

Criteria for Prioritizing and Selecting Core International Crimes Cases

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**Essential Qualities of Prioritization Criteria:
Clarity and Precision; Public Access;
Non-Political and Confidence-Generating
Formulations; Equal and Transparent
Application; and Effective Enforcement**

Claudia Angermaier

19.1. Introduction

In order to define the essential characteristics of case prioritization criteria, it is important to consider the purpose served by these criteria. Case prioritization criteria may have a benefit at the internal level, meaning for the work of the prosecution office, as well as at the external level, for instance *vis-à-vis* the public.

19.2. The Purpose of Case Prioritization Criteria

At the internal level criteria serve as guidelines for the decisions of individual prosecutors. They ensure that such decisions follow the overall prosecutorial strategy of the prosecutor's office. More importantly, however, they ensure that decisions are in consistency with the fundamental principle of equality before the law. Overall they therefore enhance the quality of prosecutorial decision-making. Finally, they may allow for a rational allocation of limited resources.

At the external level they provide a basis for justifying the prioritization of certain cases *vis-à-vis* victims, other interest groups and the public at large. They may prevent the perception that decisions are taken arbitrarily. This is also particularly important for the individual accused. Criteria thus also serve as a basis for holding the prosecutor accountable for his or her decision to prioritize a certain case for prosecution. However, they may also serve as a protection tool against various external actors that seek to influence the prosecutor's decision

regarding the prioritization of cases. The requests of such actors to prioritise a specific case for prosecution can be evaluated against the defined and publicly available prosecutorial case prioritization criteria. If requests are not in conformity with these criteria, they can be rejected as impermissible political interferences with the work of the prosecution office. This has been described as second-order accountability.¹ Overall, the prosecutor's independence in his or her decision-making therefore may be strengthened. Moreover, such transparent and rational decision-making enhances the legitimacy of the prosecution office.²

19.3. Essential Qualities of Case Prioritization Criteria

Clarity and precision are essential qualities that case prioritization criteria should have for them to function effectively at the internal level. It is only when the content of criteria can easily be understood that they can be readily applied by individual prosecutors. These qualities are therefore important for ensuring that criteria function as clear guidelines for the work of prosecutors. Furthermore, the criteria may not be inherently biased or formulated in biased terms; otherwise the application of such criteria will lead to a violation of the principle of fairness and equality.

There should be a balance between too vague and too narrow a description of the criteria. If the criteria are formulated in very broad terms, there may be too much leeway in their application. This entails the risk of treating similarly situated cases very differently. On the other hand, too narrow a definition may render the criteria inapplicable because they lack the required flexibility to be applied to different cases.³

It does not, however, suffice to merely adopt criteria and hope for an equal and consistent application. Rather there needs to be some

¹ A.M. Danner, *Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court*, (2003) 97 *AJIL* 3, 510, 512.

² See *ibid.*, 535 *et seq.* for a discussion of the concept of legitimacy as both actual and perceived legitimacy.

³ See also *ibid.*, 549 *et seq.*

form of review mechanism. This could take the form of an internal review within the prosecution office but may also be affected by an external review, for instance a review by the judiciary. Through an effective enforcement system the consistency and equality of application can be ensured. Furthermore, a fundamental prerequisite for an objective prioritization of cases is an objective and comprehensive investigation of all facts; otherwise it is likely that a skewed result will be achieved.

The issue of equal application is not only relevant at the internal level but is essential to ensure the legitimacy of the prosecutor's actions *vis-à-vis* the public and in particular the victims. In relation to the prosecution of core international crimes the charge that decisions are politically driven is quickly made. Without a set of publicly available criteria it is more difficult to respond to such a charge. In order to provide accountability but also provide protection against political pressure, the criteria need to be formulated in clear, non-political and confidence-generating terms.

The United Nations Guidelines on the Role of the Public Prosecutor (1990)⁴ stipulate:

In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.⁵

⁴ *Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, 27 August to 7 September 1990, UN doc. A/CONF.144/28/Rev.I at 189 (1990), reprinted in E. Myjer, B. Hancock and N. Cowdery (eds.), *Human Rights Manual for Prosecutors*, International Association of Prosecutors (Nijmegen: Wolf Legal Publishers, 2003), p. 141.

⁵ *Ibid.*, para. 17.

Similarly, the Recommendations of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System (2000)⁶ state:

With a view to promoting fair, consistent and efficient activity of public prosecutors, states should seek to:

[...]

– define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making.

b. The above-mentioned methods of organisation, guidelines, principles and criteria should be decided by parliament or by government or, if national law enshrines the independence of the public prosecutor, by representatives of the public prosecution.

c. The public must be informed of the above-mentioned organisation, guidelines, principles and criteria; they shall be communicated to any person on request.⁷

The adoption of a set of criteria is, however, not sufficient; only if the decision-making of prosecutors is actually governed by these criteria, can they enhance the public's confidence in the prosecutor's work.

⁶ Recommendation Rec(2000) 19 of the Committee of Ministers to Member States on the Role of the Public Prosecution on the Criminal Justice System, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, reprinted in E. Myjer, B. Hancock, and N. Cowdery (eds.), *Human Rights Manual for Prosecutors*, *op. cit.*, p. 147.

⁷ *Ibid.*, para. 36.a.

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This volume contains papers presented at a seminar of the Forum for International Criminal and Humanitarian Law in Oslo on 26 September 2008 with the same title as the publication. It has 24 contributions by some of the leading practitioners and experts in international criminal justice and policy. Armed conflicts tend to generate too many war crimes and crimes against humanity for all persons responsible to be held criminally accountable. This volume does not address what should be done with cases which probably can not go to trial due to limited capacity in criminal justice systems. That is the subject of FICHL Publication Series No. 9. Rather, this volume concerns the best way to select and prioritize the cases that should be investigated and prosecuted first. This is a question of the quality of discretion in the management of criminal justice for atrocities. The Forum seeks to start a debate on the role of criteria in case selection and prioritization through this volume.

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