



Universiteit
Leiden

The Netherlands

**Doing 'Justice' at the Office of the Prosecutor:
Portrayals of a cultural value**

Davis, C.J.; Fraser J.A., McGonigle Leyh B.

Citation

Davis, C. J. (2020). Doing 'Justice' at the Office of the Prosecutor: Portrayals of a cultural value. In M. G. L. B. Fraser J.A. (Ed.), *Intersections of Law and Culture at the International Criminal Court* (pp. 209-227). Cheltenham: Edward Elgar.
doi:10.4337/9781839107306.00019

Version: Accepted Manuscript
License: [Leiden University Non-exclusive license](#)
Downloaded from: <https://hdl.handle.net/1887/138140>

Note: To cite this publication please use the final published version (if applicable).

Grotius Centre Working Paper Series

No. 2020/092-ICL — 31 August 2020

Doing 'Justice' at the Office of the
Prosecutor
Portrayals of a Cultural Value

Cale Davis



**Universiteit
Leiden**

Grotius Centre for
International Legal Studies

Discover the world in Leiden. <https://www.leidenuniv.nl/abstract=3683748>

Doing ‘Justice’ at the Office of the Prosecutor Portrayals of a cultural value

Cale Davis¹

1 Introduction

Perceptions of culture matter. One of the means through which we observe a ‘culture’ is through its artefacts. Artefacts are ‘all the phenomena that you would see, hear, and feel when you encounter a new group with an unfamiliar culture’.² They publicly, reliably, and meaningfully ‘convey social or logic information about the community’.³ As such, artefacts shape how we understand a group’s ‘beliefs, values and assumptions, and ways of doing things’.⁴ But because actors can use rhetoric to ‘influence and modify attitudes, beliefs, and the existing perceptions of the audience’,⁵ the artefacts that observers see may not necessarily reflect the *actual* values of the ‘culture’.⁶ Nevertheless, they shape and inform how we see a specific cultural context and those we associate with it.

¹ LLM (Adv), BIR, LLB (Hons), GDLP. PhD candidate, Grotius Centre for International Legal Studies. This research is produced within the framework of the *Exploring the Frontiers of International Law* Research Programme. My sincere thanks go to Julie Fraser and Brianne McGonigle Leyh (both of Utrecht University, Faculty of Law), Sarah Mead (Leiden University, Faculty of Law) and Rozemarijn Roland Holst (Utrecht University, Faculty of Law) for their comments and suggestions; Hilmar Zech (Leiden University, Faculty of Social and Behavioural Sciences) and Ginneke Wiggers (Leiden University, Faculty of Law) for their assistance with the Python scripts that were integral to the completion of this research; as well as the two anonymous reviewers for their valuable feedback. A request has been lodged with the ICC (as the copyright holder of the public communications upon which this research is based) to make the dataset compiled for this project publicly available in a data archive.

² Edgar Schein, *Organizational Culture and Leadership* (4th edn, Jossey-Bass 2010) 23.

³ Richard Reeves-Ellington, *What is Culture? Generating and applying cultural knowledge* (Edwin Mellen Press 2010) 21, 28, citing with approval M Kennerty, *Characteristics governing the design of identity signals* (Paper presented at the American Anthropological Association Annual Meeting, Philadelphia, December 2009).

⁴ J Steven Ott, *The Organizational Culture Perspective* (Dorsey Press 1989) 24.

⁵ Birju Kotecha, ‘The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism’ (2018) 31 *Leiden Journal of International Law* 939, 943-944.

⁶ Schein (n 2) 27.

The value of ‘justice’ sits behind everything the International Criminal Court (ICC) does: from ending impunity to preventing the commission of atrocity crimes. For example, ‘justice’ is referred to in many of the ICC’s public communications. The Court invites everyone to ‘get involved’ in its work by talking to others about its activities or by sharing a three-minute video that begins by pondering ‘[h]ow can a victim of mass crimes have recourse to justice?’⁷ Or you could present a slideshow entitled ‘Justice Matters’ to explore ‘the experiences of those affected by crimes under the ICC’s jurisdiction, and how the ICC is working to bring justice to those victims’.⁸ Perhaps you would prefer to display an exhibit to ‘explore how justice is crucial to survivors of the world’s most heinous crimes, and how it matters to the world as we strive together to achieve lasting peace’⁹ For those of us who are social media savvy, remember to add ‘#justicematters’ to your tweets to join the Court in building a ‘#morejustworld’ as it celebrates its 20th anniversary.¹⁰

The Office of the Prosecutor (OTP), too, makes regular references to ‘justice’ in its public communications. This chapter is therefore based on the premise that ‘justice’ as a central value in the OTP can be seen as an expression of a specific, localized organisational or prosecutorial culture, that resonates with the global legal culture out of which the ICC has sprung. For the purposes of this chapter, prosecutorial ‘culture’ therefore mainly refers to the practices and values that are specific to the context of the OTP. To determine the contours of ‘justice’ as a central value in this cultural domain, it analyses the OTP’s public communications as an important set of artefacts that can show us what the value of ‘justice’ is portrayed as meaning in the OTP context. These public communications are a vehicle for the OTP to shape how external observers see it, and can therefore help us determine how people understand the work of the Court more broadly. After all, the OTP is uniquely positioned to affect public perceptions of the Court’s overall operations and effectiveness. The Prosecutor has been described as the Court’s ‘gatekeeper’ and ‘engine room’.¹¹ It is the Prosecutor that sets the Court’s agenda as ‘the single organ that initiates prosecutions before the Court’.¹² The Prosecutor is often the Court’s public and most visible face; the actor tasked with ushering the Court towards the fulfilment of its mandate.

Therefore, the main question is: *what* is the ‘justice’ that the OTP portrays itself as

⁷ ICC, ‘Tell others about the Court’ <<https://www.icc-cpi.int/tell-others>> accessed 16 January 2019; ICC, ‘The ICC in 3 Minutes’ (*YouTube*, 6 May 2016)

<https://www.youtube.com/watch?v=Jw_cQrGwMJ0> accessed 16 January 2019.

⁸ ICC, ‘Present these slideshows’ <<https://www.icc-cpi.int/present-slideshows>> accessed 16 January 2019.

⁹ ICC, ‘Display this exhibit’ <<https://www.icc-cpi.int/display-exhibit>> accessed 16 January 2019.

¹⁰ ICC, ‘The ICC Rome Statute is 20’ <<https://www.icc-cpi.int/romestatute20>> accessed 16 January 2019.

¹¹ Lovisa Bådagård and Mark Klamberg, ‘The Gatekeeper of the ICC - Prosecutorial strategies for selecting situations and cases at the International Criminal Court’ (2017) 48 *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; Kotecha (n 5) 940.

¹² Cale Davis, ‘Political Considerations in Prosecutorial Discretion at the International Criminal Court’ (2015) 15 *International Criminal Law Review* 170, 171.

wanting; underpinning its actions, motivations, and prosecutorial culture? This is an important question to answer to appreciate the way in which the OTP's messaging affects how its decisions and conduct are understood and assessed. It is also important to answer in order to determine whether the 'justice' that the prosecutorial culture *appears* to value supports the aim of building and developing the legitimacy of the Court.¹³ After all, if the state parties to the Rome Statute are going to entrust the power to investigate and prosecute the most serious crimes of concern to the international community to the OTP, surely they will only do so if the 'justice' that OTP's prosecutorial 'culture' appears to embody aligns closely with the 'justice' that their citizens, leaders, diplomats, and politicians cherish and desire.

The purpose of this chapter, therefore, is to investigate how the value of 'justice' is portrayed by the OTP as underpinning its prosecutorial culture, and to offer some reflections on the potential ramifications of this portrayal. Importantly, this chapter does not make any claims about whether OTP staff actually embody the value of justice in the way that this research argues it has been portrayed. They may, or they may not. This chapter is purely concerned with the way in which it has been presented to the broader public in the OTP's public communications.

This chapter proceeds as follows. Section 2 describes how the public communications issued by the OTP can be seen as cultural artefacts demonstrating particular values. It describes the statistical and qualitative methodologies employed to analyse how the value of 'justice' is portrayed as being part of the OTP's prosecutorial culture. Section 3 describes the results of this analysis, explaining the different ways in which 'justice' is used. It contrasts these findings with the references to ending impunity, contributing to deterrence, and acting impartially and independently. Section 4 then argues that the way that 'justice' is utilised in the OTP's public communications may expose the OTP to the risk that its goals and decisions are misunderstood by external observers or reinforce negative meta-narratives that have cast shadows over its work. This is because the value of 'justice' is both vague and has the tendency to invoke emotive responses. Finally, Section 5 argues that it may be preferable for the OTP to de-emphasise the importance of doing 'justice' within its public communications, and pivot towards statutorily-mandated values such as 'independence' and 'impartiality' that arguably pose less of a risk of misinterpretation.

2 Methodology

This study applies a form of discourse analysis to the public communications produced by the OTP to provide an insight into how the value of 'justice' is shown to exist in its prosecutorial culture. Discourse analysis methodologies emphasise the role that speakers play in constructing realities and views of the world and seek to expose how language develops meaning.¹⁴ They seek to understand what information is transmitted through

¹³ See Ingrid's chapter on legitimacy

¹⁴ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 927, 942-43.

the use of language from a speaker to a recipient. Discourse analysis methodologies are thus well-suited to analysing how statements by public officials foreground some ‘cultural’ values while marginalising others, while recognising the importance of language in the construction of reality.

The OTP published 394 public communications between 24 April 2003 and 2 November 2018 on the ‘News’ section of the ICC’s website under the categories ‘Statements’, ‘Press Releases’, and ‘Media Advisories’. These public communications are valuable artefacts for two reasons. First, they are plentiful, easily-obtainable, and span almost the entire duration of the OTP’s existence. Second, they provide written documentary evidence as to the values the OTP appears to embody in its prosecutorial culture, and therefore allow for as close to an objective analysis as possible of the values espoused by the public institution.

All 394 press releases and statements were downloaded and imported into qualitative data analysis software.¹⁵ Once inside the software, each document was assigned variables for the day, month, and year that they were created to allow for the mapping of results over time.

The public communications were then searched for sentences containing the keyword ‘justice’. After reflecting on the results, a decision was made regarding which codes to apply to describe the way ‘justice’ was used. The sentences containing the word ‘justice’ were coded into one (or more) of four categories. The relevant difference between these categories is how the OTP *directly speaks* about who will (or should) receive ‘justice’. This allowed for different uses of ‘justice’ to be distinguished, even when the categories may appear to be different sides of the same coin.

The first category—*general use*—was used for sentences that position the OTP in a context where it aims to do (or does do) justice, without specifying any identifiable group as the recipient of that justice. For example, the sentence ‘Angelina Jolie attended the reading of the first verdict rendered by the International Criminal Court, witnessing this decision and supporting the considerable advancements in international justice that the ICC represents’ was placed in this category. This is because while positioning the OTP—as an organ of the ICC—as an actor that aims to achieve justice, it did not specify that this justice was intended for any specific group.¹⁶

The second category was for those sentences concerning *justice to defendants*. This category was reserved for those sentences in which ‘justice’ was used in a way that made actual or potential defendants the target of that justice. For example, in the sentence ‘[Joseph Kony] must also be brought to justice’, the OTP’s use of the word was one that was primarily targeted towards Kony as a defendant.¹⁷

The third category—*justice for victims*—positions actual or potential victims as the target of the justice the OTP is shown to want to deliver. In the sentence ‘our man-

¹⁵ Specifically, MAXQDA2018.

¹⁶ Office of the Prosecutor, ‘Angelina Jolie attends ICC hearing to witness Lubanga decision’ (Press Release ICC-OTP-20120314-PR777, 14 March 2012).

¹⁷ Fatou Bensouda, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the confirmed death of LRA commander Okot Odhiambo’ (Press Statement, 10 September 2015).

date is justice, justice for the victims’, the OTP has, for example, employed ‘justice’ as something that can be dispensed specifically to victims, even though this would be implicitly achieved by bringing ‘defendants to justice’.¹⁸

The fourth and final category was for *justice in other contexts*. This residual category was used to classify sentences that did not use ‘justice’ in any of the previous three ways. Generally, sentences in this category used ‘justice’ in phrases such as ‘Minister of Justice’ or ‘Department of Justice’, or in quotes from *Rome Statute* provisions (such as the need to consider the ‘interests of justice’ under articles 53(1)(c) or (2)(c)). The common factor in this class of sentences was that they did not portray the OTP as delivering justice.¹⁹

There are natural limitations to this methodology. The analysis of the prosecutorial culture at the OTP in this chapter is limited by its focus on a single central value of what is certainly a much more complex context. Even more significantly, the public communications that are analysed in this chapter do not represent the entire gamut of ways through which the OTP portrays its specific prosecutorial culture. Nor are the public communications analysed here the only means through which public opinion about the OTP is shaped. The OTP has, for example, cooperated in the production of several documentaries about its work and the work of the ICC²⁰—during Mr Moreno-Ocampo’s tenure, for example, seven documentaries were produced with the OTP’s cooperation.²¹ OTP staff also regularly speak at conferences in The Hague and across the world, and only some are transcribed and released on the ICC website. By focusing on language and texts, this chapter also excludes messages that are conveyed through other means, such as actions, sights, and sounds. Finally, the coding and analysis involves a level of subjectivity that is inherent in any qualitative research project. Nevertheless, by providing this textual analysis, this chapter intends to contribute to the growing body of scholarship that is concerned with the legitimacy of international institutions and the efficacy of outreach activities; by analysing such a central concept as ‘justice’, there is much to learn about how the work of the ICC is understood and given meaning by actors inside and outside of the Court.

3 The Value of ‘Justice’

By analysing the ways in which the OTP uses ‘justice’ in its public communications, it becomes possible to gain a deeper understanding of what the value ‘justice’ appears to

¹⁸ Office of the Prosecutor, ‘ICC Cases an opportunity for communities in Ituri to come together and move forward’ (Press Release OTP-20080627-PR332, 27 June 2008) (OTP 27 June 2008).

¹⁹ The categorisation of sentences containing the phrase ‘interests of justice’ is admittedly borderline, but it was decided to place sentences containing this phrase into the residual fourth category. This is because they were not necessarily expressions of an underlying value in the same way as *unprompted* uses of the word are (of the kind in the first three categories).

²⁰ These were the subject of two articles by Wouter Werner, including ‘We Cannot Allow Ourselves to Imagine What It All Means: Documentary Practices and the International Criminal Court’ (2013) 3 *Law and Contemporary Problems* 319 and *Justice on Screen: A Study of Four Documentary Films on the International Criminal Court* (2016) 29(4) *Leiden Journal of International Law* 1043.

²¹ Interview with Pt, on file with author.

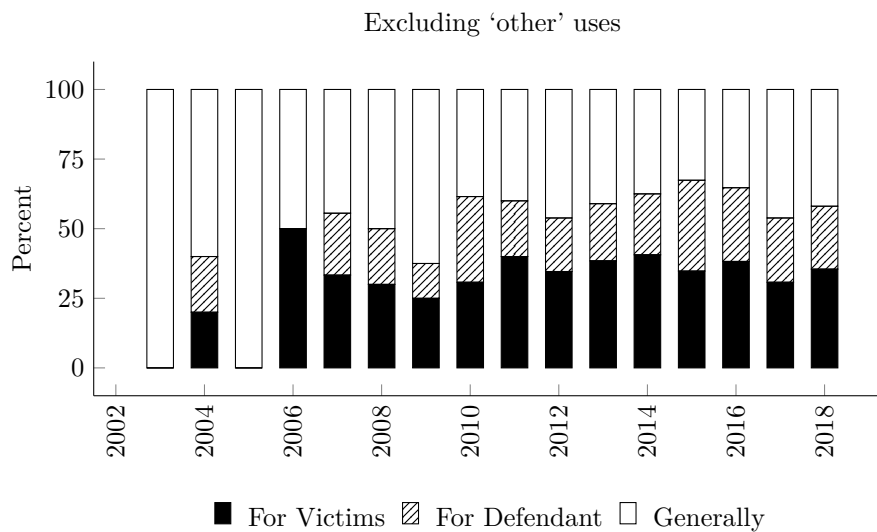


Figure 1: *Excluding 'other' uses*

mean. Once the *justice in other contexts* category is excluded from calculations on the basis that these references do not concern how the OTP presents its understanding of the value, 'justice' (in the remaining three contexts) appears in 49 per cent of the OTP's public statements.²² As shown in Figure 1, 52 per cent of all uses of the word 'justice' fall into the 'general' category, without specifying who the recipient of the justice is. Eighteen per cent of the time 'justice' is referred to, it concerns justice to defendants. In the remaining 30 per cent, 'justice' concerns justice for victims. Yet the general uses do not shed any light on who the OTP presents as the focus of the efforts to 'do justice'. The last two categories do, and they deserve further attention.

3.1 Justice for Victims

On the basis of the public communications analysed above, it is evident that when a target of efforts to do 'justice' is identified, it is likely to be the victims. It could therefore be argued that the prosecutorial culture within the OTP is presented as being driven by a desire to obtain this justice, as the most prominent *specific* category. Indeed, the examples cited in the introduction to this chapter suggest that this portrayal transcends the OTP into the ICC as a whole. Further, in 2015, Moffett observed that press releases from the ICC 'would be found wanting without the ubiquitous invocation of "doing justice for victims"'.²³

²² The figure is *not* 31% (ie, the 62% represented by all categories minus the 31% represented by the 'other' category) because some documents refer *both* to 'justice' in the 'other' sense, and 'justice' in the sense of 'victims', 'defendant', and 'general'.

²³ Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague' (2015) 13 *Journal of International Criminal Justice* 281, 282.

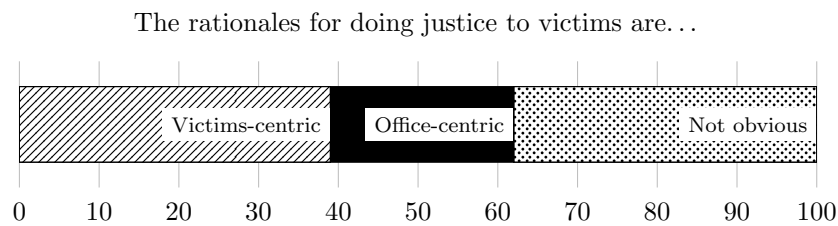


Figure 2: *The rationales for doing justice to victims are...*

But why is this type of justice sought? The uses of ‘justice’ that concern justice for victims reveal two rationales that suggest why the Office is seeking it (as shown in Figure 2).

The first class of rationales evident in the OTP’s public communications are victim-centric. These rationales emphasise that justice needs to be done for victims in order to respond to their wishes, demands, or needs. In 39 per cent of the time the need to do ‘justice for victims’ was raised, the OTP justified this by reference to victims-centric rationales. For example, in a speech entitled ‘The Time is Now’ at the Toronto International Film Festival in 2007, Mr Moreno-Ocampo pled with the audience to realise that ‘[t]he victims cannot wait; they need justice now’.²⁴ Upon the opening of the Ruto and Sang trial, Mme Bensouda emphasised that ‘survivors are crying out for more justice, not less’.²⁵ ‘[Victims] have waited far too long and deserve to see justice done’, she said in 2015.²⁶ Later the same year, when addressing the Security Council about the situation in Darfur, she regretted that ‘[y]ear after year, victims’ hopes and aspirations for justice and a durable peace have been dashed’.²⁷

Then there are the Office-centric rationales. These explain the need to do justice for victims by emphasising the OTP’s need to fulfil its mandate or satisfy personal desires or commitments of the OTP and its staff, and were evident in only 23 per cent of cases where the need to do ‘justice for victims’ was raised. ‘Our mandate is justice, justice for the victims’, Mr Moreno-Ocampo stressed in 2008.²⁸ ‘Justice for the victims of the [Central African Republic]’, said Mme Bensouda upon the conviction of Jean-Pierre Bemba Gombo, ‘has been our primary and sole objective in this case’.²⁹ ‘Seeing justice is done for the victims of Guinea is my Office’s mandate and a major

²⁴ Luis Moreno-Ocampo, “‘The Time is Now: A Conversation About Darfur’”, Opening Remarks by Mr Luis Moreno-Ocampo, Toronto International Film Festival’ (Statement, 9 September 2007).

²⁵ Statement by the Prosecutor at the Press Conference on the Opening of Ruto and Sang Trial (Press Statement, 9 September 2013).

²⁶ Fatou Bensouda, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the surrender and transfer of top LRA Commander Dominic Ongwen’ (Press Statement, 21 January 2015).

²⁷ Fatou Bensouda, ‘Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)’ (Statement, 15 December 2015).

²⁸ OTP 27 June 2008 (n 18).

²⁹ Fatou Bensouda, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the conviction of Mr Jean-Pierre Bemba’ (Statement, 21 March 2016).

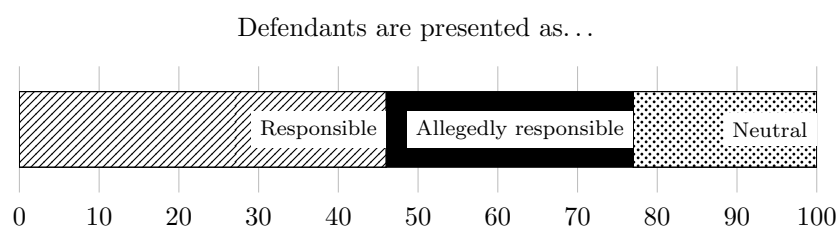


Figure 3: *Defendants are presented as...*

personal priority for me', she said in 2012.³⁰ When she released a statement concerning the withdrawal of charges against Francis Muthaura, she reminded the public of her 'unwavering commitment to justice for the victims of the 2007-2008 post-election violence.³¹ Office-centric rationales have almost equally emphasised the OTP's (and the Prosecutor's) obligations, on the one hand; and the desires of staff, on the other.

There were, of course, some statements, such as: 'my Office is continuing its investigations with a view to deliver justice to the victims of grave crimes under the Rome Statute in Darfur'³², that did not demonstrate any clear reason for why the OTP wished to be seen to be seeking justice for the victims. These appeared, on average, 38 per cent of the time.

3.2 Justice to Defendants

In contrast to victims, defendants have not featured as prominently in the OTP's portrayal of the value of justice—as shown in Figure 1. When it has been raised, it has largely been in a retributive sense: defendants should be brought to justice. In contrast, it appears there are, at most, only seven public communications (out of the total 394) where sentences concerning 'justice to defendants' *also* emphasise the defendant's entitlement to due process rights (such as when Mme Bensouda used a press conference in Uganda to appeal directly to Joseph Kony and Lord's Resistance Army members to surrender, adding that '[a]t the ICC, you will be treated fairly and impartially, in accordance with highest standards of justice, and with full respect for your due process rights as a defendant'³³). In the context of remarks about defendants, the contrast between the amount of times the OTP has emphasised the retributive and restorative aspects of 'justice' on the one hand, and the procedural aspects of 'justice' on the other, is striking.

³⁰ Fatou Bensouda, 'Press statement by Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court' (Press Statement, 5 April 2012).

³¹ Fatou Bensouda, 'Statement by ICC Prosecutor on the Notice to withdraw charges against Mr Muthaura' (Statement, 11 March 2013).

³² Fatou Bensouda, 'Statement by the Prosecutor of the International Criminal Court Mrs Fatou Bensouda' (Press Statement, 22 October 2012).

³³ Fatou Bensouda, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: justice will ultimately be dispensed for LRA crimes' (Press Statement, 27 February 2015).

Interestingly, 46 per cent of references to ‘justice to defendants’ in the OTP’s public communications have been worded to appear to presume a defendant’s guilt by not clarifying that those who need to be brought to justice are only ‘alleged’ or ‘suspected’ of criminal offences. As shown in Figure 3, this is opposed to a mere 31 per cent that reference ‘alleged’ or ‘suspected’ crimes or defendants; and 23 per cent that are neutrally worded. In this light, ‘justice’ has been portrayed by the OTP as strongly victims-focused, with little emphasis placed on the presumption of innocence defendants enjoy, or their entitlement to due-process rights.

3.3 Ending Impunity, Deterrence, Impartiality, and Independence

The expression of the value of ‘justice’ in the OTP’s public communications can be contrasted against the expression of other values in order to properly contextualise the weight and significance that has been afforded to it. These other values—ending impunity, contributing to deterrence, and acting impartially and independently—also prominently feature in discourse related to the OTP’s *raison d’être*, as well as in the OTP’s public communications. In the OTP’s 2019-2021 Strategic Plan, for example, ending impunity and contributing to deterrence were identified as part of the OTP’s ‘mission’, with these goals achievable through the OTP acting impartially and independently.³⁴ But how do they contrast against the OTP’s desire to do ‘justice’?

It is worthwhile recalling that 49 per cent of all the OTP’s public communications refer to ‘justice’ in a general context or in the context of delivering justice for victims or to defendants. This figure is higher than the number of public communications referring to ending impunity (37 per cent of public communications), deterrence (24 per cent of public communications), impartiality (37 per cent of public communications), or independence (48 per cent of public communications). Even though the value of independence is mentioned nearly the same amount as ‘justice’ (once the ‘justice in other contexts’ category is excluded from the calculation), 49 per cent of these references were in standard phrases that do not engage in substantive discussions about why the OTP sees independence as important. For example,

The International Criminal Court is an independent, permanent court that investigates and prosecutes persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes if national authorities with jurisdiction are unwilling or unable to do so genuinely.

Or

The Office of the Prosecutor of the ICC conducts independent and impartial preliminary examinations, investigations and prosecution of the crimes of genocide, crimes against humanity and war crimes.

³⁴ Office of the Prosecutor, ‘2019-2021 Strategic Plan’ (17 July 2019) 8.

Typically, these standard phrases are found tucked away at the end of public communications, between the main point the OTP is trying to convey and the OTP Public Information Coordinator's contact details. Relegated to nothing more than a mere obligatory, tiresome summary of what the ICC is designed to achieve, one could be forgiven for forgetting that they even exist.

Distinguishing itself from a desire to end impunity, contribute to deterrence, and a commitment to acting impartially and independently in both its prevalence *and* the diversity of ways in which it is deployed, 'justice' stands out as being a core value—perhaps *the* core value—of the OTP's prosecutorial culture. Yet, as argued in the next section, the position the value of justice occupies vis-à-vis these other values may be cause for concern, as it seems to be the value around which the OTP is fragmenting perceptions about what the OTP is designed to achieve, harming its perceived legitimacy.

4 The Wolf in Sheep's Clothing

The 15th Century scholar Laurentius Abstemius wrote in his *Hecatomythium* a fable about outward appearances concealing darker realities. He warned that 'people should be judged not by their outward demeanour but by their works, for many in sheep's clothing do the work of wolves'.³⁵ This section argues that the value of 'justice', as it has been referred to in the OTP's public communications, is one that appears outwardly laudable, but may conceal darker and more problematic characteristics that have the potential to cast the OTP's prosecutorial culture in a negative light.

The sheep in this analogy is readily apparent. One could not reasonably deny that the OTP and all those who work for it have a defensible interest in seeing 'justice' done. Similarly, no one could reasonably deny that a desire to do *something* or *some things* called 'justice' is an integral component of the OTP's actual prosecutorial culture, and there are good reasons why the OTP would want to demonstrate that through its public communications—after all, justice is what courts are meant to achieve.

Nevertheless, there may be a wolf hiding under this benevolent façade. 'Justice' is a concept that easily lends itself to subjective and selective application: everybody wants justice, but not everyone wants the same justice. The relative nature of 'justice' has long been recognised. Kelsen, for instance, argued that 'judgment to the effect that something is just cannot be made with the claim of excluding the possibility of a contrary judgment of value'.³⁶ In 2015, French neatly summarised the problem:

[i]deas of justice and fairness are invariably and ultimately subjective, and on any topic views as to what they demand and whether they are, or

³⁵ Laura Gibbs, 'De Lupo Ovis Pelle Induto Qui Gregem Devorabat' (*Aesopus: Latin Via Fables*, 2009) <<http://aesopus.pbworks.com/w/page/1471506/abstemius076>>.

³⁶ Hans Kelsen, *What is Justice? Justice, law, and politics in the mirror of science* (University of California Press 1960) 21. For a summary of similar arguments, see Ingo Venzke, *How Interpretation Makes International Law: On semantic change and normative twists* (OUP 2012) 208-11.

can be, achieved are open to shifting—critics might say indeterminate—interpretations.³⁷

‘Justice’ is an example of a concept that suffers from combinatorial vagueness—‘an indeterminacy as to just what combination of conditions is sufficient or necessary for the application of the term’.³⁸ The beauty (and danger) of concepts like ‘justice’ that appeal to purportedly universal values is that they can be employed to justify nearly any course of conduct, because what one person considers a legitimate form of justice is going to be different from that wanted by another. As such, ‘[t]he rhetoric of justice offers but hollow words’ and is merely ‘a reflection of actors’ [tendencies] to identify particular preferences with concepts that are said to be universal’.³⁹

The modern history of international criminal law is riddled with evidence of the relative nature of justice. Take the recent scenes of Laurent Gbagbo’s supporters popping champagne outside the ICC upon his acquittal. While one supporter said that ‘[f]inally there is some justice’, an alleged victim believed that his release would mean ‘victims will not see justice’.⁴⁰ And what does ‘justice’ demand for a person like Dominic Ongwen, who has the status of a former child soldier *and* an alleged perpetrator? There is no objective response to these examples.

Moreover, ‘justice’ is a value that is liable to generate powerful and emotive responses in those who have an interest in it being done.⁴¹ Fundamental distinctions between procedural justice, retributive justice, and restorative justice risk being lost, as justice rhetoric ‘undermines the formality of legal discourse’ and shifts debate away from objectivity and onto the ‘shaky foundations of subjectivism’.⁴² Important nuances can be overshadowed by the more subjective and emotive message heard by the receiver, which may not always align with the message intended to be sent by the speaker. For example, the phrase ‘defendants will see justice done’ may be interpreted in several ways. A victim may feel that ‘justice’ means ‘punishment’, and given the harm that they have suffered, consider this a good thing. A defendant may also feel that justice means punishment, and thus assume that their guilt has been prejudged. A judge may instead emphasise that the defendant will receive a fair and impartial trial, given that is what justice demands. Or another judge may treat the phrase as meaningless, and, like Dame Rosalyn Higgins, remark that ‘I don’t find justice either a useful decision-making tool or a recognisable objective for international law’.⁴³

³⁷ Duncan French, “‘You will always have the poor’: A reflection on the paradox of justice as law” (2015) 22 *International Journal on Minority and Group Rights* 533, 535.

³⁸ Geert Keil and Ralph Poscher, ‘Vagueness and Law: Philosophical and legal perspectives’ in Geert Keil and Ralph Poscher (eds), *Vagueness and Law* (OUP 2016) 1, 3.

³⁹ Venzke (n 36) 211.

⁴⁰ ‘Ivory Coast ex-President Gbagbo acquitted at ICC court in The Hague’ *BBC* (15 January 2019) <<https://www.bbc.com/news/world-africa-46875757>> accessed 8 February 2019.

⁴¹ French (n 37) 548.

⁴² Venzke (n 36) 208–09.

⁴³ Rosalyn Higgins, ‘Plenary Address’ (Annual Meeting of the American Society of International Law, Washington DC, 31 March 2006), quoted in Jutta Brunnée, ‘Climate Change, global environmental justice, and international environmental law’ in Jonas Ebbesson and Phoebe Okowa (eds),

And yet, despite all of the above, the OTP still refers to the value of ‘justice’ in its public communications. One might wonder whether the OTP has exposed itself to two risks. The first risk that may be foreseen is that the portrayal of the value of justice might create misconceptions in the community about the OTP’s goals, aspirations, and capabilities. This stems from three factors. First, the OTP has presented the value of ‘justice’ as being more closely associated with victims than defendants. One can see this simply in the fact that the OTP has referred to doing justice to defendants just under half as many times as doing justice for victims. Second, the OTP has only referred to a defendant’s fair trial rights in the same sentence as ‘justice’ in a maximum of seven public communications out of the total 394 analysed for this chapter. Third, the OTP refers to ‘responsible’ defendants needing to be brought to justice more often than ‘allegedly responsible’ defendants.

The apparent risk here is that this messaging may suggest that the OTP’s prosecutorial culture is one driven by the belief that defendants prosecuted by the OTP *are* guilty for the harms that the victims have suffered. It may suggest that staff see the Chamber’s ultimate finding of guilt merely a rubber stamp to what everyone has known all along, decreasing the importance of due deference to professional adjudication in the ICC’s adversarial system.⁴⁴ The desire to see ‘justice’ done may also be seen to outweigh the values of professional impartiality and detachment, leading to the incorrect belief that prosecutors will engage in conduct that seeks to further this ultimate desire—particularly in light of the fact that impartiality is referred to in a fewer number of the OTP’s public communications (37 per cent) than ‘justice’ (49 per cent).

It should be reiterated that none of this suggests that OTP staff *actually* believe that the value of ‘justice’ should be interpreted in any of the above ways. They may, or they may not. There is a possibility that how the value of justice is actually alive in the OTP’s prosecutorial culture may well be different from how the value is portrayed in its public communications. This divide between reality and perception is where the risk of misconceptions about goals, aspirations, and capabilities develops. If, for example, OTP staff engage in conduct that may appear to be at odds with the value of justice as it has been portrayed—one may think of the Prosecutor not laying particular charges due to a lack of evidence, for example—it is easy to imagine how victims may feel a sense of disenchantment with the work of the OTP. In repeated cases, this detachment may lead to cynicism because of the gap between the conduct victims have expected (from the way ‘justice’ is *portrayed*) and the conduct that has occurred in reality (because of the way ‘justice’ is *embodied*). From a different perspective, it is similarly easy to imagine how a defendant may feel that OTP staff have prejudged their guilt, and that they have a poor chance of being treated fairly by the prosecution with a view to arriving at a court-determined truth. The important task of managing expectations—of *all* those interested in proceedings—should, therefore, factor in to how the OTP’s values are portrayed in its public communications to mitigate the risk of misconceptions arising. How the OTP

Environmental Law and Justice in Context (CUP 2009) 316, 316. Notes of this speech are on file with Jutta Brunnée (see 330).

⁴⁴ Nevertheless, at the time of writing, the OTP prosecutions have resulted in more failed prosecutions than convictions.

has portrayed the value of ‘justice’ may therefore be a flaw in the current approach that warrants attention.

The second risk is that the way the value of ‘justice’ has been portrayed in the OTP’s public communications may reinforce negative metanarratives that have cast shadows over the OTP’s work. The first of these is the ‘good versus evil’ duality. While concepts such as ‘good versus evil’ are simple enough to grasp and appear useful as a marketing tool,⁴⁵ the reality is that international criminal prosecutions do not lend themselves to such simple binary depictions. They gloss over the shades of grey inherent in any judicial adjudication process and ‘undermine international criminal law’s ability to speak in other than a crude register’.⁴⁶ Painting the prosecutorial culture at the OTP as one in which staff see themselves engaged in the battle of good versus evil risks oversimplifying the complex evidential assessments, tactical decisions, and policy choices staff make on a daily basis and in some ways may be disingenuous to their talents. Perhaps more importantly, it entrenches the belief that there *is* a ‘right’ and ‘wrong’ outcome, rather than being open about the fact that the outcome is determined by an independent judiciary who will merely arrive at a court-adjudicated truth on the evidence placed before it.

The OTP also risks reinforcing the applicability of Mutua’s ‘savages-victims-saviours’ (SVS) construction to international criminal law. The SVS construction conceptualises human rights discourse as metaphorically concerned with the relationship between the savage and barbaric state; the ‘powerless, helpless innocent’ it has victimised; and the saviour—the collective of actors committed to human rights—as ‘the good angel who protects, vindicates, civilises, restrains, and safeguards’ the rights of victims who have become disempowered through the actions of those who were meant to protect them.⁴⁷ More recently, the SVS construction has been deployed to international criminal law discourse, pitting the barbaric criminals against the helpless victims, with the Prosecutor as ‘the embodiment of the crusading knight in shining linen on hand to save disempowered victims from the savagery of their own’.⁴⁸

On the basis of how the value of ‘justice’ has been portrayed, people could be forgiven for thinking that the SVS construction has permeated the OTP’s actual prosecutorial culture and that OTP staff think of their work in the terms Mutua identified. This stems from the way that the Office’s public communications have spoken about *why* it is important to deliver justice for the victims. As discussed in Section 3.1, 39 per cent of the times that the OTP referred to the need to do ‘justice’ in the context of victims, this need was rationalised by reference to the victims’ wishes, demands, or needs. In contrast, only 23 per cent of the times that ‘justice’ was used in this context saw

⁴⁵ On the subject of marketing in international criminal law, see Sophie Rigney, ‘Postcard from the ICTY’ in Jessie Hohmann and Daniel Joyce (eds), *International Law’s Objects* (OUP 2018) 366 and Christine Schwöbel, ‘The Market and Marketing Culture of International Criminal Law’ in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law* (Routledge 2014) 264.

⁴⁶ Mark Drumbl, ‘Victims who Victimise’ (2016) 4 *London Review of International Law* 217, 218.

⁴⁷ Makau Mutua, ‘Savages, Victims, and Saviours: The metaphor of human rights’ (2001) 42 *Harvard International Law Journal* 201, 202-204.

⁴⁸ *ibid* 201; John Reynolds and Sujith Xavier, ‘“The Dark Corners of the World”: TWAIL and international criminal justice’ (2016) 14 *Journal of International Criminal Justice* 959, 965.

the OTP employ rationales emphasising a need to fulfil its mandate or satisfy personal desires or commitments of OTP staff. '[W]e continue to have the victims foremost in mind, and strive to do what we can so that they may attain the justice they so rightly deserve', proclaimed Mme Bensouda in a statement following the arrest and transfer of Mr Al Hassan.⁴⁹ 'The victims of crimes under ICC jurisdiction need justice and development', argued Mr Moreno-Ocampo, '[t]he International Criminal Court and the World Bank have different mandates, but a common interest to help these victims. We are exploring different ways of cooperation to serve them better'.⁵⁰ 'The appeals made by many victims [of the conflict in the Democratic Republic of Congo] must be heard so that justice is rendered to them', claimed Mme Bensouda in 2018.⁵¹ It is possible to read statements such as these as the OTP portraying a prosecutorial culture that treats victims as disempowered; enforcing the belief that staff see themselves as responding to victims' calls for justice in the absence of anyone else who is able to secure it for them, adding weight to the SVS critique.

One may also wonder whether it is useful for the OTP to expose itself to SVS readings, given the recognition by some commentators that the recent acquittals have harmed the OTP's image and raise doubts about its capabilities⁵²—particularly noting the ICC's quest for universal Rome Statute membership and legitimacy. When seen in this light, OTP is presented as being an enthusiastic but deluded actor, painting itself as being committed and effective,⁵³ yet failing to meet the expectations its por-

⁴⁹ Fatou Bensouda, 'Statement of ICC Prosecutor, Fatou Bensouda, following the arrest and transfer of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, a suspect in the Mali situation: "We remain steadfast in the pursuit of our mandate under the Rome Statute"' (Statement, 31 March 2018).

⁵⁰ Luis Moreno-Ocampo, 'ICC Prosecutor and World Bank Vice-Presidency to Cooperate on Investigations' (Statement, 12 October 2009).

⁵¹ Fatou Bensouda, 'Statement by the ICC Prosecutor, Fatou Bensouda, at the conclusion of her visit to the DRC: "The fight against impunity and the critical prevention of crimes under the Rome Statute are essential for social stability"' (Statement, 4 May 2018).

⁵² 'The acquittal [of Laurent Gbagbo] underscores how important it is that the process to select the next prosecutor yields a person of integrity and sound judgment who is highly skilled at criminal investigation': James Goldstone, quoted in Ruth Maclean, 'Ex-Ivory Coast president Laurent Gbagbo acquitted at ICC' (*The Guardian*, 15 January 2019) <<https://www.theguardian.com/world/2019/jan/15/ex-ivory-coast-president-laurent-gbagbo-acquitted-at-icc>>; Luke Moffett argued the acquittal was 'a bigger blow for the image of the ICC than the Appeals Chamber of the Court's decision in June last year to quash the conviction of former Congolese Vice-President Jean-Pierre Bemba after a six year trial', see Luke Moffett, 'Why Gbagbo acquittal is a bigger blow for the ICC than the Bemba decision' (*The Conversation*, 15 January 2019) <<https://theconversation.com/why-gbagbo-acquittal-is-a-bigger-blow-for-the-icc-than-the-bemba-decision-109913>>. See also Douglas Guilfoyle's series of three blog posts on *EJIL: Talk!*, starting with Douglas Guilfoyle, 'Part I- This is not fine: The International Criminal Court in Trouble' (*EJIL: Talk!*, 21 March 2019) <<https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/>>.

⁵³ For example, 'As Prosecutor of the International Criminal Court [...] my mandate is to independently and impartially investigate and prosecute those most responsible for the world's gravest crimes—namely, genocide, crimes against humanity and war crimes—where the Court has jurisdiction, and no-one else is doing, or is able to do, justice for the victims': Fatou Bensouda, 'Statement by the ICC Prosecutor, Fatou Bensouda, at the conclusion of her visit to the DRC: "The

trayal of ‘justice’ might give rise to. From a defence perspective, perhaps this portrayal also bolsters the image of a prosecution office driven by a desire for convictions at the expense of the professional duties of independence and impartiality. None of these interpretations of the prosecutorial culture would appear desirable. How ‘justice’ has been portrayed in the OTP’s public communications may therefore be problematic, due to its potential to create misconceptions regarding the OTP’s role and reinforce depictions of the OTP’s collective mindset that it may be wise to shed.

5 An Alternative to ‘Justice’?

Given that how the OTP has portrayed the value of ‘justice’ risks creating misconceptions about the OTP’s goals, aspirations, and capabilities, as well as reinforcing harmful metanarratives about the ICC’s work, the next issue is whether these problems can be avoided. This section argues that the OTP has two credible, less risky alternative values that it can espouse that may cast the prosecutorial culture in a more positive light or, at least, one that is less liable to misinterpretation. Both of them can be expressly found in the Rome Statute, and avoid the problems of relativism and emotivity that are inherent in the use of ‘justice’.

The first of these is independence. The OTP is obliged to act independently under articles 42(1) and 42(5) Rome Statute. Obligations of independence are also found in the Code of Conduct for the Office of the Prosecutor; the Staff Rules; the Staff Regulations; and the Code of Conduct for Staff Members. Functional independence requires OTP staff to have ‘complete freedom in decision-making’.⁵⁴ It is a rejection of external influence and an obligation on the Prosecutor that their decision-making power will never be subjugated to an outside source. The second of these is impartiality. The obligation of impartiality is found in article 42(7) Rome Statute, among other places. It also forms part of the ‘solemn undertaking’ given by every OTP staff member upon commencing their employment, where they affirm to undertake their duties and exercise their powers ‘honourably, faithfully, impartially and conscientiously’.⁵⁵ Impartiality is a value that requires people to lack ‘bias and prejudice’.⁵⁶ Côte regards independence and impartiality as ‘opposite sides of the same coin’, as they are mutually enforcing: independence guarantees impartiality, and impartiality guarantees independence.⁵⁷

Of course, the OTP already espouses the values of independence and impartiality in its public communications. It will be recalled that 48 per cent of public communications refer to independence; and 37 per cent refer to impartiality. These two values have several advantages over that of ‘justice’ that mitigate the risk of them leading to a misinterpretation of how the prosecutorial culture will inform the OTP’s actions.

fight against impunity and the critical prevention of crimes under the Rome Statute are essential for social stability” (Statement, 4 May 2018).

⁵⁴ *Prosecutor v Nahimana and ors* (Appeal Judgment) ICTR-99-52-A (28 November 2007) para 19.

⁵⁵ ICC, Rules of Procedure and Evidence (2002) r 6(1).

⁵⁶ *Nabima and ors* (n 54) para 19.

⁵⁷ Luc Côte, ‘Independence and Impartiality’ in Luc Reydam, Jan Wouters, and Cedric Ryngaert (eds), *International Prosecutors* (OUP 2012) 319, 352.

'Impartiality' and 'independence' arguably do not rile up the same emotive responses as 'justice'; nor do they appear to lend themselves to the same degree of subjective interpretation about the outcomes expected from the OTP's work. Shifting the focus towards these values may make it easier for the OTP to manage expectations about its conduct. Furthermore, they do not enforce negative metanarratives, assisting the OTP to shed the perception that it sees victims as disempowered and itself as a saviour. The values of independence and impartiality portray a prosecutorial culture that emphasises cool-headedness, professionalism, and commitment. They might not sound as attractive from a marketing perspective. They might not stir up the same emotions. Nor might they fit into the same pattern of 'justice' rhetoric that has followed international criminal law since the 1990s. Yet it is precisely in their blandness that these values find their strength, and that they may help to turn the tide of increasing suspicion that the OTP is affected by 'political' considerations.⁵⁸

6 Conclusion

Perceptions of the prosecutorial culture of the OTP matter. The values an institution espouses in its artefacts play an important role in how people external to that institution believe its members will 'perceive, think, and feel' about problems that they encounter, as they influence the perception of a group's 'beliefs, values and assumptions, and ways of doing things'.⁵⁹ Espoused values set expectations. In the context of the OTP, they shape the way people will assess its implementation of its legal mandate. The OTP's portrayal of the value of 'justice' may not necessarily be conducive to portraying the prosecutorial 'culture' in a positive light. A statistical and qualitative analysis of the way the OTP has espoused 'justice' in the 394 press releases and statements it has published over 15 years reveals the OTP has been portraying a 'justice' that emphasises victims' desires for restorative and retributive justice; while neglecting to clarify that the defendants sought by the OTP are merely 'alleged' until such time that they are found guilty.

Yet the relative nature of the notion of 'justice' must not be forgotten. The tendency of the value of 'justice' to evoke emotive responses and subjective views as to the prosecutorial culture of the OTP risks creating misconceptions in the broader community regarding its goals, aspirations, and capabilities. It also risks entrenching negative metanarratives that have dogged the work of the OTP since its commencement. While it is easy to understand *why* espousing a value of 'justice' would be seen as desirable, these two risks may arguably outweigh any positive 'marketing' effect that this 'justice' rhetoric may have. There may be a better option. If the OTP pivoted towards emphasising more strongly the values of independence and impartiality, emphasising cool-headedness, professionalism, and commitment, the OTP may mitigate the risk that those external to the prosecutorial culture of the ICC will misconceive of how the OTP fulfils its legal mandate.

⁵⁸ Kotecha (n 5) 940.

⁵⁹ Schein (n 2) 24.