



Office of the Prosecutor, International Criminal Court, *Draft Policy Paper on Case Selection and Prioritisation*

Comments of Human Rights Watch

May 3, 2016

Human Rights Watch appreciates this opportunity to provide comments on the draft “Policy Paper on Case Selection and Prioritisation” (the Policy Paper) of the Office of the Prosecutor (OTP) at the International Criminal Court (ICC), as well as the opportunity to participate in consultations on the draft Policy Paper with civil society held at the ICC on March 9, 2016.

Critical importance of case selection decisions

This Policy Paper is of singular importance. The prosecutor’s selection of cases—whom to try and for what—provides the earliest and most visible measure of whether and how the court will bring justice to the victims of grave international crimes in the situations before the court. As a result, the ability of the ICC to have a positive impact in communities affected by the crimes to be tried—that is, for the court’s delivery of justice to be accessible, meaningful, and perceived as legitimate—will be closely linked to its selection of cases. Enhancing the odds for the court’s impact for victims and within affected communities should be, in our view, a central strategic goal for all court officials.

To a large extent, the OTP’s choice of cases also will provide the framework in which the court’s other actors need to carry out their own responsibilities. For example, under the court’s case law, the prosecutor’s selection of alleged perpetrators and charges has practical implications for victims. It determines which victims will be eligible to have their voices heard as direct participants in proceedings and it may determine which victims are eligible for reparations in the event of a conviction. This places a large burden on the shoulders of the OTP to drive the court’s work in a manner that is sensitive to achieving impact.

The OTP’s case selection choices are not only relevant for affected communities, however. While we believe that an ICC that is valued within local communities may be more resilient to unprincipled and damaging attacks, how the OTP exercises prosecutorial discretion in the selection of cases may also directly affect broader perceptions of the ICC within the international community, with knock-on effects for the credibility and support provided to the institution. Selection of cases and the fair and effective prosecution of those cases are, of course, critical to fulfilling the court’s mandate to fight impunity.

Unfortunately, missteps in the selection of cases to date have created significant credibility gaps for the court, led to perceptions of bias in the court's work, and undermined its potential positive impact in affected communities. In some cases, they have led to a loss of trust and confidence in the court as an independent and impartial judicial institution.

This has taken numerous forms. It has occurred where there has been a failure to bring cases where more than one party to a conflict has committed serious crimes (as in Libya and in the Kivus investigation in the Democratic Republic of Congo), or to seek to establish individual criminal responsibility at senior levels of leadership (as in the Ituri investigation in the Democratic Republic of Congo), or to minimize the time lag between cases brought against different parties to the conflict (as in the Ituri investigation in Democratic Republic of Congo and in Côte d'Ivoire) or to provide adequate explanations as to why those cases are not being pursued (as in Uganda), or to present charges sufficiently representative of underlying patterns of crimes (as in the *Lubanga*, *Ongwen*, and *Gbagbo and Blé Goudé* cases).¹ Beyond specific missteps, in all open situations under investigation, the number of cases brought by the OTP has been insufficient to address accountability needs. Many of these gaps, some long-standing, continue to need to be addressed by future ICC investigations.

We appreciate that the OTP may view these decisions differently, and we also recognize that case selection decisions are as challenging as they are important, if not more so. Ongoing criminality within situations and the evolving availability of evidence to support cases selected for prosecution increase the challenge of achieving outwardly coherent approaches. But we stress the missteps as we see them to underscore the importance we attach to the OTP's development of a policy that incorporates lessons learned. A final Policy Paper should equip the OTP to arrive at sound decisions going forward—in both existing and new situations—and to communicate effectively about those decisions.

Please find below select comments on certain aspects of the draft Policy Paper. We previously commented on the OTP's 2006 draft Policy Paper on "Criteria for Selection of Situations and Cases."² With regard to the selection of cases, our comments expressed concerns regarding preserving impartiality in the OTP's selection of cases and the need for the OTP to communicate about selection decisions where they may give rise to perceptions of bias. Our comments also welcomed an emphasis on pursuing senior officials, but called on the OTP to ensure flexibility in identifying suspected perpetrators where, for example, prosecuting lower-ranking commanders is necessary to undercut a pervasive culture of impunity, achieve greater impact for victims, or for the implementation of an effective prosecutorial strategy in a particular country situation. These concerns are largely addressed by the current draft Policy Paper, but we have incorporated some

¹ See Human Rights Watch, *Making Justice Count: Lessons from the ICC's Work in Côte d'Ivoire*, August 2015, <https://www.hrw.org/report/2015/08/04/making-justice-count/lessons-iccs-work-cote-divoire>; "Libya: New ICC Investigation Needed Amid Crisis," Human Rights Watch news release, May 11, 2015, <https://www.hrw.org/news/2015/05/11/libya-new-icc-investigation-needed-amid-crisis>; Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 2011, <https://www.hrw.org/report/2011/09/15/unfinished-business/closing-gaps-selection-icc-cases>.

² See Human Rights Watch, "The Selection of Situations and Cases for Trial before the International Criminal Court," October 26, 2006, <https://www.hrw.org/news/2006/10/26/selection-situations-and-cases-trial-international-criminal-court>.

of our earlier comments—regarding communication needs and the risks of a sequenced approach to cases—and it may be helpful to read these in the context of our earlier submission.

1. Articulating an overarching vision of the OTP’s contribution to accountability

As discussed below, we see the introduction of a “case selection plan” for each situation as a positive step forward that will assist the OTP in approaching its work in each situation in a more holistic manner. What may not come across sufficiently clearly in the draft Policy Paper, however, is a clear articulation of the OTP’s vision when it comes to its role in addressing accountability needs in a given situation.

The draft Policy Paper (correctly) notes that the OTP’s role is limited, and complementary to national jurisdictions, as well as to transitional justice mechanisms. But this defines the OTP’s role in the negative. It may be more helpful to define a proactive vision against which a case selection plan can be developed, and its implementation measured. In other words, what does the OTP seek to achieve once its case selection decisions are added up together? What will be the sum of the OTP’s contributions to addressing accountability needs in a given situation?

This sense of vision is something separate to specific criteria for case selection and prioritization; the application of those criteria, guided by the general principles, should add up over time to achieving the OTP’s vision. It may be particularly important in situations of ongoing criminality; new crimes may require new selection decisions, but where the OTP can refer back to an initial vision, this can help to identify cases that best implement its mandate even as the crime base and actors evolve.

A clear vision should also assist the OTP with formulating exit strategies. This is so because it could identify what needs to be achieved for the OTP to consider its work complete, including more intensive engagement with national authorities to enable them to carry out their responsibilities to pursue additional cases.

One possible vision could be to address all patterns of underlying criminality in a situation. This commitment is consistent with the Rome Statute preamble, but presently only reflected in the draft Policy Paper in the third case selection criterion, “Charges.” There the OTP indicates that its aim is “to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished.” While this is relevant to the identification of specific charges, it strikes us as perhaps a more far-reaching goal that should sit above specific criteria.

2. Impact as a general principle

The draft Policy Paper identifies independence, impartiality, and objectivity as general principles guiding case selection and prioritization.

We emphasized in our 2006 comments the importance of impartiality as a general principle. As the draft Policy Paper points out, impartiality may not lead to mounting prosecutions against all parties in a situation. But the absence of cases against some parties may give rise to profound perception problems. We continue to believe that it is essential to provide public reasons where not all parties are prosecuted in a given situation. Providing comprehensive reasons—and

communicating these reasons in an effective manner to the communities most affected by the crimes at issue—will improve transparency, and may help to bolster the credibility of the OTP and the ICC.

Alongside the cornerstone principles of independence, impartiality, and objectivity, Human Rights Watch recommends adding “impact in affected communities” as a general principle governing case selection and prioritization.

As indicated above, we see achieving impact in affected communities as a key strategic goal for the ICC. While the ICC has multiple constituencies, affected communities lie at the heart of the court’s work, and victims and communities that have been directly affected by atrocity crimes are the court’s chief stakeholders. These communities are diverse, and are likely to include victims as well as supporters of defendants. In our experience, impact requires that the court’s proceedings are accessible, meaningful, and perceived as legitimate by these key stakeholders. This sense of immediate impact is likely to be a necessary pre-requisite for achieving broader goals, including catalyzing additional national prosecutions and addressing root causes of criminality in order to deter future crimes.

The draft Policy Paper’s general principles of independence, impartiality, and objectivity are all important to building the ICC’s legitimacy in affected communities, a key element of impact. And, as discussed below, a commitment to representative charges has particular importance to responding to the experience of victims. But the general principles presently do not speak specifically to a concern to deliver meaningful justice to affected communities. A clear, overarching commitment to achieving local impact would signal the central place of the delivery of justice to these communities.

3. Case selection plan

The introduction of a case selection plan is a welcome development, and the development of this plan, refined on the basis of investigations, should enhance the OTP’s holistic approach to its situations.

At certain points in the past, the OTP’s case selection choices were seemingly driven by a more ad hoc approach, that is, the selection of one or two cases, followed by additional cases, if and when resources permitted. An overarching view of what the OTP seeks to achieve in any given situation from the outset of a situation—or as soon as investigations permit the identification of cases—should assist long-term planning, including as to resource needs.

We also see a close connection here between instituting this practice and the OTP’s announced changes to its prosecutorial policy, namely, its commitment to ensure more open-ended, in-depth investigations leading to trial-ready cases from the earliest phase of proceedings. It may be helpful to refer in the draft Policy Paper to these prosecutorial policies and shifts in investigative approaches as the basis for the development of sound case selection plans.

A case selection plan should also assist the OTP in its communication around its decisions because, ideally, it will be possible to communicate specific developments against the backdrop

of a clear plan as to what the OTP seeks to achieve overall. This could help to inform expectations and mitigate perception problems.

In addition, a case selection plan developed at the outset recognizes that it is difficult to fix gaps in case selection—whether as to the need for additional charges in a particular case or the need for additional cases—with the passage of time. Judicial proceedings follow their own timetable, one which is not fully within the control of the OTP. Once a suspect is in custody, for example, judicial deadlines and fair trial rights may make it difficult to close gaps, for example, in the addition of charges. More generally, it is unlikely that demand for the ICC’s involvement in more and more situations will abate. As new situations are opened, it becomes difficult for the OTP to return to situations and to have the resources necessary to invest in closing gaps in case selection. A clear and specific view as soon as investigations permit as to what contributions the OTP will seek to make to accountability is important to allocate resources appropriately, at least in situations without ongoing criminality.

We understand that the OTP is continuing to consider the question of which cases should be included in the case selection plan. Should the plan be a mapping of all potential cases? Or is the case selection plan a map of what the OTP intends to do in a given situation?

In our view, the case selection plan should be the latter.

We do see tremendous benefit to a comprehensive mapping of all cases; such a mapping or elements of that mapping could be shared, at an appropriate time, with national authorities, whether in the situation country or in other jurisdictions, to facilitate additional prosecutions. But the case selection plan should be the manifestation of the OTP’s vision of its role and responsibilities in a given situation. What cases does it seek to do to complete its mission? As indicated in the draft Policy Paper, the plan, of course, can be revisited. In our view, however, it is preferable to maintain the posture presently adopted by the draft Policy Plan, that is a commitment to “investigate and prosecute *all* cases that are selected pursuant to the case selection criteria” (para. 46, emphasis added). It is this vision of the totality of the OTP’s engagement in a given situation that we feel has at times been missing in past, and which would best support long-term planning and communications strategies.

4. Case selection criteria

Human Rights Watch welcomes the retention in the draft Policy Paper of a commitment under the third case selection criterion of “Charges” to “represent as much as a possible the true extent of criminality which has occurred within a given situation” and to ensure that “charges chosen will constitute, whenever possible, a representative sample of the main types of victimization and the communities which have been affected by the crimes in that situation.”

In our view, the formulation of charges across selected cases that include incidents representative of the gravest crimes and that reflect the underlying patterns of crimes committed in the situation, that is, what crimes, committed where, and by which groups, is essential to achieving impact in affected communities. This is a key part of the ICC’s overall mission to fight impunity for the most serious crimes. While a balance needs to be struck within a specific case with regard to charges that can also contribute to efficient trials, this criterion can help ensure that across its

cases, the ICC remains responsive to the experiences of victims. And where cases within a situation do not meet this criterion, our observation of ICC practice suggests that the court's legitimacy can be undermined in the eyes of affected communities, lessening impact.

We note that the draft Policy Paper appears to contain a new element to the OTP's pre-existing commitment to representative charges, namely, that charges are not only a representative sample of the main types of victimization, but also of the communities affected by the crimes. It would be helpful for the OTP to consider elaborating further on what it means by a "representative sample of the communities affected." It may be difficult to justify including charges stemming only from certain localities, assuming that crimes of a similar gravity connected to the same group of perpetrators also have been committed elsewhere.

In addition, it may be helpful to consider how the OTP will arrive at its determination of what constitutes a "representative sample of the main types of victimization." In our view, one element of this should be increased consultation with affected communities and we would welcome an explicit commitment to that end within the Policy Paper. While that commitment is contained in a number of existing policy papers, and, in particular in the policy paper on sexual and gender-based crimes, there is a need to bring together and to consider how best to implement consultations in practice. The OTP should consider developing a strategy specifically guiding its consultations with victims and their representatives regarding case selection, which could take into account (a) how to make the best use of analysis conducted during the preliminary examination process, particularly when it comes to information collected as to the "interests of victims"; (b) how to make the best use of the written, victims' representation process conducted pursuant to article 15; (c) whether an article 15-like process with regard to written, victims' representations should be replicated, even where investigations are opened pursuant to state or Security Council referrals; and (d) how to conduct consultations with victims, while taking steps to minimize risks to them and their representatives or intermediaries.

5. Prioritization

Perhaps the most challenging element of the draft Policy Paper is its introduction of case prioritization criteria.

As a preliminary matter, we understand that the draft Policy Paper intends to draw a line between the criteria used to select cases, and those that will govern only the "roll-out" of those cases. This makes clear that the more operational criteria governing prioritization are distinct from a principled identification of the cases the OTP will seek to do to fulfill its mandate in a given situation. The OTP should consider revisiting language in paragraph 47 to make clear this hierarchy.

More substantively, we recognize that, given the resource constraints faced by the court and the high number of situations already opened, prioritization between cases is a difficult fact-of-life. We are concerned nonetheless that the OTP not place too much reliance on prioritization as a means to square the circle between selected cases and available resources.

This is so for a number of reasons.

First, “prioritization” appears to be a different concept from the OTP’s past practice of “sequencing.” Sequencing applied even to the selection of cases, that is, one case would be selected for investigation, and, then, once completed, the next case would be selected for investigation. Prioritization under the draft Policy Paper, by contrast, requires the identification first of all cases the OTP will prosecute, and only next a sequencing in the investigation or roll-out of those cases.

And yet, the public results of prioritization may look very much like sequencing, that is, long time delays in between cases, with consequences for perceptions of the court’s impartiality and legitimacy. The court’s experience to date—including perception problems in eastern Democratic Republic of Congo and Côte d’Ivoire—suggests that what appears publicly as a sequenced approach may be difficult to manage even through strengthened communication strategies.

Second, the operational criteria identified to guide prioritization may actually be influenced by prioritization. A case that is deprioritized may never be capable of prioritization because time delay may worsen, rather than improve these factors. The prioritization and bringing of one case may actually worsen the investigative climate for future cases, e.g., by eliminating incentives for cooperation, or because credibility gaps with victim communities due to investigation choices results in a lack of future cooperation from witnesses. In spite of the OTP’s commitment that “deprioritization” is not “deselection,” deselection may be the de facto result.

Third, the identification of some criteria, for example, the availability of international cooperation and judicial assistance, or witness protection, may actually signal to perpetrators how to avoid investigations into their conduct.

Admittedly the fact that a certain degree of prioritization is likely necessary from a resource perspective poses significant challenges, not easily resolved. One limited suggestion could be to “demote” prioritization within the context of the draft Policy Paper. At the moment, selection and prioritization appear on the same level of importance, and prioritization is given considerable prominence and an almost routine quality in the draft Policy Paper. The OTP could clarify that prioritization is used as a last resort rather than a first resort, for example, in situations with multiple armed groups making simultaneous investigations truly impossible.

6. Revisiting budgetary assumptions

To give best effect to a final Policy Paper in both open and future situations, we recommend that the OTP revisit budgetary assumptions for investigations contained in the Basic Size.³

The ICC is not expected to try all crimes or all perpetrators, and, therefore, there will be limits to the number of cases brought by the OTP in each situation, as well as to the scope of these cases. To be sure, not every situation before the ICC will be the same, and, therefore, it is difficult to identify as a rule of thumb how many cases will be necessary for the OTP to achieve its goals. Still, in situations where multiple groups have committed a wide range of ICC crimes in multiple

³ See Assembly of States Parties, “Report of the Court on the Basic Size of the Office of the Prosecutor,” ICC-ASP/14/21, September 17, 2015, https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-21-ENG.pdf (accessed May 3, 2016).

localities, it is highly likely that implementing a case selection policy that “represent[s] as much as possible the true extent of the criminality” will require investigation and trial of several cases.

Indeed it is our observation that the ICC’s intervention in its situation countries to date has likely been too limited to fully achieve the general principles and the specific legal and case selection criteria articulated in the draft Policy Paper. These limits have intensified as the number of situations open before the court has increased, without sufficient increases in funding to support its mandate. At a time of grave human rights abuses in many places around the world, there may be a difficult and unresolvable tension between the OTP’s view that it has no discretion in the selection of situations (that is, once a situation meets legal criteria, the OTP needs to open or seek authorization to open an investigation) and its ability to fully meet its case selection goals within those situations. The draft Policy Paper already refers to the prospect of prioritization of cases not only within situations, but also across situations. Under these circumstances, it may be an impossible task to ever fully develop a robust practice of case selection that achieves the principles identified in the draft Policy Paper.

It seems clear, however, that the current Basic Size assumption of six active cases per year is far too limited. The final Policy Paper will need to be applied both in existing situations and new situations.

The OTP itself has acknowledged this problem. The Basic Size document indicates that the seven new investigations it would have the capacity to open by 2018 will not absorb “the already known minimal number of investigations ... for which an investigation would be required or justified.” It refers to a then-ongoing “systematic mapping of the required investigations in existing situations which will lead to an increase” in the number of investigations.⁴ Ideally this mapping would be carried out again with reference to the final Policy Paper. In the meantime, states parties have not fully funded the first step-up in the OTP’s budget needed to achieve the Basic Size by 2018. Taken together, this suggests that the OTP will be left far short of the resources it needs to implement the draft Policy Paper.

“Available resources” is included in the draft Policy Paper as a prioritization criteria governing the roll-out of selected cases. But, as indicated above, we believe that the OTP should be cautious in any over-reliance on prioritization.

We recognize that the political space currently available to the court to articulate its resource needs is insufficient. Human Rights Watch is committed to raising at every opportunity the capacity crisis facing the court. We are well aware that it will likely take considerable time to shift states parties’ understanding of the court’s needs, and a willingness to fund them. But a Policy Paper that is applied exceptionally, rather than as a rule, will lessen its value. The OTP should use the finalization of its draft Policy Paper as an opportunity to articulate to states parties a more realistic vision of what it needs to achieve its mandate.

⁴ Ibid., paras. 24-25.