

Case Mapping, Selection and Prioritisation of Conflict and Atrocity-Related Crimes

Case Matrix Network

The Case Matrix Network ('CMN') provides knowledge-transfer and capacity development services to national and international actors in the fields of international criminal and human rights law. We seek to empower those working to provide criminal accountability for core international crimes and serious human rights violations, by providing access to legal information, legal expertise and knowledge tools. The CMN is a department of the Centre for International Law Research and Policy ('CILRAP'), which is an international non-profit organisation, registered in Belgium.

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1. Introduction

Contemporary armed conflicts are characterised by an overwhelming range and scale of illegal conduct, often carried out against vulnerable or marginalised groups. Justice efforts should address the total character of victimisation, including the geographic area of victimisation and the affected communities, as well as the responsible organisations and individuals. However, it is rarely possible to provide criminal justice for all violations. Justice institutions are often limited in the number of cases that can be processed at any one time: without an objective and transparent strategy, cases will be pursued on an *ad hoc* basis without a clear structure – such as first come first served – while many others will remain unaddressed. This type of selective approach may – inadvertently or purposely – be discriminatory, partial or unfair and could result in *de facto* impunity for certain offences, perpetrator groups or victimised groups.

Case mapping, selection and prioritisation aim to address these challenges by enabling the totality of victimisation in any conflict to be addressed in an impartial and socially sensitive way. They seek to balance the quest to end impunity for the perpetrators of mass atrocity with the constraints of justice and accountability mechanisms, ensuring a more efficient and transparent administration of justice. This does not necessarily mean the deselection of cases, nor the closing of all but a handful of cases, but rather establishes an objective and transparent process for the allocation and phasing of cases within and across appropriate justice mechanisms.

Criminal prosecution should prioritise cases involving offences committed in the areas and communities most affected by violence. Equally, organisations or institutions most responsible for the commission of offences should face criminal justice to a greater extent than, or ahead of, organisations and institutions of lesser significance. Other cases or incidents may be allocated to other accountability mechanisms, depending on the post-conflict needs of the country and its legal framework (see Table 1).

These Guidelines set out the approach recommended by the CMN, which is based on our experience in different post-conflict settings as well as empirical observation and theoretical research. They outline:

- Key general principles that help to guide case mapping, selection and prioritisation;
- The scope and process for mapping backlogs of open case files as well as broader incidents;
- Considerations on the adoption of a policy to guide any case mapping, selection and prioritisation process;
- Model criteria for the selection and prioritisation of cases;
- CMN services in case mapping, selection and prioritisation.

CMN case mapping, selection and prioritisation methodology

CMN has developed a complete case mapping, selection and prioritisation methodology, which supports national actors in the adoption of an objective and transparent policy to address these questions. This includes the comprehensive mapping and analysis of the totality of victimisation (including the backlog of all open case files); the adoption of objective criteria for selection and prioritisation and their inclusion in a broader strategic policy that establishes the rationale for case mapping, selection and prioritisation and the allocation to different justice procedures (including abbreviated criminal proceedings); the application, review and monitoring of criteria for selection and prioritisation; outreach; and assessment of the necessary material and infrastructural resources. Our case mapping, selection and prioritisation methodology has informed the practice of several institutions, including in Bosnia and Herzegovina and the Democratic Republic of Congo, and the International Criminal Court ('ICC'). Further information is available on request.

Table 1: PROSECUTION STRATEGY FOR CONFLICT AND ATROCITY-RELATED CRIMES



2. General principles of case selection and prioritisation



Current selection or prioritisation practices should be scrutinised

Conflict-related cases are often addressed selectively, taking cases forward as ‘first come first served’, on the ready availability of evidence or as a result of political or public pressure. Delays almost always occur leading to a greater backlog and increased pressure on criminal justice services. Existing selection and prioritisation practices should be reviewed to identify the realities of conflict-related adjudication, including practices which may involve inadvertent or purposeful bias, undue delays, limitations on the fulfilment of fair trial practices, as well as victim and witness protection and support.

Mapping of open case files should be carried out to determine the totality of victimisation

An inventory of existing open case files should be undertaken and should form the basis of a comprehensive review of the factual circumstances of the conflict to understand the extent of victimisation caused and the available legal framework/s for accountability. This process will inform the choice of specific indicators of the selection and prioritisation criteria and will ensure that the cases that are selected and prioritised remain representative of the overall victimisation. In many circumstances it may be optimal/necessary to extend the mapping exercise to include incidents registered with other bodies – such as national human rights institutions or ombudsmen, commissions or inquiries – and beyond.

Case selection and prioritisation should be consistent but flexible

Case selection should be *consistent but flexible*, taking into account newly acquired or developed evidence – or any other new information – that may render a case more or less of a priority. Exceptions can be made for justifiable tactical reasons to pursue cases where the alleged perpetrator holds greater liability. The decision to prosecute a specific case is a balancing exercise, requiring an assessment of the interests of the victims, the accused and the community as a whole. The legitimacy of the use of criteria and the cases selected must also be considered to ensure that certain types of crimes, perpetrator groups or victims are not prioritised disproportionately – or conversely – ignored or overlooked. The CMN criteria provide a framework from which the interests of the victims, the accused and the community as a whole can be assessed and balanced.

A selection and prioritisation policy should be adopted

The selection and prioritisation policy should provide a roadmap for the pursuit of justice by addressing the specific needs and realities of the conflict, as well as the legal system and its resources. It should respond to the backlog of cases and violations, fair trial considerations, issues of legality and resource/capacity considerations, and include formal and objective criteria that will guide the selection and prioritisation process.

Outreach to affected communities should be conducted

Affected communities and society at large often view justice mechanisms with suspicion or even hostility. This can be exacerbated by the absence of transparent and objective information on the character of the conflict in general and their experience of the conflict and the judicial response to it, in particular. By following a clear and objective mapping, selection and prioritisation policy it is possible to engage with concerns – of the scope of arbitrariness or of accusations of impunity, bias or targeting – and provide a transparent standard by which prosecutors' decisions can be evaluated. Accordingly, there are credible justifications for publicising case selection and prioritisation practices, in order to demonstrate the legitimacy of the priorities and the objective factors that inspire them.

3. Mapping open case files and the extent of victimisation

Case mapping, selection and prioritisation work on the principle that justice efforts – particularly criminal prosecutions – should be representative of the overall victimisation of a conflict, including the offences, perpetrators and victims. This requires the mapping of the violations committed, which will include accurate and reliable data on the criminal conduct, the perpetrators and the victims. Existing backlogs of open case files and complaints from the criminal justice system will need to be mapped in order to manage the process of selection and prioritisation and to ensure that the most senior level and most involved perpetrators are identified and charges against them well managed. Broader *incident mapping* of victimisation may also be necessary, particularly where the registration of formal complaints has been severely impeded or compromised or where the scale and character of complaints is heavily disputed.

Backlogs of existing open case files

Most jurisdictions experience a backlog of cases or complaints of violations committed as part of a conflict or atrocity. All existing open case files or complaints from the criminal justice system that may amount to core international crimes, violations of international humanitarian law or serious human rights violations – including new cases – should be mapped in order to create a quantifiable inventory of existing cases.

Incident mapping

In many situations it may be necessary to expand the mapping exercise to include incidents or violations that have been registered with other bodies, including police stations, national human rights institutions or ombudsmen offices, commissions of inquiries, healthcare facilities, morgues, as well as IGOs and NGOs and other credible sources. This may be necessary to ensure that the totality of victimisation is understood, including an accurate portrayal of the scale of victimisation and criminality.

Inventory of open case files, complaints and incidents

Mapping allows disaggregation and cross-referencing between sources to determine accurate and reliable data on the victimisation caused by the criminal acts. This process should be supported by an inventory that enables accurate and reliable recording of data on criminal facts, alleged perpetrators and victims. Inventories such as the Database of Open Case Files (‘DOCF’) should be used to complete effective mapping and identify the totality of criminal behaviour.

This can be done through analytical functions, including:

- **Catalogues of victims, suspects, incidents:** develop accurate lists searchable by geography, time, violation types, and other relevant factors including ethnicity, status, gender, source of complaint etc.;
- **Involved institutions:** reconstruct chains of command and establish links to suspects;
- **Fact-finding:** link persons (victims, witnesses and suspects), institutions, material damages, incidents and context with each other before assigning criminal classifications;
- **Case (re)construction:** register and (re)assign incidents to different justice procedures within the justice system including criminal cases, human rights cases and alternative procedures (e.g. truth commissions, abbreviated criminal proceedings);
- **Real-time monitoring:** identify bottlenecks, delays, bias that may reduce the fairness of equality of the administration of justice, as well as monitor the progression and outcomes of all cases and complaints.

The inventory of cases and incidents provides the factual information that will inform and support the adoption of a selection and prioritisation policy and will form the basis for decisions on the allocation of cases for prioritised criminal prosecution as well as other justice options.

4. Adoption of a policy on selection and prioritisation

The adoption of a policy is encouraged to ensure objective, consistent and achievable selection and prioritisation of cases. The policy should provide a roadmap for the pursuit of justice, by responding to the specific needs and realities of the conflict, as well as the legal system and its resources.

Analyse the inventory of open case files

Analysis of the victimisation should take place using the inventory of open case files, complaints and incidents to determine the scale and character of the conflict or atrocity. This should include disaggregation and crosschecks of all data to verify the true extent of victimisation and the alleged perpetrator groups, as well as the geographic breakdown. These are important factors in determining the potential jurisdiction of cases as well as potential conflicts of jurisdiction.

Identify resource gaps and needs of the justice system

The capability of the justice system should be assessed to understand how many cases it can realistically and fairly process within a specific time period: very few justice systems will have the capacity to prosecute all violations without unreasonable delay. It will also be necessary to understand the allocation of cases according to applicable jurisdictional requirements and procedures. This should be followed by diagnosis of the resources necessary to deliver justice, including the skills, equipment and infrastructure, along with financial assessment to ensure adequate budgetary planning.

Consultation and monitoring

CMN recommends a consultative process with relevant groups during the adoption of the policy and its prioritisation criteria. This could include the various levels of jurisdictions that will be responsible for conflict and atrocity-related cases, alongside cooperation with national and international stakeholders in building national capacity and knowledge. Equally, monitoring of the application of the policy and its criteria should also be planned for, including a response system to address ineffective, biased or zealous application.

Clarity, precision and equal application

The policy should be formulated in clear, non-political and confidence-generating terms in order to be easily and consistently applied. The equal application of any selection and prioritisation is essential to ensure the legitimacy of prosecutors' actions with the public and in particular the victims.

Adoption of criteria to minimise arbitrariness

Fixed prioritisation criteria should be adopted that consider the crimes committed, as well as the surrounding circumstances. Such criteria may reduce the scope for arbitrariness, protect prosecutors from accusations of initiating politically-motivated prosecutions and provide a clear framework to evaluate and monitor cases.

Publication and dissemination of the policy

CMN recommends the development of an outreach program as part of the policy. This should include publication and dissemination of the policy in general and the selection and prioritisation criteria in particular. Outreach should be directed towards the victims, affected communities and general public, all of whom have an interest in knowing how justice is done. This can help to minimise mistrust and accusations of arbitrariness, bias or selectivity, as well as to reduce misinformation and importantly, to build and strengthen trust in justice institutions.

5. Model criteria for selection and prioritisation

The adoption of objective criteria for selection and prioritisation is an essential safeguard to ensure that the cases taken forward are reflective of the *total* victimisation and that they are not discriminatory or unfair, or provide *de facto* impunity for certain offences, perpetrator groups or victimised groups. The CMN proposes three criteria groups:

Gravity: facts and context of the criminal acts

This group of indicators examines the behaviour that may form the basis of criminal prosecution, through assessment of (i) the seriousness of the alleged offence combined with (ii) the seriousness of the responsibility of the alleged perpetrator. The indicators help to properly establish the facts and context of the criminal acts in question and to assess their gravity in a fair and objective manner. The indicators include *quantitative and qualitative* factors that together support the determination of the gravity of the alleged offence/s, while some indicators are also significant in determining specific classifications of crimes or liabilities. Within these Guidelines, reference is made to the crimes and liabilities of the Rome Statute although this should be adapted to the applicable law of the jurisdiction that is considering the adoption of case selection and prioritisation criteria.

- **Qualitative indicators:** measurable data that demonstrate the facts of the criminal behaviour such as their scale, as well as the extent and patterns of the criminal behaviour;
- **Quantitative indicators:** data that helps to determine the motivations, reasons and patterns of criminal behaviour, which may also be reflected in findings of aggravating and/or mitigating circumstances.

Seriousness of the offence

The indicators listed here help investigators to properly establish the facts and context surrounding the criminal acts in question and to assess the gravity of the crimes in a fair and objective manner. They include quantitative aspects that measure the scale and extent of the criminal behaviour under examination, as well as qualitative factors that may later be reflected in findings of aggravating and/or mitigating circumstances.

Number of victims

This includes the compilation of data that establishes the number of direct and indirect victims. Gathering this data can be a challenging task, requiring the use of complex methodologies: in the aftermath of conflict or atrocity, data should be collected through counting reported victims and/or estimating their number based on samples and extrapolations.

Nature of acts; and Duration and repetition of the offence

The nature of the acts refers to the specific factual elements of each offence – such as killing, torture, rape or other sexual or gender-based crimes, or crimes committed against or affecting children or other vulnerable groups. Reference should be made to the legal requirements of applicable crimes.

NB: In many jurisdictions, an interest-based ranking of the seriousness of crimes may be employed, which will consider the interest that the offence protects, for example, the protected interest of life may be considered greater than that of property. This would elevate the seriousness of the crime of killing over plunder or looting and may lead to thematic prosecutions of specific offences: in such instances, the criminal sanctions for each offence, as well as the interests of the victims, should be taken into account. National policies on sanctions and sentencing are themselves a subjective reflection of the gravity of crimes. In many jurisdictions, sanctions for sexual and gender-based violence crimes may be lower than offences of comparable gravity: this should be taken into consideration to ensure that the former are not underrated due to the application of lower sanctions.

The duration and repetition of the offence are directly linked with the nature of the offence and the consequence/s of the offence/s. The reoccurrence and/or repetition of a crime helps to determine its scale and may also indicate that the crime forms part of a plan or organised policy, which forms part of the legal requirements of the definition of crimes against humanity.

Area and scale of destruction; and Location of the crime

These indicators allow investigators to assess the geographical area affected by the specific offences/acts, while also evaluating their broader and long-term impact, beyond the immediate victims or damage. Evaluating the geographic spread of crimes helps to determine their gravity and facilitates the selection of the most relevant cases to be prioritised.

Group identity of the victim/s and perpetrator/s

Identification of the group identities of both the victim/s and perpetrator/s helps to determine the common features that may establish patterns of criminality. This includes nationality, as well as ethnicity, tribe or other relevant group belongings. The ability to establish the existence of such patterns may help to determine whether the crimes committed were systematic, resulted from a plan or organised policy [components of the definition of crimes against humanity] or were committed with discriminatory motives.

***Modus operandi* of the criminal offence**

This indicator encompasses a qualitative examination of the manner of commission of the alleged crimes including:

- The means employed to execute the crime;
- The extent to which the crimes were systematic or a product of a plan or organised policy, or otherwise resulted from the abuse of power or official capacity;
- Crimes committed with a flagrant disregard for the law;
- The existence of elements of particular cruelty, including the vulnerability of the victims.

Discriminative motives

The commission of core international crimes on the basis of discriminatory motives is a cross-cutting indicator: it facilitates understanding of other indicators including group belonging, nature of acts, *modus operandi* of the criminal conduct and consequences of crimes, and it also lends an element of particular gravity to the offences committed. For offences resulting in genocide or persecution as a crime against humanity, the existence of discriminative motives on the basis of belonging or group identity is important in establishing the following specific legal requirements:

- **Genocide:** [group belonging] the victims belonged to a particular national, ethnical, racial or religious group; and [*mens rea* of group belonging] the perpetrator intended to destroy, in whole or in part, that national ethnical, racial or religious group;
- **Crime against humanity of persecution:** any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds that are universally recognised as impermissible under international law (ICC Statute, Article 7(1)(h)).

Defencelessness of the victims

The defencelessness or vulnerabilities of the victims should be assessed: non-combatants and the civilian population, especially women and children are afforded special protection under international humanitarian law, while refugees, internally displaced persons, migrants, indigenous persons, LGBTIQI, human rights defenders as well as land defenders, are also frequently adversely affected by conflict and atrocity.

Consequence/s of the offence/s

The effects of the crimes on the victim/s and the community are inherently linked to the gravity of the criminal acts, where it results in permanent or lasting consequences. This is also referred to as the *impact of the crimes* and may include assessment of the increased vulnerability of victims, the social, economic and environmental damage inflicted on the affected communities, the illegal exploitation of natural resources, or the illegal dispossession of land. It is advisable that assessment considers the conditions before the offences occurred in order to have a baseline against which the short-, mid- and long-term effects can be measured.

Seriousness of the responsibility of the alleged perpetrator

This group of indicators examine the position the suspect held in the leadership hierarchy and their involvement in the commission of crimes, as well as the degree of personal culpability for crimes committed by leaders or their subordinates. It considers that the higher the position of the alleged perpetrator and level of involvement in the commission of a core international crime, the greater the level of their criminal responsibility. However, the indicators also take into account the lower-level perpetrators who have committed particularly egregious offences.

This approach is consistent with the practice/strategies of international criminal tribunals in identifying the greater level of criminal responsibility amongst the breadth of perpetrators in any conflict or atrocity. However, each jurisdiction working on the formulation of criteria must choose what best serves its needs. The formulation chosen should provide adequate guidance to those who will work with it, be sufficiently clear to the public and lend itself well to serve the interest of equal treatment of all cases.

Position in hierarchy; Status as political, military, paramilitary, guerrilla or civilian leader; and Leadership at municipal, regional or national level

These indicators examine the criminal responsibility of the leadership of any party to the conflict or atrocity for the commission of core international crimes and cover individuals with *de jure* or *de facto* positions of leadership in the military, police, political or judicial chain of authority, as well as paramilitaries, guerrillas and other armed groups. They apply to current as well as to past members of the leadership.

Group identity of the perpetrator

This indicator is used to identify the specific belonging of the actors taking part in the conflict or atrocity and aims to ensure that the prosecutorial strategy addresses the criminal behaviour of all actors involved in the commission of atrocities. It uses the perpetrator data from seriousness of the offence or group identity of the victim/s and perpetrator/s.

Notoriousness/responsibility for particularly heinous acts

This indicator ensures that individuals who are accused of having committed particularly egregious crimes are included in assessments of ‘those most responsible’. It targets individuals who have allegedly committed particularly heinous crimes and have reached a certain level of notoriety that contributes to the victimisation and terrorisation of the local population. It is frequently used to refer to lower-ranking perpetrators, as well as to direct perpetrators who acted with particular cruelty. Indicators from the seriousness of the offence should demonstrate the severity of the crimes, particularly the nature of the acts, *modus operandi*, defencelessness of victims, and consequence/s of the offence/s.

Role/participation in policy/strategy decisions; Personal culpability for specific atrocities; and Extent of direct participation in the alleged incidents

These indicators seek to cover potential modes of criminal responsibility of an alleged perpetrator, whether that person commits a crime as an individual, jointly with another person or through another person. Arguably, the higher the rank of the suspect and the more directly this person is responsible for the crimes in question, the higher their level of responsibility.

Authority and control exercised by the suspects; and The suspect’s alleged notice and knowledge of acts by subordinates

These indicators seek to verify the relationship that senior leaders had with their subordinates, as well as the measures taken to have knowledge of the actions of their subordinates. They are closely linked with the concept of command or superior responsibility, or related omission liabilities. This is important in determining the responsibility of the alleged perpetrator as it establishes the seniority of suspects as well as their involvement. While the indicators of this criterion do not emphasise any one mode of liability, it is quite probable that some liabilities will become dominant, due to the scale of crimes and the typical roles of senior leaders. However, the purpose of such indicators is to ensure that the determinations of who bears the greatest responsibility is pursued on the basis of objective factors.

Objective representativity: case representative of the overall victimisation

These criteria ensure that the prioritised cases are representative of the overall criminality, taking into account the areas and communities affected by the violence and the organisations or institutions most responsible for the commission of such offences, the interests of victims and society and the fair trial considerations that may be triggered by the prioritised case. Its purpose is to maximize the impact of prosecutorial work and minimise perceptions of unfairness and injustice that inevitably arise from the process of case selection and prioritisation. By the end of the justice process for conflict, post-conflict or mass violence, the accumulated portfolio should reflect – or be representative of – the *overall victimisation* caused by the criminal activity.

Representative of the overall victimisation

The cases that are prioritised should be representative of the total criminality or victimisation: the areas, communities and victim groups most affected by the crimes will be the subject of more cases than those in less affected communities. Equally, organisations or structures that caused the most serious crimes should have more of its responsible members – or more of the crimes caused by them – prosecuted than other such organisations or structures. The reasoning behind this criterion is underpinned by concerns for the interests of victims, as well as the ability of the criminal justice for the core international crimes in question to contribute to reconciliation and deterrence. The balancing, which the approach entails, is also intended to solve the problems that may arise due to the prioritisation of the cases. It balances the interests of victims and society as a whole with the reality of limited resources and the limited capacity of the criminal justice system in question.

A representative prosecution requires comprehensive knowledge and understanding of the criminality of a given situation. It presupposes a mapping of the offences committed, which will include accurate and reliable data on the criminal offences, the alleged perpetrators and the victims. This must include broader contextual analysis of the political environment, conflict and geography, the motivations of the parties involved, and the structure and affiliations of local and regional authorities.

Interests of victims and society as a whole

Contemporary criminal justice for atrocity has increasingly focused on being a means through which victims receive justice for their suffering: the design and implementation of any prioritisation practice should therefore include consideration of their physical and psychological well-being, dignity and privacy. Prosecution services can achieve this by working with civil society organisations and victim organisations, conducting consultations regarding the proposed prioritisation practices, as well as publicising the objectives of the prioritisation and any broader policy. Moreover, in interactions with victims, victim groups and civil society in general, investigation and prosecution teams should be sensitised and skilled to understand:

- Local perception of justice, including traditional and institutional means;
- Taboos surrounding many conflict-related crimes, particularly sexual violence;
- Social (and economic) consequences of the transmission of evidence by victims, particularly of sexual violence crimes;
- Overall security situation surrounding victims and victim groups;
- ‘Do no harm’ and informed consent;
- Possible negative impacts on victims and victim groups as a result of interaction with investigative authorities;

- Adoption of measures to minimise risk, harm and damages that may be inflicted upon victims through their participation in justice processes.

Fair trial and due process considerations

These considerations are relevant to the public role of the criminal justice system as both a guarantor of law and order, and protector of the security and safety of the people. Applicable fair trial protections and associated protections to victims and witnesses should also be reviewed in light of case selection and prioritisation, and the adoption of its underpinning criteria to ensure the adequacy of the legal framework and resource allocation and to identify any areas requiring reform, additional resources or monitoring.

Policy and practical considerations

Most justice systems are unavoidably constrained by practical and policy considerations when deciding whether to proceed with a case. In post-conflict and transitional situations, these constraints are likely to be amplified, and justice institutions will likely operate with an impaired infrastructure in environments with high levels of criminality, particularly in the most affected areas. It is therefore advisable to define and formalize such constraints – as part of the commitment towards greater transparency in the criminal justice process – while also ensuring that investigative and prosecutorial resources are not duplicated, that evidence is complete, admissible and reaches the required standard of proof, and that the case falls within the overall strategic direction without destabilising other cases.

Available investigative resources

The availability of investigative resources is a decisive indicator in the conduct of investigations and prosecutions. It aims to prevent the needless duplication of investigative and prosecutorial resources, as well as to encourage judicial efficacy and rational resource management.

Evidence/witness availability; and Potential rollover witness/likelihood of linkage evidence

These indicators support the objective assessment of credibility and reliability of both material evidence and witnesses in a specific case before a decision is made to prosecute a particular suspect. Measures should be taken to anticipate problems that may arise in the course of their investigation and should consider whether evidence is

- Admissible;
- Substantial;
- Reliable;
- Sufficient to establish the relevant standard of proof.

Assessment of sexual and gender-based crimes presents additional specific challenges for evidence and witness availability, which may need to be addressed, including:

- Availability of forensic or documentary evidence;
- Potential standard of proof for sexual violence offences, especially concerning circumstantial evidence;
- Social stigma and factors that deter reporting crimes and/or appearing as witnesses;
- Intimidation and fear of retaliation;
- Traumatization of the judicial process and testifying.

Completeness of evidence

The completeness of the evidence of criminal activity is linked to its value to prosecutorial services in aiming to prove the charged crime. This indicator is essential because the provability of charges is decisive for a prosecutor when deciding to proceed with a case.

Availability of exculpatory information and evidence

Effort should be made to identify the existence and availability of exculpatory evidence that may indicate the provability or otherwise of achieving a conviction in the particular case. The strong presence of such evidence may suggest that a prosecution of a specific case could fail to result in a sentence and should consequently be avoided.

Arrest potential

The arrest potential of a suspect is extremely important in a conflict/post-conflict context and in many instances may pose a severe challenge to the national authorities, due to a number of factors that may include:

- Location of perpetrators in remote, difficult-to-access areas;
- Ability of victims to identify their attacker with certainty;
- Interference to shield alleged perpetrators from judicial proceedings;
- Refusal to surrender accused persons or their transfer to new units.

Available charging theories; and Liability theory and legal framework of each potential suspect

Consideration of the charging and liability theories during investigation is fundamental in assessing the likelihood of conviction. It can also serve to double check that the prosecution would be representative of the total criminality and to encourage prosecutorial services to cover a wide range of perpetrators and types of criminal behaviour.

Potential legal impediments to prosecution; and Potential defences

Obstacles to the pursuit of justice, including *potential legal impediments* such as personal immunities and amnesties, should be considered along with *potential defences* such as superior orders, self-defence or diminished responsibilities, and reviewed in order that prioritised cases can proceed on a sound basis.

Overall strategic direction

These indicators seek to maximize the effects of the overall work of the prosecution, including efficient deployment of its resources.

Impact of new investigation on ongoing investigations and on making existing indictments trial ready; and Estimated time to complete the investigation

This cluster of indicators addresses the temporal dimensions of the case, its status and impact on other cases under the rubric of ‘readiness to proceed’. These factors serve to reduce delays in completing all connected investigations and ensure that cases are not put at risk.

Chain of command escalation potential (can the case can take the investigation to higher political, military, police and civil chains of commands)

This indicator aims to review the suspect/s of a case in light of their chain of command, to discern the level of involvement of commanders or senior level persons and the possibility that they could be found criminally responsible. It reinforces the objective that prosecutions address those most responsible.

Extent that the case fits into a larger pattern-type of ongoing or future investigations and prosecutions

This final indicator seeks to maximize the impact of the prosecutorial workload by establishing links between ongoing and future investigations and prosecutions.

Table 2: MODEL CRITERIA FOR SELECTION AND PRIORITISATION

The adoption of objective criteria for selection and prioritisation is an essential safeguard to ensure that the cases taken forward are reflective of the total victimisation and that they are not discriminatory or unfair, or provide *de facto* impunity for certain offences, perpetrator groups or victimised groups.

Gravity		Objective representativity	Policy and practical considerations
Seriousness of the offence	- Number of victims; - Nature of acts; - Duration and repetition of the offence; - Area and scale of destruction; - Location of the crime; - Group identity of the victim/s and perpetrator/s; <i>Modus operandi</i> of the criminal offence; - Discriminative motives; - Defencelessness of the victims; - Consequence/s of the offence/s.	- Representative of overall victimisation (presupposes mapping of the offences) - Interests of victims and the society as a whole - Fair trial and due process considerations	- Available investigative resources; - Evidence/witness availability; - Potential rollover witness/likelihood of linkage evidence; - Completeness of evidence; - Availability of exculpatory information and evidence; - Arrest potential; - Available charging theories; - Potential legal impediments to prosecution; - Potential defences; - Liability theory and legal framework of each potential suspect; - Overall strategic direction; - Impact on on-going investigations and on making existing indictments trial ready; - Estimated time to complete the investigation; - Chain of command escalation potential (can the case take the investigation to higher political, military, police and civil chains of command); - Extent that the case fits into a larger pattern-type of on-going or future investigations and prosecutions.
Seriousness of the responsibility of the alleged perpetrator	- Position in hierarchy; - Status as political, military, paramilitary, guerrilla or civilian leader; - Leadership at municipal, regional or national level; - Group identity of the perpetrator; - Notoriousness/responsibility for particularly heinous acts; - Role/participation in policy/strategy decisions; - Personal culpability for specific atrocities; - Extent of direct participation in the alleged incidents; - Authority and control exercised by the suspects; - The suspect's alleged notice and knowledge of acts by subordinates.		

6. CMN services in case mapping, selection and prioritisation

Database: Database of Open Case Files (DOCF)

DOCF supports the entire process of case selection and prioritisation through the mapping, application of criteria, real-time monitoring, and identification of bottlenecks or backlogs of open case files. It has been deployed in Bosnia and Herzegovina and the Democratic Republic of Congo. DOCF allows institutions to:



DOCF

**Database on Open
Case Files**

- Organise open case files of core international crimes and serious human rights violations;
- Obtain an overview of a totality of victimisation as a pre-condition to objective selection and prioritisation process;
- Map and analyse open cases according to geography, time, legal classification of offences and liabilities, vulnerable groups, alleged perpetrators and their institutional belonging, etc.;
- Diagnose bottlenecks or backlogs of cases during each stage of investigation and adjudication;
- Increase accuracy, information-flow and transparency in processing existing open case files;
- Apply criteria for case selection and prioritisation.

Advisory services: technical assistance, diagnostics and evaluation

CMN advisory services are designed and delivered according to the mandate, legal framework and material and infrastructural resources of each institution, and can include training, consultation, evaluation, review of:

- Methodologies and principles for case mapping, selection and prioritisation;
- Backlogs and transfers of open case files;
- Selection and prioritisation strategies;
- Mapping or inventory systems;
- Customisation, installation, training and support in the use of DOCF to map, select and prioritise cases.

Publications

- Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes* (2nd edition), FICHL Publication Series No. 13, TOAEP, 2018;
- Morten Bergsmo (ed.), *Abbreviated Criminal Procedures for Core International Crimes*, FICHL Publication Series No. 9, TOAEP, 2017;
- CMN, *Prioritising International Sex Crimes Cases in the Democratic Republic of the Congo: Supporting the national justice system in the investigation and prosecution of core international crimes with a sexual element*, CILRAP, 2015;
- Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (2nd edition), FICHL Publication Series No. 4, TOAEP, 2010;
- Ilia Utmelidze, “The Time and Resources Required by Criminal Justice for Atrocities and *de facto* Capacity to Process Large Backlogs of Core International Crimes Cases: The Limits of Prosecutorial Discretion and Independence”, in Morten Bergsmo (ed.), *Criteria for Prioritising and Selecting Core International Crimes Cases* (2nd edition), FICHL Publication Series No. 4, TOAEP, 2010, p. 189;
- Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze and Gorana Zagovec (eds.), *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (2nd edition), FICHL Publication Series No. 3, TOAEP, 2010.



I-DOC

Investigation
Documentation
System



DOCF

Database on Open
Case Files



CICD

Core International
Crimes Database



CJAD

Cooperation and
Judicial Assistance
Database



CLICC

Commentary on the
Law of the International
Criminal Court



CM

Case Matrix

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