DOI:10.1017/ilm.2018.49

# INTRODUCTORY NOTE TO OFFICE OF THE PROSECUTOR: POLICY PAPER ON CASE SELECTION AND PRIORITISATION (INT'L CRIM. CT.)

BY KAI AMBOS*

[September 15, 2016]

Given the high number of international crimes, it is practically impossible to prosecute all potential perpetrators at the international level. Impunity gaps at the national level aggravate this situation since they practically turn the International Criminal Court (ICC) into the lone or at least most visible enforcer of international criminal law (ICL). Thus, the Court suffers from a situation and case overload that manifests itself at the level of preliminary examinations conducted by its Office of the Prosecutor (OTP) which, in turn, suffers from "overall basic size and capacity constraints."[1] This situation leaves the Court/the OTP no other choice than to deliver mere distributive (instead of retributive) criminal justice, where the main challenge is not so much the fair or just delivery of sanctions to individual defendants, but the *fair distribution of justice* to a selected number of suspects/perpetrators. Against this background the rational and transparent selection and prioritization of situations and cases turns out to be of utmost importance for the success and legitimacy of the Court.

## The Responsibility of the Prosecutor

In the procedural design of the Court it is up to the Prosecutor to make this selection and prioritization. She has the power to select not only individual defendants but also—and first—entire situations for investigations. This is, roughly speaking, a twofold process: first, the primary selection of situations, and second, the subsequent extraction of cases from these situations.[2]

As a general rule, it follows from the principles of equality before the law and nondiscrimination[3] that selection decisions must not be "based on impermissible motives such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin."[4] The Prosecutor is thus required to investigate, as a rule,[5] all sides of a conflict without favoring or discriminating against any person or groups. In fact, this is a prerequisite to overcome the victor's justice stigma attached to international criminal justice since the Nuremberg and Tokyo precedents. It is an enormous challenge for the Court to avoid the impression that it only prosecutes individuals of weak states and thus reproduces the structural inequalities between states existing at the international level. If this were the case, as alleged with regard to the (previous) African focus of the ICC,[6] the Court would discriminate on the basis of nationality and rightly face the charge to use disturbing double standards. Matters are further complicated by the fact that suspects are not selected as bare individuals—as normally is the case in domestic proceedings—but as representatives of certain perpetrator groups (the Serbs, the Croats, the Hutus, the Tutsis) and thus the selection entails the distribution of blame to their respective states or groups. This, in fact, explains why states often make it their national cause to get their nationals acquitted, at least if they belong to the high echelons of civilian or military power.

## (Other) Policy Papers to Define Prosecutorial Strategy and Focus

The need to integrate the OTP's broad discretionary powers into a transparent and coherent prosecutorial strategy is acknowledged by Regulation 14 of the OTP Regulations. It obliges the Office to make its strategy public and make use of policy papers that reflect the key principles and criteria of this strategy.[7] So far, the OTP has issued several documents:

(1) The 2003 "Paper on Some Policy Issues Before the OTP" attempts to define a general prosecutorial strategy, in particular by highlighting some priority tasks. Its central point is the focus on those suspects who bear the greatest responsibility for the most serious crimes,[8] thus leaving the task of closing the ensuing impunity gap for middle- and low-rank perpetrators to national justice systems.[9]

* Chair for Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August-Universität Göttingen, Germany, and Judge at the Kosovo Specialist Chambers, The Hague, as well as Advisor (amicus curiae) of the Colombian Special Jurisdiction for Peace, Bogotá. The author would like to thank Dr. Rod Rastan (ICC-OTP) for critical comments and Tjorven Vogt for formatting the paper.

(2) The general guiding principle of "focused investigations and prosecutions" is concretized, modified, and further developed by four strategy papers laying down some key strategic issues: (i) the Strategy 2006-2009 (September 14, 2006), (ii) the Strategy 2009-2012 (February 1, 2010), (iii) the Strategy 2012-2015 (October 24, 2013), and (iv) the Strategy 2016-2018 (November 16, 2015). According to the latter, building on the plan 2012-2015, the OTP currently faces six external challenges and pursues nine strategic goals organized around three major themes.[10] The strategy also refers to case identification and prioritization within a formal investigation.[11]

(3) Several policy papers of the OTP clarify other key issues, such as the "interests of justice," victims' participation, preliminary examinations, the prosecution of sexual and gender-based crimes, and crimes against children.

Thus, the here-reproduced Policy Paper on Case Selection and Prioritization draws, on the one hand, on *strategy papers*, which clarify the Office's strategic objectives for a time period of three to four years, and, on the other, *policy papers* addressing particular fundamental issues on which the Office wants to provide more clarity and transparency, not least for itself. At the same time the need for selection and prioritization follows from the capacity restraints imposed on the OTP by the state parties by way of the already-mentioned "Basic Size" document, which itself calls for "prioritisation of activities."[12]

The strategy papers are valid working agendas that—due to their temporal limitation—also give the OTP the opportunity to critically evaluate and, if necessary, adjust its strategy on a regular basis. A good example is the Office's decision to complement its sequential approach with a simultaneous approach. Originally, in line with its focus on persons most responsible, the OTP adopted a sequential approach, investigating cases within a situation one after another and selecting them according to their gravity.[13] Later, the Office became more flexible and, for example in the Kenya proceedings, moved to simultaneous investigations, bringing two cases for prosecution at the same time.[14] Accordingly, the Strategy 2009-2012—albeit adhering to the policy of focused investigations—no longer explicitly contained the sequential approach.

Another shift in strategy was introduced by the Strategic Plan 2012-2015 and confirmed by the 2016-2018 one. As the evidentiary standards adopted by the (Pre-Trial) Chambers were higher than expected by the OTP, the Office decided to replace the policy of focused investigations with "the principle of in-depth, open-ended investigations while maintaining focus."[15] In particular, in situations where the OTP has limited investigative possibilities, this approach is meant to allow for "a strategy of gradually building upwards," which means that the OTP will "first investigate and prosecute a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable chance to convict the most responsible."[16] Depending on the evidence available, the OTP even considers limiting itself to the prosecution of low-level perpetrators who committed particular grave and notorious crimes, instead of initiating proceedings against persons most responsible without a reasonable prospect of conviction.[17] The aim was to be "trial-ready" as early as possible, in any case not later than at the stage of the confirmation proceedings.[18]

While these examples show that a certain flexibility is useful and even necessary, in order to be able to react to legal or jurisprudential changes, the current OTP approach, while approved by the most recent strategy paper[19] and indeed also by the here-documented Policy Paper on Selection and Prioritisation,[20] still suffers from the lack of a comprehensive, overall strategy. The Strategic Plan 2012-2015, for example, emphasizes the prioritization ("pay particular attention") of sexual and gender-based crimes and crimes against children[21] but neither the Strategic Plan nor the respective Policy Paper give reasons *why* these crimes should be prioritized instead of others. Even if one understands the "pay particular attention" language in a more flexible way—not calling for prioritization but only aiming at making sure that certain phenomena, such as sexual crimes, are not overlooked and are properly addressed[22]—the question remains whether there is any underlying rationale of the OTP's prioritization policy at all. Against the background of the Basic Size document—which itself, as we have seen, calls for prioritization—it appears most plausible that prioritization is simply the consequence of the mentioned capacity constraints. In other words, to keep the workload manageable and the OTP/Court going, one needs prioritization (and, a fortiori, the preceding case selection).[23]

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

### The Policy Paper on Selection and Prioritization—Critical Remarks

The Policy Paper on Selection is an important step forward. It introduces the novel concept of a *case selection document*[24] that seeks to map out all the different cases across all situations the OTP intends to focus on and thus not only helps with prioritization, but also with completion strategies.[25] It provides for general *principles*[26] and legal *criteria*[27] with regard to situation and case selection that, albeit in abstracto easily agreeable, entail a series of contentious and tricky issues of interpretation. Last but not least, it suggests "*case prioritisation criteria*"[28] that apply to the actually (normatively) selected cases by which it becomes clear that prioritization comes after selection. But is it realistic, as suggested in the Paper, to aim to investigate and prosecute "*all*" selected cases (para. 47), and does nonprioritization really have no impact on selection (para. 48)? In fact, the realistic scenario is most probably—given the already mentioned limited OTP resources—that nonprioritization effectively entails deselection, i.e., prioritization amounts, de facto, to a second selection filter. This shows that selection and prioritization are not separate but interrelated concepts.

While there is no hierarchy between the "strategic" and the "operational case prioritization criteria," (paras. 50–51), the overall impression is that the prioritization exercise is basically guided by practical considerations (quantity and quality of evidence, nature of cooperation to support OTP, etc.)[29] with more normative considerations (comparative assessment across selected cases, impact)[30] playing a secondary role.[31] It likely cannot be otherwise. For the concrete application of any (selection or prioritization) criterion is always situation- and case-specific, i.e., the ultimate selection or prioritization decision cannot be precisely determined by abstract criteria; it remains in the hands of the Prosecutor who enjoys discretion subject to only a limited judicial review.[32] In particular it has been acknowledged that the OTP enjoys quite a broad degree of flexibility with regard to the selection of cases (acts, incidents, persons) within an authorized investigation of a certain situation.[33] In any event, the development of abstract criteria and the broadest possible transparency in the selection process will not make this process immune against criticism—in fact, it is easy to criticize any prosecutorial choice as political or biased for other reasons—but only help to better explain the respective decisions.

Notwithstanding these critical remarks, the Policy Paper on Selection is a necessary tool to make the OTP's approach to selection/prioritization more transparent and also to serve as general guidance for OTP management (Executive Committee) and teams. It is for this reason that its documentation in this issue of the *International Legal Materials* is to be welcomed.

---

ENDNOTES

1 Office of the Prosecutor, *Policy Paper on Case Selection*, ¶ 11 (2016) (referring to Assembly of State Parties, *The Report of the Court on the Basic Size of the Office of the Prosecutor*, ICC-ASP/14/21 (Sept. 17, 2015)) [hereinafter *Policy Paper on Case Selection*].

2 Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Regs. 34–35 (Apr. 23, 2009).

3 Rome Statute of the International Criminal Court arts. 21(3), 67(1), July 17, 1998, 2187 UNTS 3 [hereinafter Rome Statute].

4 *Cf.* Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgement, ¶ 605 (Feb. 20, 2001); Margaret deGuzman & William Schabas, *Initiation of Investigations*, *in* INTERNATIONAL CRIMINAL PROCEDURE 146, 167 (Goran Sluiter et al. eds., 2013).

5 Exceptionally though the investigation is limited to the alleged perpetrators if jurisdiction is based on active personality pursuant to Article 12(2)(b) of the Rome Statute; thereto Rod Rastan, *Jurisdiction*, *in* LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 152 (Carsten Stahn ed., 2015).

6 *See* Birju Kotecha, *The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism*, 31 LEIDEN J. INT'L L. 929 (2018) ("[M]ost trenchant criticism of bias."). While this African focus can be explained with legal and factual reasons (*cf.* Kai Ambos, *Expanding the Focus of the "African Criminal Court"*, *in* THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES 499–529 (William Schabas et al. eds., 2016)), legal arguments never fully account for legitimacy arguments (Kotecha, *supra* (referring to "legalism" as "a weak tactic of legitimation") and, in any case, the appearance of any African bias alone does harm to the reputation of the Court. It is therefore to be welcomed that the OTP shifted its attention to other regions of the world (see the opening of a formal investigation regarding Georgia and the several preliminary examinations in non-African states, e.g., Colombia, Palestine, and Iraq/U.K.).

7 This corresponds to No. 17 of the UN Guidelines on the Role of Prosecutors ("In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.").

8 However, one must not confuse the OTP's policy choice to limit prosecutions to certain high-caliber cases with the admissibility threshold as a legal barrier to bring certain cases, in particular with the gravity threshold of Article 17(1)(d) of the Rome Statute.

9 ICC-OTP, *Paper on Some Policy Issues Before the Office of the Prosecutor* 7 (2003).

10 ICC-OTP, *Strategic Plan 2016-2018*, ¶ 3 (Nov. 16, 2015) (referring, inter alia, to the lack of cooperation and coordination), ¶ 4 (the first four goals referring to the "performance of the Office's mandate"; the second four referring to the "conditions to fulfil the Office's mandate"; and the last referring to better coordination in investigation and prosecution).

11 *Id.* ¶ 36.

12 Assembly of State Parties, *Report of the Court on the Basic Size of the Office of the Prosecutor*, ICC-ASP/14/21, ¶ 5 (Sept. 17, 2015).

13 ICC-OTP, *Paper on Some Policy Issues*, *supra* note 9, at 5.

14 The case against Ruto, Kosgey, and Sang on the one hand, and the case against Muthaura, Kenyatta, and Hussein Ali on the other.

15 ICC-OTP, *Strategic Plan 2012-2015*, ¶¶ 4, 23 (Oct. 11, 2013); *see also* ICC-OTP, *Strategic Plan 2016-2018*, *supra* note 10, ¶ 34.

16 ICC-OTP, *Strategic Plan 2012-2015*, *supra* note 15, ¶ 22; also ICC-OTP, *Strategic Plan 2016-2018*, *supra* note 10, at ¶ 35.

17 ICC-OTP, *Strategic Plan 2012-2015*, *supra* note 15, ¶ 22.

18 *Id.* ¶¶ 3, 4, 18, 23; *see also* ICC-OTP, *Strategic Plan 2016-2018*, *supra* note 10, ¶ 34.

19 ICC-OTP, *Strategic Plan 2016-2018*, *supra* note 10, ¶¶ 1, 13 (arguing that the improved results, especially in terms of confirmations of charges, demonstrate that the shift in strategy was appropriate and successful).

20 ICC-OTP, *Policy Paper on Case Selection*, *supra* note 1, ¶ 4 (referring to the "same principles and criteria").

21 ICC-OTP, *Paper on Some Policy Issues*, *supra* note 9, ¶¶ 58–63; also ICC-OTP, *Strategic Plan 2016-2018*, *supra* note 10, ¶ 37 ("In prioritising investigations, the Office will continue to pay particular attention to prosecuting specific forms of crime. In line with the Sexual and Gender Based Crimes Policy, the Office has committed to focusing in particular on the investigation and prosecution of SGBC.").

22 *Cf.* ICC-OTP, *Policy Paper on Case Selection*, *supra* note 1, ¶ 46 ("[P]ay particular attention to crimes that have been traditionally under-prosecuted.").

23 *Id.* ¶¶ 11–12 (referring to the "overall basic size and capacity constraints" and the limited "resources available").

24 *Id.* ¶ 10.

25 These are to be the subject of a separate policy paper. *Id.* ¶ 12 n.16.

26 *Id.* ¶ 16 (independence, impartiality, and objectivity).

27 *Id.* ¶ 24 (jurisdiction, admissibility and the interests of justice as well as, more specifically with regard to cases, the gravity of the crimes, the degree of responsibility of the alleged perpetrators, and the potential charges).

28 *Id.* ¶ 47.

29 *Id.* ¶ 51.

30 *Id.* ¶ 50.

31 *But see* Rod Rastan, *Case Selection and Prioritisation at the International Criminal Court*, *in* MORTEN BERGSMO, CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASES (3d ed. forthcoming), stressing the more normative strategic prioritization criteria (focusing on ¶ 50(b), which facilitates nonprioritization if a member of a certain group, e.g., the Lord's Resistance Army (LRA), has already been investigated).

32 Only pursuant to legal regulation, especially Article 53 (3) of the Rome Statute.

33 *Cf.* Situation in Georgia, Case No. ICC-01/15-4-Corr2, Corrected Version of "Request for authorisation of an Investigation Pursuant to Article 15," 16 October 2015, ICC-01/15-4-Corr, ¶ 51 (Nov. 17, 2015) (holding that "the Prosecution should be permitted to expand or modify its investigation with respect to these or other alleged acts, incidents, groups or persons and/or adopt different legal qualifications, so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation").

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

DOI:10.1017/ilm.2018.49

# OFFICE OF THE PROSECUTOR: POLICY PAPER ON CASE SELECTION AND PRIORITISATION (INT'L CRIM. CT.)*

[September 15, 2016]


## OFFICE OF THE PROSECUTOR

## POLICY PAPER ON CASE SELECTION AND PRIORITISATION

15 September 2016

* This text was reproduced and reformatted from the text available at the International Criminal Court website (visited October 20, 2018), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

## TABLE OF CONTENTS



https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

## 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 of prioritising cases both within a 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, the prosecutorial strategy and other 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.[1]

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 its prosecutorial discretion in accordance with its mandate under the Statute.

4. The jurisprudence of the Court distinguishes between "situations", which are generally defined in terms of temporal, territorial and in some cases 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,[2] and whose scope are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.[3] While the Office's Policy Paper on Preliminary Examinations[4] addresses the process for the opening of investigations into situations as a whole, this paper addresses how cases are selected and prioritised. 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.

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.[5] 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 preamble[6] and article 1 of the Statute.

6. Gravity is the predominant case selection criteria adopted by the Office and is embedded also into considerations of both the degree of responsibility of alleged perpetrators and charging.

7. In relation to cases not selected for investigation or prosecution, it should be recalled that the goal of the Statute to combat impunity and prevent the recurrence of violence, as expressed in its preamble, is to be achieved by combining the activities of the Court and national jurisdictions within a complementary system of criminal justice.[7] As such, the Office will continue to encourage genuine national proceedings by relevant States with jurisdiction.[8] In particular, it will seek to cooperate with States who are investigating and prosecuting individuals who have committed or have facilitated the commission of Rome Statute crimes.[9] The Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.[10] Finally, the Office recalls that it 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.[11]

8. The overall aim of the Office is be 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.

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

9. As noted in the Office's Policy Paper on Victims' Participation, the Office promotes direct interaction with victims and victims' associations at all stages of its activities and on an ongoing basis from the preliminary examination, investigation, pre-trial, trial to reparation stages.[12]

## 2. CASE SELECTION DOCUMENT

10. The Office will develop a Case Selection Document which identifies in broad terms the potential cases across all situations. As each new situation is opened for investigation, the Office will include the potential cases arising from that situation into the Case Selection Document. Initially, the Case Selection Document will be based on the conclusions from the preliminary examination stage, including the potential cases identified therein.[13] As investigations within each situation proceed, and bearing in mind the Office's strategy to conduct in-depth and open-ended investigations, the Office will gradually develop one or more provisional case hypotheses that meet the criteria set out in this policy paper. The Case Selection Document is a dynamic document that will be reviewed and updated accordingly.[14]

11. The Office will select cases for investigation and prosecution among the provisional case hypotheses identified in the Case Selection Document. Considering that there will normally be numerous cases that meet these criteria within any one situation or across several different situations, the Case Selection Document 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.[15]

12. 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 Document 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.[16]

13. Case selection and prioritisation will require regular updating on the basis of the information and evidence obtained during the course of investigations, any ongoing criminality, as well as the evolution of operational conditions that could impact the Office's ability to conduct successful investigations and prosecutions. As part of this process, not only could a selection or prioritisation decision need to be revisited over time, the case hypothesis itself may need to be adjusted to take into account the evidence that has been collected.[17] As such, case selection and prioritisation, as well as the preparation of the overall Case Selection Document, should be considered a dynamic process that seeks to continually refine the focus of the Office's investigations until such time as an article 58 application is made.

14. At least once a year, the Office will review the Case Selection Document with a view to revisiting its decisions regarding selection and prioritisation and adjusting the Case Selection Document in accordance with the level of information and evidence available and current operational conditions, as necessary.

15. The Case Selection Document, due to its very nature, will remain confidential. However, once a person has been arrested or appeared voluntarily before the Court, the Office will include as part of its public information activities its rationale for bringing forward the case for prosecution in the light of this policy paper.

## 3. GENERAL PRINCIPLES

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

### a) Independence

17. Article 42 of the Statute provides that the Office of the Prosecutor shall act independently of instructions from any external source.[18] 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.

18. 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

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

constrained by the information contained therein for the purpose of determining whether specific incidents or persons should be investigated or prosecuted.[19]

### b) Impartiality

19. The principle of impartiality, which flows from articles 21(3) and 42(7) of the Statute,[20] 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. In particular, 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).

20. 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 the Statute. However, 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 the crimes allegedly committed by them warrant investigation and prosecution. This may in fact lead to different outcomes for different groups. Cases against specific persons will only be brought if they meet the case selection and prioritisation criteria identified in this policy paper. Accordingly, 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.

### c) Objectivity

21. Case selection is an information and evidence-driven process. This means that the Office will select and pursue cases only if the information and evidence available or accessible to the Prosecution, including upon investigation, can reasonably justify the selection of a case.

22. As part of the case selection process, 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" in order to "establish 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 and the case hypothesis may be adjusted or rejected on the basis of further investigations.

23. 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. 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 Office will conduct a comprehensive evidence review involving Office staff external to the team to whom an investigation or prosecution is assigned, to scrutinise the sufficiency of the evidence for the relevant stage of the proceedings and to assess whether the Office can conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction.

## 4. LEGAL CRITERIA

24. The Office shall ensure that cases selected for investigation and prosecution fall within the jurisdiction of the Court; that they would be admissible in terms of complementarity and gravity; and, as a matter of policy, that they would not be contrary to the interests of justice. 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.

25. The factors that the Office considers in relation to these legal criteria are set out in the Office's Policy Paper on Preliminary Examinations.[21] The Office will apply these factors *mutatis mutandis* at the case selection stage. Nonetheless, 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.

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

### a) Jurisdiction

26. 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 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. 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]

27. 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 solely 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), even if that conduct has occurred on the territory of a State not party to the Statute. In the latter case, the Office will consider investigating such a person if he or she falls within the scope of the Prosecution's strategy for case selection and prioritisation as set out in this paper. In this regard, the Office will not consider as a bar to the exercise of criminal jurisdiction the fact that a dual national falls within the personal jurisdiction of the Court under one nationality, but not the other.

28. The referral of a situation by the UNSC under Chapter VII of the UN Charter concerning any UN Member State 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]

### b) Admissibility

29. 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.

30. In relation to complementarity, the Office will determine whether any State is exercising its 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]

31. If the national authorities are conducting, or have conducted, investigations[28] or prosecutions against the same person for substantially the same conduct, and such investigations or prosecutions 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 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.[29]

32. 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.[30] 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.[31]

### c) Interests of Justice

33. Considerations relating to the interests of justice will continue to be assessed on a case by case basis by the Office as a matter of best practice in the exercise of prosecutorial discretion over case selection. As set out in the Office's Policy Paper on the Interests of Justice,[32] *inter alia*, 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.

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

## 5. CASE SELECTION CRITERIA

34. 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 of the case hypothesis and investigation.[33] The Case Selection Document will be reviewed as investigations proceed, by applying the same case selection criteria.[34]

### a) Gravity of crime(s)

35. 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 situation[35] that are of concern to the international community as a whole.[36]

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, given that many cases might potentially be admissible under article 17, the Office may apply a stricter test when assessing gravity for the purposes of case selection than that which is legally required for the admissibility test under article 17.[37]

37. 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.[38]

38. 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).

39. The nature of the crimes refers to the specific factual elements of each offence such as killings, rapes, other sexual or gender-based crimes,[39] crimes committed against or affecting children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.

40. The manner of commission of the crimes may be assessed in light of, *inter alia*, the means employed to execute the crime, 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, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination held by the direct perpetrators of the crimes, the use of rape and other sexual or gender-based violence or crimes committed by means of, or resulting in, the destruction of the environment or of protected objects.[40]

41. The impact of the crimes may be assessed in light of, *inter alia*, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.

### b) Degree of responsibility of alleged perpetrators

42. Regulation 34(1) of the Regulations of the Office and the Prosecution's Strategic Plan[41] 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 the commission of the crimes. That may entail the need to consider the investigation and prosecution of a limited number of mid- and high-level perpetrators in order to ultimately 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.

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

43. 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 any motive involving discrimination; and any abuse of power or official capacity.[42]

44. 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.[43]

### c) Charges

45. 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 of the communities which have been affected by the crimes in that situation.

46. The Office will pay particular attention to crimes that have been traditionally under-prosecuted, such as crimes against or affecting children as well as rape and other sexual and gender-based crimes. It will also pay particular attention to attacks against cultural, religious, historical and other protected objects as well as against humanitarian and peacekeeping personnel.[44] In so doing, the Office will aim to highlight the gravity of these crimes, thereby helping to end impunity for, and contributing to the prevention of, such crimes.

## 6. CASE PRIORITISATION CRITERIA

47. The Office aims to investigate and prosecute all cases that are selected pursuant to the case selection criteria set out above.[45]

48. Prioritisation governs the process by which cases that meet the 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 Document and the Office will endeavour to investigate and prosecute such cases as circumstances permit, based on the criteria below.

49. Case 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. It takes into account the practical realities faced by the Office in its work, including the number of cases the Office can investigate and prosecute during a given period with the resources available to it. Accordingly, based on information and evidence, as well as the operational environment at any given time, the Office will need to prioritise among the selected cases within a situation and across the various situations.

50. For the prioritisation of cases, the Office will take into consideration the following strategic case prioritisation criteria:

(a) a comparative assessment across the selected cases, based on the same factors that guide the case selection;

(b) whether a person, or members of the same group, have already been subject to investigation or prosecution either by the Office or by a State for another serious crime;

(c) the impact of investigations and prosecutions on the victims of the crimes and affected communities;[46]

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

(d) the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes; and

(e) the impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis.[47]

51. The Office will also take into consideration the following operational case prioritisation criteria, to ensure that the Office focuses on cases in which it appears that it can conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction.[48] Although these considerations will typically arise in all of the Office's activities and routinely require the adoption of measures to mitigate and manage their effect, the criteria below will be used to assess operational viability in a relative manner across selected cases:

(a) the quantity and quality of the incriminating and exonerating evidence already in the possession of the Office, as well as the availability of additional evidence and any risks to its degradation;

(b) international cooperation and judicial assistance to support the Office's activities;

(c) the Office's capacity to effectively conduct the necessary investigations within a reasonable period of time, including 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 that might arise from their interaction with the Office; and

(d) the potential to secure the appearance of suspects before the Court, either by arrest and surrender or pursuant to a summons.

52. The above strategic and operational case prioritisation criteria stand in no hierarchical order to each other. The specific weight to be given to each individual criterion will depend on the circumstances of each case.

53. As the investigations proceed, the Office shall continuously re-evaluate, based on the same criteria, whether it can continue to conduct the necessary investigations leading to a prosecution with a reasonable prospect of conviction. 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. It may also reconsider such a decision if the circumstances have changed favourably, including the extent to which the Office has been able to overcome any operational obstacle(s) to conducting an effective investigation.

54. 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 prosecutions 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) and it will in any event cooperate with national authorities, as appropriate.

55. 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.[49]

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

## ENDNOTES

1 *See* ICC-ASP/14/Res.4, para. 35.

2 *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.

3 The Appeals Chamber has held that "the 'conduct' that defines the 'case' is both that of the suspect [. . . ] and that described in the incidents under investigation which is imputed to the suspect. 'Incident' is understood as referring to a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators": *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, paras. 1, 62.

4 *Policy Paper on Preliminary Examinations,* ICC-OTP, November 2013.

5 The Prosecutor's discretion is reflected, *inter alia*, in articles 14(1), 42(1) and 58(1) of the Statute.

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

7 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".

8 *Paper on some policy issues before the Office of the Prosecutor,* ICC-OTP September 2003.

9 *Strategic Plan, 2016-2018*, ICC-OTP, 16 November 2015, paras. 92-98.

10 *See* article 93(10) of the Statute.

11 *Policy Paper on the Interests of Justice*, ICC-OTP 2007, p. 7.

12 Information can be sent to: ICC Office of the Prosecutor, Communications, Post Office Box 19519, 2500 CM The Hague, The Netherlands; by email to otp.informationdesk@icc-cpi.int, or by fax to +31 70 515 8555. *Policy Paper on Victims' Participation*, ICC-OTP, April 2010, p. 1.

13 *Policy Paper on Preliminary Examinations,* ICC-OTP, November 2013, para. 43.

14 *See* regulations 33 and 34 of the Regulations of the Office of the Prosecutor. *See also Strategic Plan, 2016-2018*, ICC-OTP, 16 November 2015, para.34: the open-ended aspect of the investigations means that the Office first identifies alleged crimes (or incidents) to be investigated within a wide range of incidents. Following this meticulous process, alleged perpetrators are identified based on the evidence collected. This approach implies the need to consider multiple alternative case hypotheses and to consistently and objectively test case theories against the evidence – incriminating and exonerating – and to support decision-making in relation to investigations and prosecutions.

15 *The report of the Court on the Basic Size of the Office of the Prosecutor*, ICC-ASP/14/21, 17 September 2015.

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

17 *See* regulation 35(4) of the Regulations of the Office of the Prosecutor. See also paras. 51, 53 below.

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

19 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.

20 *See also* Code of Conduct for the Office of the Prosecutor, 5 September 2013 (OTP2013/024322), Chapter 2, Section 6.

21 *Policy Paper on Preliminary Examinations*, ICC-OTP, November 2013, paras. 34-71.

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 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, 15 November 2011, paras. 178-179; *Situation in Georgia*, "Decision on the Prosecutor's request for authorization of an investigation" ICC-01/15-12, 27 January 2016, para. 64.

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.

24 *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "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-01/09-01/11-307 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

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press

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.

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.

28 The Appeals Chamber has held that the term "investigations" in this context signifies "the taking of steps directed at ascertaining whether those suspects are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. The mere preparedness to take such steps or the investigation of other suspects is not sufficient." *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, "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-01/09-01/11-307 OA, 30 August 2011, para. 41.

29 *See* paras. 7-8 above; *see also* para. 50(b) below.

30 *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.

31 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.

32 *Policy Paper on the Interests of Justice*, ICC-OTP, 2007.

33 *See* para. 6 above.

34 *See* para. 13 above and paras. 51, 53 below.

35 *Strategic Plan, 2016-2018*, ICC-OTP, 16 November 2015, paras. 34-37, 104.

36 *Preamble,* para. 4, Statute.

37 *See* para. 32 above.

38 *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.

39 *Policy Paper on Sexual and Gender-Based Crimes*, ICC-OTP, June 2014.

40 *See* articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute.

41 *Strategic Plan, 2016-2018*, ICC-OTP, 16 November 2015, para.34, last bullet point.

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

43 *See The Prosecutor v. Jean-Pierre Bemba*, "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3343, 21 March 2016, para. 172; *The Prosecutor v. Jean-Pierre Bemba*, "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/05-01/08-3399, 21 June 2016, para. 16.

44 The Office aims to issue a policy paper for each of the above priority crimes. *See Policy Paper on Sexual and Gender-Based Crimes*, ICC-OTP, June 2014. Other policy papers will be published on the Court's website (https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx).

45 As noted in paragraph 13 above, case selection decisions will also need to be reviewed and revisited as investigations progress.

46 *See* para. 9 above.

47 *See* para. 20 above.

48 *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.

49 Regulation 60, Regulations of the Office of the Prosecutor.

https://doi.org/10.1017/ilm.2018.49 Published online by Cambridge University Press