Cumulative Charging and Challenges in Charge Selection

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1 Introduction

If you've ever watched the long-running TV show *Air Crash Investigations*, you will know that there is hardly ever one cause of a disaster. What might start as a small stress fracture overlooked by an inattentive and preoccupied engineer with debt problems may progressively grow into a crack. The crack may cause a rare leak. The leak may trigger a warning in the cockpit. The warning may be misunderstood by crew. When other warnings begin to sound, the crew may be confused by information. They may become overwhelmed due to poor crew resource management training, resulting from a hurriedly-prepared and ill-executed training regime. The process of identifying what went wrong will hopefully uncover these concurrent chains of events, and emphasise that to ensure air safety, attention needs to be paid to the underlying causes that enabled problems to develop in the first place. In some instances, the cracks that are revealed may require the entire discipline to be rethought, as the causes do not lend themselves to easy fixes. All accidents will involve a human element, although in some that will be more readily apparent than others.

Today, I want to encourage you to think about the problems that have stemmed from the exercise of the charging discretion as the air crash that we are going to investigate. What is the crash I am referring to? Well, we know the ICC Prosecutor's exercise of the charging discretion led to the OTP obtaining more acquittals and failed prosecutions than convictions. We know that this failure rate so much higher than the ICTY, or the ICTR, or the SCSL. We know that significant amounts of time and money are being spent on investigations and prosecutions for charges that do not stand up in court. And we know the issue of cumulative charging has attracted controversy for what is seen by some as an overburdening of defence and poor prosecutorial preparation.

At the same time, the charging discretion is the most important important discretion that international prosecutors enjoy. As the 'gatekeepers' to international courts,[1] international prosecutors have the life of international criminal law in their hands. There is no other discretion singularly more important to the fulfilment of an international court's mandated objectives than the decision of who to charge and what to charge them with.

Perhaps it isn't surprising that criticisms of the charging discretion flow free and fast, and with them, many opinions about just *how* it should be exercised. Yet none seem to gain traction.

All of this begs the question: can the exercise of the charging discretion be improved?

I do not intend to provide an answer to this. Instead, I want to present you with some information that might cause you to question charging practice. Perhaps it will be food for thought; ideas that you can raise with your colleagues and friends; the impetus for a discussion that we can have together.

My presentation this afternoon is divided into three parts. First, I will explore with you how the charging discretion has historically been exercised.

[1] Lovisa Bådagård and Mark Klamberg, 'The Gatekeeper of the ICC - Prosecutorial strategies for selecting situations and cases at the International Criminal Court' (2017) 48(5) *Georgetown Journal of International Law* 639; Héctor Olásolo, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?' (2003) 3 *International Criminal Law Review* 87, 89.

Second, we will delve into the rationales that have underpinned charging. Third, I will give you my thoughts on the root causes of the varied charging practices. And fourth, I will suggest some ways forward.

While listening, I invite you not to distinguish issues concerning *cumulative* charging and *charging*. I also invite you to think about the charging discretion from, perhaps, a different perspective—one that places the focus on mindsets of the people *exercising* the discretion; leaving policy-based approaches in the background.

After all, in our collective mission to find what caused the air crash, it is appropriate we rethink the way we look at controversial topics. It is excellent that projects like this exist for this purpose.

Before I go any further, it is important to note that I have no interest in the results of this study. The information I am going to show you are simply my observations. I am funded by the University of Leiden, and not by any actor with an interest in what I am looking at.

2 Charging in numbers

The first things I would like to do is show you the charging discretion in numbers. Perhaps these historical figures can be seen as benchmarks by which we can assess best practices.

From 1995 onwards—the year that the first final charging document was issued—to December 2018, international prosecutors at the ICTY, ICTR, SCSL, and ICC have issued 195 final charging documents accusing 298 defendants of 2,774 core international crimes.

On average, defendants at these courts will be faced with just over 9 core international crimes. The actual figure is 9.3. The figures between each court vary a little bit. At the ICTY, the number is 10; the ICTR it is just 6; the SCSL it's 13; and at the ICC, the number is 12.

In Figure 1, we can see the average number of charges laid against individual defendants on a year-to-year basis. These numbers are averages: for each year, the total number of charges per individual were added up and then divided by the number of individuals charged. If we look at the ICTY,

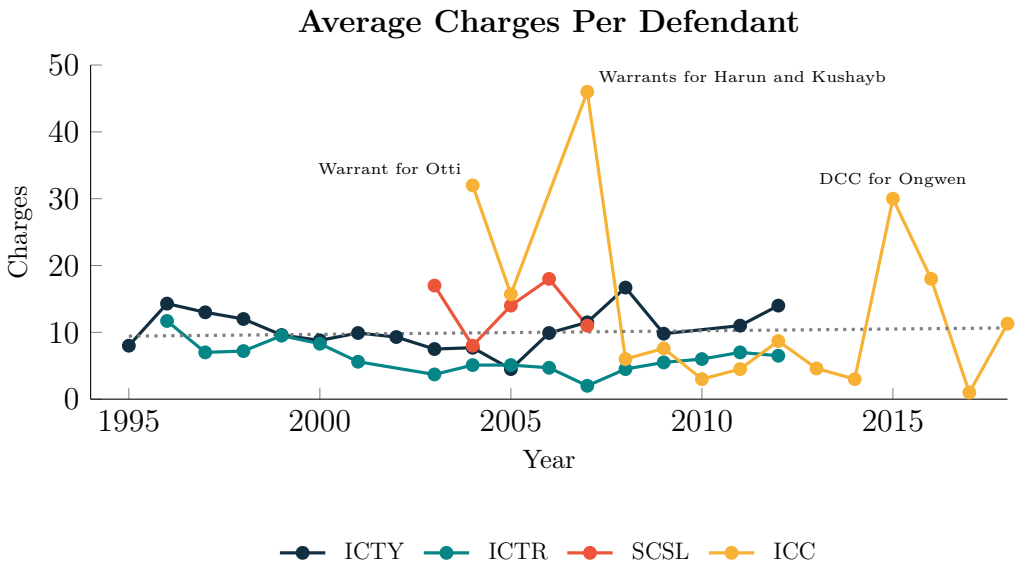

Figure 1: The average number of charges per defendant.

the ICTR, and the SCSL, we can see that the average number of charges was pretty consistent. The grey dotted line is the trend, and you can see it is also pretty flat.

Consistency has many benefits, of course: it allows people to better plan their future and the resources they will probably need to do their jobs. And it might mean that everyone has a pretty similar understanding of the number of charges it is reasonable for a defendant to face.

But look at the ICC. What's going on here? The data is all over the place. There are huge peaks in 2004, 2007, and 2015, the years in which final charging documents were issued for Otti, Harun, Kushayb, and Ongwen. These numbers are very different from the stable, consistent averages we see at the other courts.

If the average number of charges per defendant at *all* courts is 9.3, why do we have these years where the average spikes to 30?[2] Or 32?[3] What about 46?[4] That's *5 times the average*. It's interesting, too, that this variation is seen only in *one* court.

[2] In 2015.
[3] In 2004.
[4] In 2007.

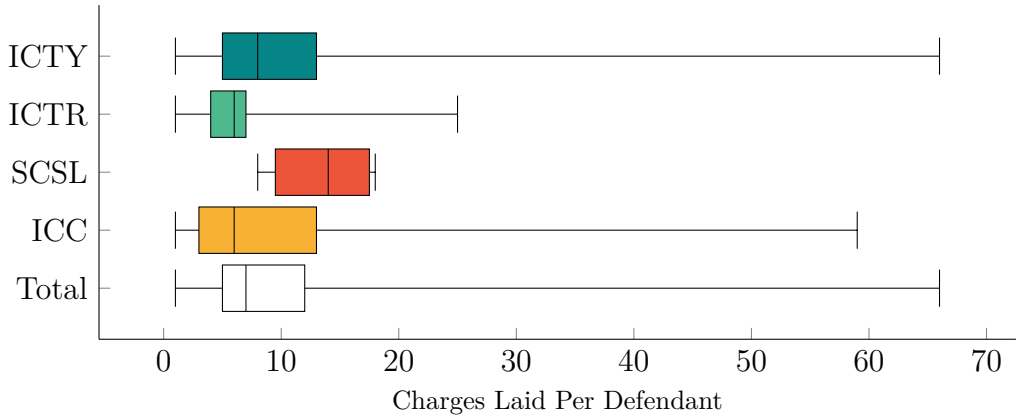

Figure 2: The distribution of charges per individual.

More charges mean more time and money need to be invested in laying them; they also mean more attention needs to be given to evidence at trials to ensure the elements of each offence are met—or not met.

So with this in mind, what is the marginal benefit that comes from laying 45 charges as opposed to 46? And is this justifiable in light of the benefits that come from laying the average 9 charges? An interesting question to ponder is whether it is more important for prosecutors to justify the number of charges by reference to the benefits they bring, the further that number strays upwards from the expected mean.

Let's look at the same data differently. Figure 2 is a box plot. These whiskers represent the top 25% and bottom 25% of charges against each individual. The coloured boxes in the middle are the middle 50%. The lines in the middle are the median points, or the 'middle-most' number once the number of charges for each individual are arranged from the highest to the lowest.

Looking at the total plot, we can see that the middle 50% of charge numbers are hovering around between 5 and 12. But here we also see something interesting happening (ignore the SCSL). The data is not normally distributed. It's skewed towards the higher numbers. You can see the range for the top 50% of charge numbers is far greater than the bottom 50%. In other words, if prosecutors have the choice between laying *more* or *fewer* charges,

they

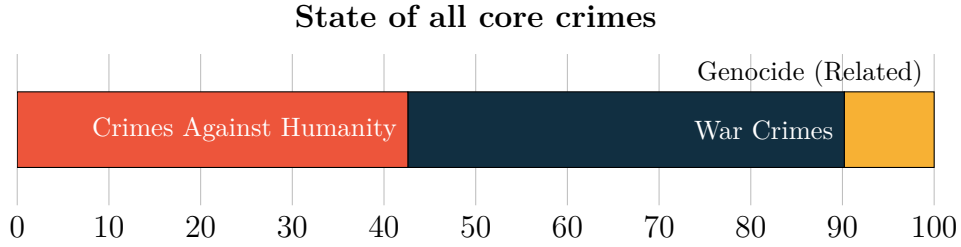

Figure 3: Summary of core international crimes.

they seem to be erring on laying more—sometimes a lot more. What does this mean for consistency or predictability? And does this mean we should look closer at what goals are sought to be achieved by exercising the charging discretion, that might explain why we see this skewness?

Let's then shift our focus to the core international crimes. How are they represented in these 2,774 charges? Figure 3 gives us an overview of how core crimes have appeared in indictments overall. Across the ICTY, ICTR, SCSL, and ICC, crimes against humanity constitute 42.6% of all charges laid; and war crimes, which are the most common charges, make up 47.6% of all charges. Genocide, the 'crime of crimes', comes in at only 9.8% of all charges.

Now let's present this data differently to see whether this pattern exists on a year-to-year basis. Figure 4 shows a mess. But this isn't really surprising because the context of the situation will determine the core crimes that are charged.

But where you *would* expect to see a pattern is with respect to charges for sexual and gender-based violence. After all, books have been written, policies have been created, and staff have been hired to ensure the effective prosecution of this class of offences.

Figure 5 shows the number of charges for those crimes with an express sexual or gender element as a percentage of all charges laid each year over the last 24 years. Again: it's a mess. If there is a trend, it's still a very weak one. Maybe this surprises you. Maybe it doesn't.

I suggest that the data I have just shown you raises some interesting questions about the value of using statistics as quality benchmarks with respect to the number of charges alleged against individuals and the implementation

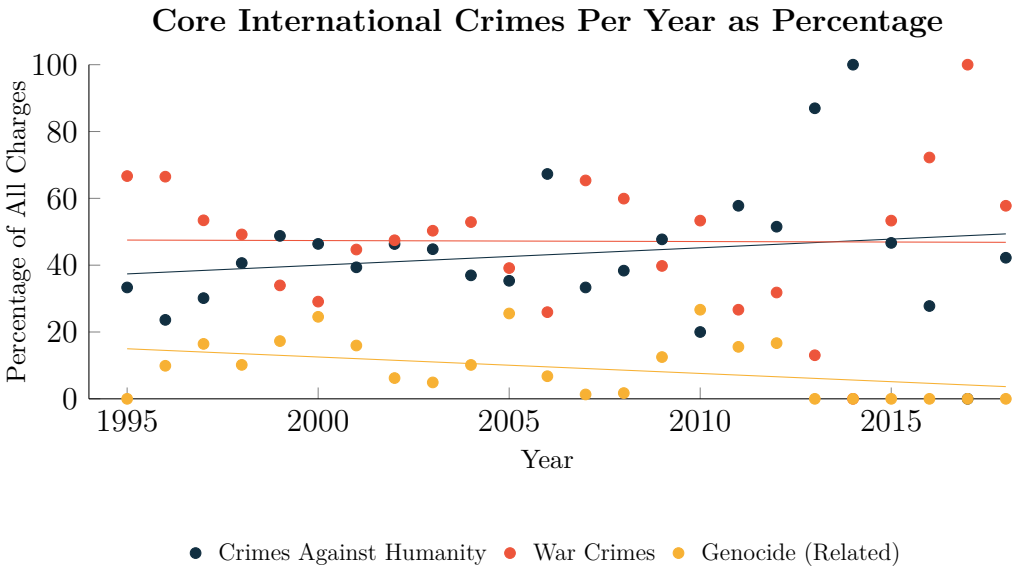

Figure 4: Core international crimes at all courts.

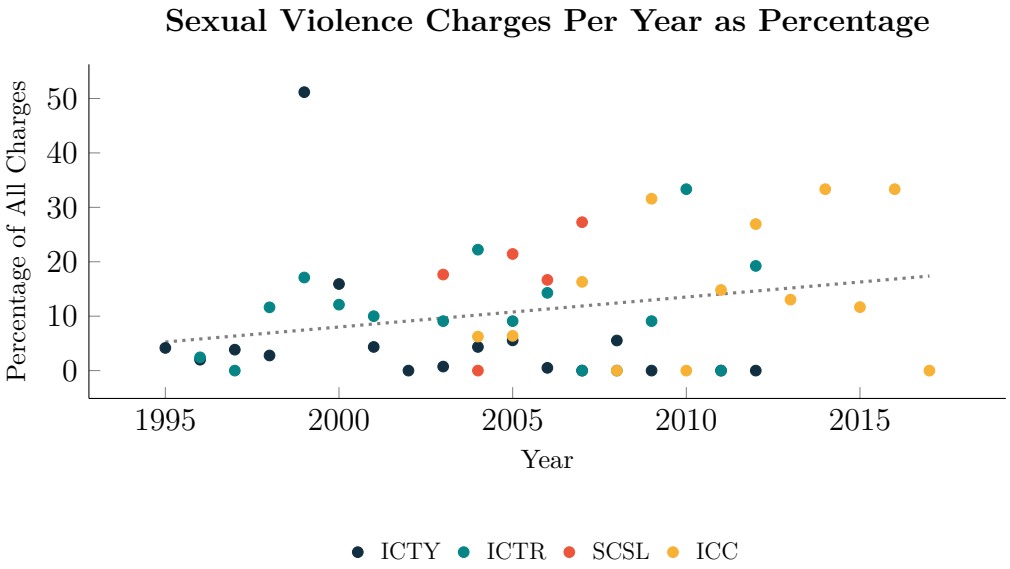

Figure 5: Sexual violence charges as a percentage of all charges.

of policy goals.

It also leads me in to the next two issues I would like to explore with you: why do prosecutors charge what they do? Can we explain this messy data by reference to the reasons that prosecutors have used to justify their charging decisions?

3 Rationales for charging

Over the last year I've been speaking with current and former international criminal prosecutors who held the rank of Senior Trial Attorney and above regarding what factors they considered to be important when exercising the charging discretion. I've tried, as much as possible, to let these people speak with minimal prompting using broad, open-ended, and often very simplistic questions.

We should assume, of course, that in the absence of evidence to the contrary, all prosecutors are trying to do make the best decisions they can in any given circumstance. Therefore, the insights provided allow us to reflect on what those people *on the ground* consider relevant to making high-quality decisions.

I do not claim that *any* of these reasons that I am about to describe to you are the primary cause for why the charging discretion has been exercised in the way that it has. I do not claim that they are considered by every prosecutor in each case. I also do not claim that these views are widely held. Instead, I want to use these explanations to paint a picture of a decision-making process that is informed by a plethora of different considerations that may or may not have application in each specific case.

3.1 The number of charges

First, let's turn to some of the factors that appear to have influenced the decisions of prosecutors regarding how many charges to allege against a potential defendant.

3.1.1 Desire for convictions

The desire to obtain convictions is obviously a big one.

This is hardly surprising. Schabas has said that international criminal law "thrives on conviction".[5] Damaška has similarly argued that a *failure* to obtain convictions would herald the failure of ICL in its primary mission to 'end impunity'.[6] One might wonder, in light of recent ICC OTP practice, whether the trumpets are already sounding.

Even if we are to put questions of whether conviction and punishment actually results in general (or even specific) deterrence aside—and there *are* legitimate questions, particularly in the ICL context—convictions nevertheless demonstrate that the incredible amount of resources that are being put into international criminal investigations are being appropriately spent. A conviction is a vindication of not only the work that has been done, but also the suffering of the victims.

But we should also not ignore the fact that some defendants are seen to fit in a unique category of extraordinary maliciousness. Completely aside from any lofty desire to fulfil the aims of international criminal justice, this itself has, in some instances, warranted charging a defendant with numerous crimes to increase the likelihood that a conviction will be entered against them. One prosecutor has noted, for example, that while it would not be suitable to "double up on war crimes and crimes against humanity" in every case, the alleged maliciousness of a particular defendant "warranted using everything in our armoury to get him" and that "on that basis alone, it was appropriate to use all relevant crimes in the *Statute* that applied to what he'd done".[7]

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[5] William Schabas, 'Balancing the Rights of the Accused with the Imperatives of Accountability' in Ramesh Thakur and Peter Malcontent (eds), *From Sovereign Impunity to International Accountability: The search for justice in a world of states* (United Nations University Press, 2004) 154, 165.

[6] Mirjan Damaška, 'Reflections on Fairness in International Criminal Justice' (2012) 10(3) *Journal of International Criminal Justice* 611, 613.

[7] Interview with P19.

3.1.2 Advancing the law

Prosecutors have also demonstrated a desire to advance the law through their charging. The law is in a constant state of development and reinvention. Since 1993, practitioners have been 'discovering' new crimes that were not necessarily envisaged a quarter of a century ago. Judges are given most of the credit for this, with one scholar noting that judicial creativity involves "the sculpting of the relatively featureless granite of existing law in order to give it form, effect, and reason".[8]

But the role of prosecutors in this process of law creation must not be understated, nor their willingness to engage in it. After all, creative charging practices have led to the development of the law in several areas. We can see this, in particular, with respect to sexual and gender-based violence and terrorising the civilian population.

Some prosecutors lept on the opportunity to advance the law with an enthusiastic sense of duty. As noted by one prosecutor, "you really want to build the law and you want to use the opportunity to do it".[9] Another reflected that the undeveloped state of international humanitarian law meant that its development "needed to be pursued" and saw the development of the law as part of their mandate (although, when questioned further about the sense of being mandated to advance the law, they explained that this was "putting it too high" and that they misspoke).[10]

The desire to advance the law had practical consequences for how the charging discretion was exercised. One ICTY prosecutor reflected that, at least in the early days of the ICTY, there was what they termed a "policy" for all investigators, and "in particular, the Senior Trial Attorneys", under which "they should not be afraid to advance legal arguments and legal theories in prosecuting the cases".[11] However, this was on the proviso that they needed

[8] Joseph Powderly, 'Judicial Interpretation at the Ad Hoc Tribunals: Method From Chaos?' in Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford University Press, 1st ed, 2010) 17, 18.

[9] Interview with P9.

[10] Interview with P4.

[11] Interview with P4.

to maintain a more traditional, fallback position just in case.[12]

3.1.3 Macro objectives and public expectations

We cannot ignore, too, the reality that international criminal courts are burdened with many objectives and are expected to bring about positive change in society and leave behind them a legacy.

One prosecutor considered the benefits of setting an historical record warranted charging a potential defendant with all possible crimes that it was believed they committed. "I think starting at the beginning there was an unspoken policy", they said, "that you should charge [a defendant] with pretty much everything you could prove against them". The rationale for this belief, they explained, is that war crimes trials, certainly in cases where the leadership is being prosecuted, "do have a role in telling a full story even though [prosecutors are] not there to write history".[13]

3.1.4 Representation

Perhaps the most significant factor that has informed the number of charges a defendant will be faced with is the desire for prosecutors to lay *representational* charges. But representative of what? It depends on who you ask.

Some would say criminality. Charges should, in the words of one prosecutor, capture the "essence of what happened on the ground" through a curated set of charges that can be said to be representative of other uncharged acts.[14] You can see this in Regulation 34(2) of the ICC OTP's *Regulations of the Office of the Prosecutor*. Others might add structural commission. Charges should reflect the different *ways* through which alleged offences were committed. Add temporal spread to the list to ensure that an entire conflict is covered. Don't forget the alleged victims, either. The charges should reflect the different types of people who were allegedly harmed through an act.

[12] Interview with P4.
[13] Interview with P11.
[14] Interview with P14.

3.1.5 More or fewer charges?

As I have already mentioned, I do not intend to hold these rationales out as being a complete set of reasons that prosecutors have employed to justify their charging decisions. All I do is offer these as examples of factors that prosecutors have employed in their assessment of how many charges to lay against an accused.

The elements that I have discussed could conceivably cause cumulative charging, or the spikes in the data. But importantly, some of them, and many others, have *also* caused prosecutors to lay *fewer*—not *more*—charges.

For example, I mentioned earlier a desire for convictions. While this has caused some indictments to grow, it has also caused them to shrink or remain limited if the prosecutor with carriage believed that the alleged defendant would nevertheless receive a fair or lengthy sentence if they were convicted.

Macro managerial considerations are also a good example of a slimming factor. The pressure encountered by both the ICTY and the ICTR to wrap up their operations placed pressures on the OTP in terms of identifying which charges to proceed with, forcing them to be prudent with respect to the number of charges alleged against each defendant.

Individual trial management also operates in the same way. At the end of the day, prosecutors need to be able to run trials pragmatically and lengthy indictments may make this difficult. The Karadžić indictment was, for example, reduced in part because of a desire to have a manageable trial that did not last exceedingly long.

Criticism from the judiciary is also known to have played a role in reducing the size of indictments. Rule 73 *bis* of the ICTY's *Rules of Procedure and Evidence* allowed the Chamber to 'invite' the Prosecution to reduce the scope of the indictment. On a more personal level, one prosecutor noted that they could "almost feel the judge wince" when they laid a lengthy indictment for a short course of conduct that was basically murder. Anyone who has ever attracted the ire of the bench for proceeding with superfluous charges knows the feeling is one to be avoided.

Finally, while one might argue that lengthy indictments enhance the

prospect of a conviction, they might simultaneously create misconceptions in the broader community about the state of the evidence or what they should expect from the prosecution, militating in favour of the number of charges being reduced.

3.2 The types of charges

While the factors that I have just discussed can be somewhat neatly categorised as going to the *number* of charges laid, they will never be considered alone.

There are many other considerations that factor into the charging discretion than I have explained today. I spoke only briefly about the policies concerning the type of criminal conduct warranting the attention of the prosecution, such as sexual and gender-based crimes or crimes against children. I haven't touched at all on the relevance of arrests; the need for efficiency; conceptions of fairness; previous representations made by prosecutors to Defence and states; the likelihood of a defendant suffering harm as a result of the charges; procedural factors; the budget; *other* pressures from states; or the simple prospect of actually being able to conduct a successful prosecution. The list goes on.

The point here is that while it is easy to pinpoint factors that *taken by themselves* appear to have affected the exercise of the charging discretion and can explain the numbers, it is *not* a discretion that lends itself to an easy, clear-cut analysis from which patterns can be derived and the future predicted.

There is heavy degree of 'instinctive synthesis' involved. All of these factors—and undoubtedly many more—are pulled together and synthesised by people who, presumably in good faith, attempt to make what they see are the most quality charging decisions possible in the circumstances. And they do this by drawing upon their backgrounds, experiences in prosecution, and desires for the court or the broader ICL field.

4 What is causing these differences?

So what's causing all of these different views and these varied practices? I'm going to suggest two factors that might be at play.

4.1 Goal confusion

The first factor, I think, is that prosecutors have many aspirations for what courts and the field should be doing. Back in 2008, Damaška called international criminal courts out for self-imposing a gargantuan number of objectives. Unlike Atlas, he argued, these courts are not "bodies of titanic strength, capable of carrying on their shoulders the burden of so many tasks".[15] But, as we have seen, even the job of *identifying* and *prioritising* these goals is problematic. And if you can, then maybe the problem becomes trying to get everyone on the same page.

Is the goal of prosecutors to obtain convictions? What about providing a forum in which victims can tell their stories? Do prosecutors need to consider the role their work has in creating an historical narrative? Should international prosecutors strive to exercise the charging discretion in a way that ensures the survival of their court and to build its legitimacy? What about ensuring the survival of the *field*? There is no doubt that prosecutors have considered these questions—even if not explicitly—when determining who to charge and what to charge them with. All of them are laudable.

4.2 Inherent subjectivity

This leads into the second, and more pragmatic issue. The charging discretion is one that is steeped in subjectivity. There's no way around this, and will surprise none of you. To again quote and appropriate Schabas, there is no 'iPhone app' that tells prosecutors what is relevant and the weight to be given to any one particular factor. People are, quite simply, going to have different ideas about what are or are not relevant considerations.

[15] Mirjan Damaška, 'What's the point of international criminal justice?' (2008) 83(1) *Chicago-Kent Law Review* 329, 331.

What weight should prosecutors give to maintaining a positive relationship with the bench? Should prosecutors consider the prospect of a defendant entering custody? What weight should they give to prosecuting the same conduct in different ways so that they can look back and, with good conscience say, 'well, at least we tried'?

These fundamental questions have no answer, and it is wrong to proceed on the assumption that they do. Moreover, and more importantly, there is *certainly* no guidance as to how these broadly-defined and vague considerations translate into concrete and tangible advice as to how prosecutors should act in any given situation.

5 Moving forward

So, with the knowledge that past practice is fragmented and laced with subjectivity, how do we move forward?

Perhaps we need to place more emphasis on the point that everyone has different understandings of what is a quality decision. All prosecutors are undoubtedly trying to do the best job that they can do in the circumstances of each case in the context of the role as they understand it.

But they seem trapped in an unenviable position: unable to satisfy the expectations of the broader community of actors regarding *how* the charging discretion should be exercised, they are subjected to eternal cycle of criticism.

Two things seem to be at play. First, we never know all the reasons prosecutors charge the way they do in each case. It's unreasonable to expect that we should. Second, Koskenniemi, Robinson, and Stahn have convincingly shown that no matter what justification is raised to support a charging decision, there will always be an argument for the opposing side. Such is our profession.

This afternoon, I have invited you to look at the charging discretion in a different light by embracing subjectivity and looking at the mindsets of the people exercising the charging discretion. Hopefully, what I have shown you reveals that the exercise of the charging discretion is, at its core, driven by a prosecutor's own judgement about what is best in the circumstances.

Someone's mindset, I suggest, is the most powerful motivating factor behind why they make the decisions that they do.

And we can't change mindsets without having open, honest discussions about what makes people tick. Through these deeper discussions that transcend the mere issues of the evidence or the policies, we can get a much better understanding of what prosecutors actually *want*—and *why* they want them.

These discussions are particularly important to have for those cases that, like the spikes on my graph, stand out as being statistically different from the rest. They're not inherently wrong. Perhaps the reasons why we see these differences will make everyone think about a *new* best practice?

In other words, instead of trying to create guidelines; or a committee; or a working group; or a policy paper to try to list what should or should not be considered in the exercise of the charging discretion, maybe we should think about simply changing the way we look at and discuss the topic of charging.

The beauty of this is that it requires no change to existing work processes. It's simply about how people engage with these processes and their colleagues. Of course, this may take time. It requires trust, and a heavy dose of introspection. But by looking at the problems surrounding charging and cumulative charging in a different way, we may be able to look beyond the cracks and see their causes.

Because if there's one thing that binge-watching *Air Crash Investigations* teaches the procrastinating viewer, it's that the problems are rarely what they seem on the surface. Quality control runs far deeper.

Thank you.