most responsible. The Office may also decide to prosecute lower level-perpetrators where their conduct has been particularly grave or notorious.³⁹

42. The notion of the most responsible does not necessarily equate with the *de jure* hierarchical status of an individual within a structure, but will be assessed on a case-by-case basis depending on the evidence. As the investigation progresses, the extent of responsibility of any identified alleged perpetrator(s) will be assessed on the basis of, *inter alia*, the nature of the unlawful behaviour; the degree of their participation and intent; the existence of a discriminatory motive; and any abuse of power or official capacity.⁴⁰

³⁸ [Strategic Plan, 2016-2018](#), ICC-OTP, 16 November 2015, para.34, last bullet point.

³⁹ [Strategic Plan, 2016-2018](#), ICC-OTP, 16 November 2015, para.34, last bullet point.

⁴⁰ Rules 145(1)(c) and 145(2)(b) of the Rules of Procedure and Evidence.

43. The degree of responsibility of alleged perpetrator(s) will also be taken into consideration when defining the charges. The Office will explore and present the most appropriate range of modes of liability to legally qualify the criminal conduct alleged. For this purpose, the Office will also consider the deterrent and expressive effects that each mode of liability may entail. For example, the Office considers that the responsibility of commanders and other superiors under article 28 of the Statute is a key form of liability, as it offers a critical tool to ensure the principle of responsible command and thereby end impunity for crimes and contribute towards their prevention.

c) Charges

44. The Office will aim to represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished. Consistent with regulation 34(2) of the Regulations of the Office of the Prosecutor, the charges chosen will constitute, whenever possible, a representative sample of the main types of victimisation and the communities which have been affected by the crimes in that situation.

45. The Office will also take into particular consideration crimes that have been traditionally under-prosecuted, such as the recruitment and use of child soldiers, rape and other sexual and gender-based crimes, attacks against cultural, religious and historical objects, attacks against humanitarian and peacekeeping personnel, and crimes that involve or are committed through large-scale destruction of the environment. In so doing, the Office aims to highlight the gravity of these crimes, and thereby end impunity for, and contribute to the prevention of, such crimes.

6. CASE PRIORITISATION CRITERIA

46. The Office aims to investigate and prosecute all cases that are selected pursuant to the case selection criteria set out above. Prioritisation governs the process by which cases that meet selection criteria are rolled-out over time. A case that is temporarily not prioritised is not thereby deselected: it remains part of the Case Selection Plan and will be investigated and prosecuted as circumstances permit, based on the criteria below. In particular, prioritisation

flows from the requirement under article 54(1)(b) that the Office take appropriate measures to ensure the effective investigation and prosecution of crimes.⁴¹ Accordingly, and based on information available at any given time, the Office will need to prioritise among the selected cases within any given situation and across the various situations those cases in which it appears that it can conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction.

47. For the prioritisation of cases, the Office will make a comparative assessment across the selected cases, based on the same factors that guide the case selection and consider them together with the following operational criteria.⁴² These criteria stand in no hierarchical order to each other. They are all taken into consideration, but the specific weight to be given to each individual criterion will depend on the circumstances of each case:

- a) the number of cases the Office can investigate and prosecute during a given period with the resources available to it;
- b) the quantity and quality of the incriminating and exonerating evidence already in the possession of the Office;
- c) the availability of additional evidence, and risks to its degradation;
- d) the security situation in the area where the Office is planning to operate or where persons cooperating with the Office reside, and the Court's ability to protect persons from risks arising from their interaction with the Office;
- e) international cooperation and judicial assistance to support the Office's activities;
- f) the Office's capacity to effectively conduct the necessary investigations within a reasonable period of time;

⁴¹ Article 54(1)(b) further requires the Prosecution during its investigation to respects the interests and personal circumstances of victims and witnesses including age, gender as defined in article 7(3) and health, and take into account the nature of the crime, in particular where it involved sexual violence, gender violence or violence against children.

⁴² See para. 8 above. *See also Policy Paper on Preliminary Examinations*, ICC-OTP, November 2013, para. 70, discussing the non-applicability of "feasibility" as separate legal factor for determining the opening of investigations. At the case prioritisation stage, by contrast, operational feasibility does become a relevant factor when exercising discretion regarding the timing of the roll-out of selected cases.

- g) the potential to secure the arrest and surrender of suspects to the Court or their appearance before the Court either voluntarily or pursuant to a summons;
- h) the impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel, weighed against the impact and the ability of the Office to do so on a sequential basis; and
- i) the potential impact of investigations and prosecutions on the occurrence of ongoing or future crimes.

48. As the investigations proceed, including after cases have been selected for investigation, the Office shall continuously re-evaluate whether it can continue to conduct the necessary investigations leading to a prosecution with a reasonable prospect of conviction.⁴³ If it appears to the Office at any given point in time that it cannot do so, the Office may decide to deprioritise and postpone the investigation of that case until conditions have improved.

49. Where witness interference or evidence tampering has caused the degradation of the collected evidence or has impacted on the conditions of evidence-gathering or further investigations or on the trial proceedings, the Office will consider whether to commence investigations pursuant to article 70 of the Statute for offences against the administration of justice. This will be particularly so when witness interference or evidence tampering has affected investigations which are advanced to such an extent that the Office considers to be trial ready. Mindful of its mandate and the need to focus its efforts on the prosecution of core crimes, the Office will resort to article 70 prosecutions bearing in mind the factors set out in rule 162(2).

50. If, at any stage in the proceedings, the Office considers that the evidence available, including both incriminating and exonerating evidence, does not support an element of the charges pleaded or supports a different charge, or that any charge pleaded otherwise cannot be pursued, the Office will seek to amend or withdraw the relevant charge(s) pursuant to articles 61(4) and (9) of the Statute, or in appropriate circumstances, submit the matter to the Trial Chamber pursuant to regulation 55 of the Regulations of the Court.⁴⁴ | OTP

⁴³ Regulation 35(4), [Regulations of the Office of the Prosecutor](#).

⁴⁴ Regulation 60, [Regulations of the Office of the Prosecutor](#).