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Front cover: *Master carpenter Lorenzo Corti fine-tuning a piece of European cherrywood in the CILRAP Bottega (office) in Florence. Recognized for the high quality of his work, he has restored churches and monasteries in Tuscany for many years. The books in CILRAP's Quality Control Project display contemporary Florentine artisans as symbols of the mindset of quality control which they seek to inspire. Photograph: © CILRAP 2020.*

Back cover: *Segment of the steps at the entrance of the San Miniato al Monte Basilica, a Romanesque church (from 1013 AD) on a hill-top in southern Florence. The surface of each stone is carefully carved by a mason's hand for water to run off and for better grip. Photograph: © CILRAP 2020.*

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Challenges in Charge Selection: Considerations Informing the Number of Charges and Cumulative Charging Practices

Cale Davis*

13.1. Introduction

There is no other discretion singularly more important to whether an international criminal tribunal fulfils its mandate than a prosecutor's decision of who to charge, and what to charge them with. Prosecutors are the 'gatekeepers' to international courts,[1] tasked with determining what conduct does and does not merit prosecution. It is no exaggeration to say that in setting a court's agenda, they have the life of international criminal law in their hands.

Yet the charging discretion is also one of the most complex decisions prosecutors are called upon to make. It is marked by a plethora of pragmatic, legal, evidential, and policy considerations that need to be assessed and weighed. Prosecutors must carefully exercise their professional judgement to determine the most appropriate course of action in each case. Rarely will they be confronted with a scenario that sufficiently mirrors a previous case from which they can draw a direct historical comparison.

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1 Lovisa Bådagård and Mark Klamberg, "The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court", in *Georgetown Journal of International Law*, 2017, vol. 48, no. 5, p. 639; Héctor Olásolo, "The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?", in *International Criminal Law Review*, 2003, vol. 3, no. 2, p. 89.

Moreover, they must make these decisions in the knowledge that the path they choose will have consequences not only for the potential defendant, but also an innumerable number of actors with an interest in the court's work.

Perhaps for this reason, deontological, rule-based approaches to analysing and guiding the charging discretion have their attractions. Yet attempts to provide normative guidance to prosecutors on how to navigate the discretion have inevitably failed to placate critics. For example, despite the ICC-OTP's efforts to produce policy papers and strategic plans (a practice largely ignored by the ICTY, ICTR, and SCSL), Darryl Robinson has observed that "[f]or any position the Court can possibly take, perfectly plausible and powerful criticisms can inevitably be made".[2] Martti Koskenniemi's famous apology – utopia duopoly remains relevant.[3] William Schabas has argued that the policy papers fail to explain why some cases were selected while others were cast aside.[4] Deontological approaches to analysing the charging discretion have so far failed to provide sufficient nuance to be useful in any concrete sense. A different focus is required to better understand how the quality of the exercises of the charging discretion can be ensured.

It should be noted at the outset that it is misleading to speak of the 'charging discretion' as a single choice. It is not. The charging discretion is a collective of smaller discretionary choices, such as *who* to charge, *when* to charge them, and *what* to charge them with. The question of what to charge can again be broken down into the issues of the *types* of charges someone should face and the *number* of charges they should face. This may lead to the practice of cumulative charging, one of the seven bottlenecks identified by the *Quality Control in Criminal Investigations* team as being pertinent to improving the speed and cost of international criminal processes.[5] For reasons of brevity, it is this last issue concerning the number of charges that a defendant should face that this chapter shall focus on.

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2 Darryl Robinson, "Inescapable Dyads: Why the International Criminal Court Cannot Win", in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, p. 324.

3 Martti Koskenniemi, *From Apology to Utopia*, Cambridge University Press, 2005, p. 16.

4 William A. Schabas, "Feeding Time at the Office of the Prosecutor", *International Criminal Justice Today*, 23 November 2016 (available on its web site).

5 Morten Bergsmo, "Towards a Culture of Quality Control in Criminal Investigations", FICHL Policy Brief Series No. 94, Torkel Opsahl Academic EPublisher, Brussels, 2019 (https://www.toaep.org/pbs-pdf/94-bergsmo/).

This chapter has three broad purposes. First, it attempts to highlight the weaknesses of deontological approaches in analysing or guiding the charging discretion by demonstrating that the factors that affect how the discretion is exercised do not lend themselves to normative constraint. Second, it represents an attempt to turn the discussion regarding charge selection towards the views of the people exercising the discretion by drawing heavily upon the author's own interviews with international prosecutors. Third, it hopes to encourage the quality of choices to be assessed by reference to the willingness of the actor who made the decision to engage in debate and discussion regarding why the choice was made.

This chapter is divided into five core sections. Section 13.2. presents descriptive statistics to place the exercise of the charging discretion in its historical context. It reveals that the issue of how many charges to allege against individual accused is marked by both consonance and dissonance. From a purely numerical perspective, historical practice is widely varied. Section 13.3. goes on to explore the factors international prosecutors have relied upon in describing how many charges to allege. It demonstrates that these factors are numerous and context-specific. Section 13.4. posits that attempts to ensure the quality of the exercise of the charging discretion need to accept that prosecutors are trying to achieve numerous goals through their charging practices and that the charging discretion is steeped in subjectivity. Section 13.5. argues that Thomas Risse's logic of arguing provides a conceptual framework through which we can assess the quality of exercises of the charging discretion. It aims to demonstrate the importance of sharing practitioners' experiences in exercising the charging discretion and the reasons they have relied upon to justify the decisions that they have made. The voices of practitioners who work at the proverbial coalface are not given sufficient prominence in the literature. It is important their experiences be shared. By drawing these voices into the conversation, we can hope to develop a more complete picture of the challenges they face in charge selection, as well as accelerate the development of collective knowledge about desirable and undesirable conduct.

13.1.1. Interview Methodology

This chapter is based in part on a subset of thirty personal, anonymous interviews the author conducted between March and September 2018. With only two exceptions, the interview subjects held or hold the rank of

Senior Trial Attorney (or its equivalent) and above at the ICC, ICTY, ICTR, and SCSL.[6] These individuals were selected because of their senior positions within trial teams and the organisational structure of the various OTPs, allowing them to speak with authority regarding discretionary choices.

Interviews were conducted in person, via video-conference, or on the phone. To encourage the interviewees to speak openly, they were informed at the start of the interview that they would not be quoted directly by name or in a manner that identifies them personally. The open interviews were structured around two broad questions: what discretionary choices did the interviewee consider to be important in their work, and what did they consider relevant when exercising them. At the conclusion of the interviews, the recordings were transcribed by the author. The transcripts of the recordings are stored on file with the author.

Importantly, the views presented in this chapter are not offered as being universally held. Nor are they claimed to be widely held, or even held by more than one person. The point of discussing these views is simply to demonstrate that the views *are* held, and this is important in order to develop a picture regarding the factors that have influenced the decision of how many charges a defendant should be faced with.

13.2. Charging in Numbers

Before proceeding to analyse the rationales that have informed the question of how many charges to allege against an accused, it is useful to reflect on historical charging practice. This section presents descriptive statistics that contextualise this issue, while contrasting the variations in charging practices across, and within, the ICC, ICTY, ICTR, and SCSL's prosecution offices.

The descriptive statistics presented in this section are based on the charges alleged against individual accused contained in the *final charging documents* filed against each individual defendant at the ICC, ICTY, ICTR, and SCSL up to December 2018. The final charging documents are

[6] Of the 30 interviewees, 26 came from a common law background and 4 came from a civil law background. The predominance of common law practitioners reflects the reality that most individuals who fall into this class come from common law systems. The author is thankful for the co-operation and assistance of all the interviewees who spoke on a voluntary basis, as well as the OTPs of the MICT and the ICC for making current staff available.

the most recent official filings regarding the charges a defendant is accused of. They may be indictments, 'documents containing the charges', warrants of arrest, or summonses to appear. While some accused were never prosecuted (they may have died, or the charges may have been later withdrawn), the final charging documents are nevertheless useful because they are the ones in which the prosecutor 'nails their colours to the mast'. They represent the final assessment of what the prosecutor considers to be the charges on which there *are* grounds for a conviction.

Between 1995 (the year the first final charging document was issued) to December 2018, international criminal prosecutors at the four courts within the framework of this study have seen 195 final charging documents issued, accusing 298 defendants of 2,774 core international crimes. On average, defendants charged by the prosecutors of these courts will face 9.3 charges. The average number of charges alleged against defendants at the ICTY is 10; at the ICTR is 6; at the SCSL is 13; and at the ICC is 12.

Figure 1 presents the average number of charges alleged against individual accused for each year across the four courts. As depicted by the dotted regression line, the average number of charges alleged against defendants each year has remained largely flat. There is only a minor upward trend.

On a year-to-year basis, the averages have also remained largely consistent at the ICTY, the ICTR, and the SCSL. There is only minimal variation. The averages never exceed 20 charges. ICC-OTP practice, however, has been far less consistent. Periods of relative stability – such as between 2008 and 2014 – contrast sharply against the periods 2004-2007 and 2015-2018. Significantly higher averages are reported in 2004, 2007, and 2015. These were the years in which final charging documents containing a large number of charges were issued for Otti, Harun, Kushayb, and Ongwen. In these years, the averages spiked respectively to 30, 32, and 46 charges – roughly five times the average across all courts.

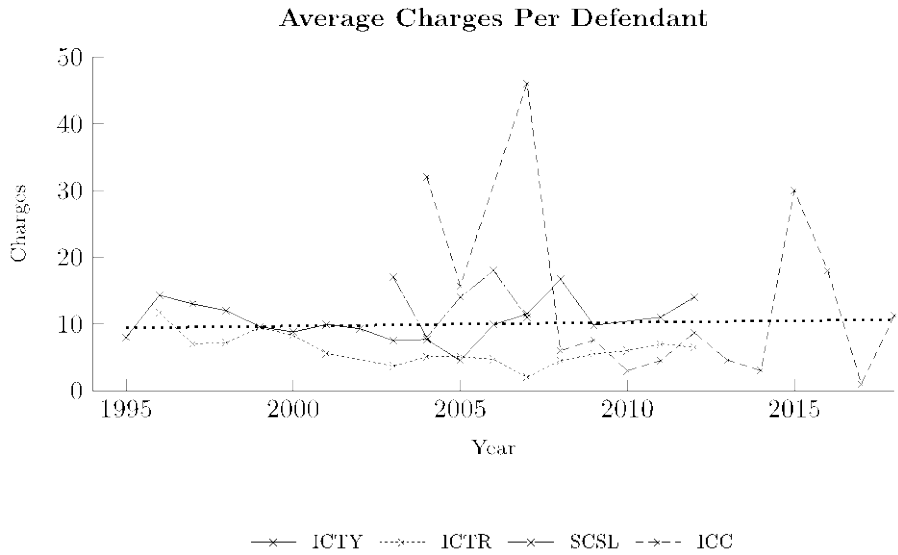

Figure 1.

One might be tempted to explain away the spikes in the ICC-OTP's averages by claiming that each case is unique and that past practice cannot, therefore, be used as a reliable benchmark against which to assess charging practices. This is undoubtedly correct. However, the explanation is not entirely satisfying, for two reasons. First, each case is *always* unique. Therefore, over a quarter of a century of charging practice, it would be reasonable to expect that in at least some of those years, at some other court, similar fluctuations would have been seen. They have not. Second, for this explanation to be convincing, we would expect to see similar spikes in *other* courts. Yet the ICC-OTP is the only prosecution office to demonstrate such significant fluctuations on a year-to-year basis.

The data in Figure 1 can be presented differently to provide additional insights into charging practices. Figure 2 is a box plot. Box plots are constructed by listing the number of charges per each individual defendant in order from lowest to highest. The 'whiskers' – the lines extending from either end of the central boxes – represent the top 25 per cent and bottom 25 per cent of observations. The boxes are the middle 50 per cent of observations. The vertical line dissecting each box represents the median observation. Box plots therefore demonstrate how observations are distributed over the range between the lowest score and the highest

score. They allow charging practices to be easily compared between courts.

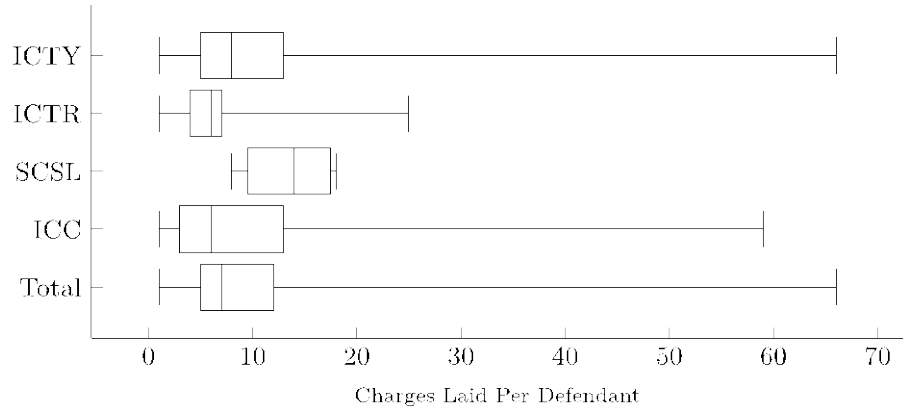

Figure 2.

The Total plot is derived from all 298 observations. It represents the 'state of the art' of charging across the four courts. Twenty-five per cent of all defendants that have ever been prosecuted by the OTPs of ICTY, ICTR, SCSL, and ICC faced between 1 and 4 charges each. Fifty per cent faced between 5 and 12 charges. Twenty-five per cent faced between 13 and 66 charges. These figures show that the number of charges faced by all defendants are *not* normally distributed. They do not depict a neat, symmetrical 'bell curve' in which the middle 50 per cent of observations lie equidistant from the highest and lowest scores, and the top 25 per cent and bottom 25 per cent of observations cover the same range of data. Instead, the data is skewed, with the top 25 per cent of observations covering a much higher range than the bottom 75 per cent of observations. A similar skewness is evident at the ICC and the ICTY. The SCSL and the ICTR display more normal distributions.[7]

What Figure 2 demonstrates is that there have been divergent practices regarding the number of charges prosecutors have alleged against individual accused. While 75 per cent of defendants have faced between 1 and 12 charges, history has revealed that 25 per cent of the time an OTP

[7] The SCSL-OTP only charged 11 defendants, so the number of observations was significantly lower than the ICTY (165); ICTR (85); and ICC (37).

charges someone, they will allege a far greater number of charges against them than the 75 per cent of other cases would suggest.

The figures presented in Figures 1 and 2 require reflection. They raise important questions concerning what goals international criminal prosecutors hope to achieve through the prosecutions they commence. More charges mean prosecutors need to invest more money and more resources to prove them. It also means that defence needs to invest similar resources in casting reasonable doubt over them. With this in mind, it could be suggested that the further the proposed number of charges against an individual strays upwards from the mean figure of 9.3, the greater consideration should be given to what is hoped to be achieved by the prosecution.

13.3. Charging Rationales

The figures presented in Section 13.2. invite an inquiry into why there has been such varied practice with respect to the number of charges alleged against individual defendants. The purpose of this section is to begin this inquiry. Section 13.3.1. discusses four factors that appear to have operated to *increase* the number of charges faced by individual defendants. Yet one should not view these in isolation. As discussed in Section 13.3.2., there are other factors that appear to have operated to *reduce* the number of charges faced by individual defendants.

13.3.1. Factors Justifying More Charges

There appear to be at least four factors that have operated in favour of defendants facing more, rather than fewer, charges: the desire to obtain convictions; the aspiration of advancing the law; recording history; and finally a hope that the prosecution of the defendant will be representative of other uncharged – allegedly criminal – acts.

13.3.1.1. A Desire for Convictions

The fact that a desire to obtain convictions has militated in favour of defendants facing more charges should not come as a surprise. While Richard J. Goldstone once argued that "[w]hether there are convictions or whether there are acquittals will not be the yardstick" against which the

success of international criminal justice will be assessed,[8] there is cause for scepticism as to whether this is universally accepted. Schabas has recognised that international criminal law 'thrives on conviction' – a hunger that has driven international criminal law and procedure "into a more repressive mode".[9] Mirjan Damaška went further, arguing that international criminal courts possessed a '*libido puniendi*' unlike those of their domestic counterparts, driven by the famous desire to 'end impunity' – on his account, "[h]igh acquittal rates could easily augur failure of their mission".[10]

While this sort of narrowly-focussed consequentialist reasoning might appear unrefined in light of recent turns towards expressivist accounts of international prosecutions that draw legitimacy from the broader effects criminal justice mechanisms have on society, it is difficult to deny them some visceral attraction. A conviction is a vindication of the time, effort, and resources expended on the prosecution. It validates the suffering of the victims. And given the relentless barrage of commentary about just how few convictions the ICC-OTP has obtained, it could be used to justify a court's very existence.

There is an additional reason why prosecutors have seen convictions as important: some defendants are seen to fall into 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 in order to increase the likelihood that a conviction will be entered against them. One prosecutor recalled that in the Prosecution's Final Trial Brief in *Galić*, Mark Ierace SC submitted that Galić's crimes were not "committed in the heat of battle, or with little time to reflect on their consequences. Rather, they were continuing crimes, in which his *mens rea* was refreshed on a

8 Richard J. Goldstone, "Address Before the Supreme Court of the United States", speech delivered at the 1996 CEELI Leadership Award Dinner, Washington, D.C., 2 October 1996, quoted in Mark Ellis, "Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defence Counsel", in *Duke Journal of Comparative and International Law*, 1997, vol. 7, no. 2, p. 526 (fn. 37).

9 William A. 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, p. 165.

10 Mirjan Damaška, "Reflections on Fairness in International Criminal Justice", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 3, p. 613.

daily basis".[11] In this light, the prosecutor recalled that Galić's conduct "almost [fell] in a special category", and on their assessment, the Prosecution was justifiably "out to get him".[12] While they reflected that it would not be appropriate to "double up on war crimes and crimes against humanity" in every prosecution, the alleged maliciousness of Galić "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".[13]

There is another reason why a desire to obtain convictions has led to defendants facing an inflated number of charges: ambiguity. This takes two forms: ambiguity as to what the law requires to be proved for a conviction to be entered; and ambiguity as to what evidence will emerge at trial. One prosecutor recalled questioning a "very prominent member of the OTP" regarding why comparatively low-level offenders were being faced with a large number of charges. The response, they recollected, was "because we don't know what we are going to be able to prove".[14] The prosecutor recalled saying (perhaps words to the effect of) "that's good, that's really good. So if you get four counts conviction and the other fifty-six [are] acquittals, that's a win?", and worried that the practice of overcharging would raise unrealistic expectations in the community.[15]

13.3.1.2. Advancing the Law

A desire to advance the law has also arguably influenced considerations of how many charges a defendant should face. International criminal law is in a constant state of development and transformation. Since 1993, practitioners have been 'discovering' new crimes that were not necessarily envisaged a quarter of a century ago. While judges are given most of the credit for this – Joe Powderly has correctly noted that judicial creativity involves "the sculpting of the relatively featureless granite of existing law

[11] ICTY, *Prosecutor v. Stanislav Galić*, Trial Chamber, Prosecution's Final Trial Brief, 28 April 2003, IT-98-29-T, para. 644 (https://www.legal-tools.org/doc/8263bd).

[12] Interview with P19.

[13] Interview with P19.

[14] Interview with P29.

[15] Interview with P29.

in order to give it form, effect, and reason"[16] – the role of prosecutors cannot be understated. After all, prosecutors provide courts with the defendants who serve as vehicles for important jurisprudential developments. It is similarly important not to understate the willingness of prosecutors to engage in the process of law development.

The historical context in which prosecutorial discretion has been exercised sheds some light on why this is the case. "Apart from Nuremberg […] and Tokyo for that matter", remarked one prosecutor, "there had been no real attempt to develop the international criminal law".[17] Prior to the creation of the ICTY, they observed, international criminal law "had been more academic than an enforceable body of law".[18] Prosecutors had before them a blank canvas, and could hand the judiciary the brushes through which modern international criminal law could be painted.

In part, a desire to advance the law can be attributed to pressure from the broader international community that enforced upon prosecutors a sense of duty to ensure the ICTY was a success. This sense of duty was felt at the highest levels of the ICTY-OTP. One prosecutor reflected that prior to Graham T. Blewitt travelling to The Hague to take up the role of Deputy Prosecutor, he travelled to the United Nations in New York and met with high-profile NGOs, members of the US State Department, international media, and others. The prosecutor recalled that Blewitt felt that all those with whom he met were "trying to impress on [him] the importance of the ICTY and what it meant for international humanitarian law", and that they were impressing on him the belief that the ICTY should not be allowed to fail.[19]

The sense of duty felt by prosecutors was accompanied by a desire to ensure that the jurisprudence that was developed by the Chambers was of a quality that would withstand legal scrutiny. An ICTY prosecutor described that they "had the *responsibility* of making sure that the judgments that came out of the trial chambers, but more particularly out of the Ap-

16 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, 2010, p. 18.

17 Interview with P4.

18 Interview with P4.

19 Interview with P4.

peals Chamber, would withstand international scrutiny".[20] They wanted the jurisprudence to be consistent, and saw it as a "major responsibility to put up good, sound legal arguments".[21] The prosecutor noted that the production of good jurisprudence would aid the survival of the ICTY, and that "if the Tribunal succeeded, then the creation of a permanent court had more chance of […] being achieved than if we failed", conceding that their eye was trained on the future of international humanitarian law.[22]

Prosecutors seized the opportunity to advance the law with an enthusiastic sense of duty. One SCSL prosecutor, noting that international law contains many rules that have never been enforced, noted "you really want to build the law and you want to use the opportunity to do it".[23] 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).[24]

The desire to advance the law had practical consequences for how the charging discretion was exercised. One ICTY prosecutor reflected that Blewitt introduced 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".[25] There are several examples of where charges appear to have been affected by this policy. In the prosecution of Stanislav Galić, the ICTY-OTP was of the view that "there was an international crime of terror and that it came within the jurisdiction of ICTY", despite there being no on-point jurisprudence to clearly justify this position.[26] The charge of inflicting terror was a "discretionary additional charge" in the indictment.[27] One prosecutor recalled that "we thought it was important to nail [the infliction of terror

20 Interview with P4. Emphasis added.
21 Interview with P4.
22 Interview with P4.
23 Interview with P9.
24 Interview with P4. Emphasis added.
25 Interview with P4.
26 Interview with P19.
27 Interview with P19.

upon civilians as] an express crime", explaining that they saw this as a "a responsible exercise of our power".[28]

The ICTY and ICTR-OTP was also prolific in the development of the law surrounding sexual violence in armed conflict. Several members of the Office wanted to prove the criminality of certain sexual conduct.[29] The 'dearth' of jurisprudence regarding this category of crime allowed the Office to be creative in the formulation of charges.[30] "I think it was probably always recognised that plundering and raping and pillaging was part of the process of conquering the enemy", remarked one prosecutor, adding that "it was nothing that was previously prosecuted, and the Tribunal had been urged to examine this aspect of the conflict, and of course we did that".[31] The OTPs charged sexual violence as "cruel treatment, torture, persecution, enslavement, and genocide", which led to the "rapid development of sexual violence jurisprudence".[32]

Despite the clear path the OTPs had before them to push forward novel charges and arguments, constraint needed to be exercised. Even though Blewitt had introduced the policy that Senior Trial Attorneys should not be afraid to advance "novel" legal arguments, this was on the proviso that "they had a fall-back position of a more traditional position".[33] The arguments justifying the novel position should also be reasonable. "[W]e were going to be asking the judges to make rulings that were unique", one senior ICTY prosecutor noted, "I certainly felt the obligation to ensure that what we were putting up to the judges was sound and would enable them to bring rulings that would […] withstand international scrutiny and withstand the test of time".[34]

Another prosecutor described that they were constrained by the "spirit" that animated the provisions in the *Rome Statute*, describing the need to adhere to processes "that will look to be fair in the light of day".[35]

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28 Interview with P19.

29 Interview with P29.

30 Michelle Jarvis and Kate Vigneswaran, "Challenges to Successful Outcomes in Sexual Violence Cases", in Serge Brammertz and Michelle Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford University Press, 2016, p. 58.

31 Interview with P4.

32 Jarvis and Vigneswaran, 2016, p. 58, see above note 30.

33 Interview with P4.

34 Interview with P4.

35 Interview with P24.

While they recognised that the nature of the ICC's cases required prosecutors to be "aggressive and forward-leaning" and "creative", they explained that the Court was "not a place to be cute or clever with the rights of the accused" and it was "not a place where you're clever with the law".[36]

Similarly, another prosecutor described that the law should be developed carefully. They explained their view that "it was fine for us to stretch the envelope, but there's no ruddy way in which we should be ripping the edges off".[37] They described that this philosophy affected the charges laid against Duško Tadić, explaining that there were some members within the Office who wanted to argue that grave breaches of the *Geneva Conventions* applied to non-international armed conflicts. The prosecutor described that, in their view, this was "just not so" and that the only way those arguments would be advanced was going to be "over [their] dead body".[38]

At the ICC-OTP, the policy decisions to focus on sexual and gender-based crimes and crimes against children has been further explained by a desire to, in the words of one prosecutor, "do what we can to protect the most vulnerable populations".[39] The prosecutor explained that this approach affected the charges laid against Bosco Ntaganda. Ntaganda was the first defendant charged by the ICC-OTP for alleged sexual offences committed against 'child soldiers' within the *Forces Patriotiques pour la Libération du Congo*, by members of that same armed group. "[P]eople think of the law of armed conflict as essentially focussed on the so-called enemy population or the opponents in the conflict", the prosecutor explained, "[b]ut we said no […] children don't lose those protections simply because they'd been conscripted into armed forces".[40]

13.3.1.3. Recording History

A desire to record history may also have militated in favour of defendants being charged with more, rather than fewer, charges. Remarkably, while all international criminal tribunals record history through the taking and

[36] Interview with P24.
[37] Interview with P13.
[38] Interview with P13.
[39] Interview with P14.
[40] Interview with P14.

recording of evidence, only the ECCC has this stated as one of its express goals.[41]

One prosecutor advanced the argument that 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 that you should charge them with pretty much everything you could prove against them", they observed.[42] They added, "I don't think you can say that that approach was wrong. And, on the contrary, I think it is probably right".[43] 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".[44]

The prosecutor was also in favour of laying charges that are at least arguable. They argued this by positing that if a prosecutor did *not* "try" to prove an arguable charge, revisionist historians could reflect on the conduct and deny the unalleged arguable charge ever occurred.[45] The prosecutor observed that "history will look back and say there was no genocide in Kosovo" due to the OTP not including that charge in the Kosovo indictment against Milošević, suggesting that such a charge – in their view – should have been included for this reason.[46]

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. Representative charging is a necessary ancillary

41 In their request for assistance to the United Nations, the two Cambodian Prime Ministers hoped that the United Nations would "assist the Cambodian people in establishing the truth": Identical letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, UN Doc. S/1997/488, 24 June 1997 (https://www.legal-tools.org/doc/kcnjj4). The United Nations General Assembly hoped that the UN would assist Cambodia in investigating its 'tragic history': Situation of Human Rights in Cambodia: Resolution Adopted by the General Assembly, UN Doc. A/RES/52/135, 27 February 1998 (https://www.legal-tools.org/doc/6e9a5f).

42 Interview with P11.

43 Interview with P11.

44 Interview with P11.

45 Interview with P11.

46 Interview with P11.

to the fact that international prosecutors must be selective in their charging decisions. Prosecutors "can't charge every crime that was committed, every murder, every act of sexual violence or mutilation".[47] There are not the resources to do so, nor the motivations. The charging discretion has therefore been used to curate a selection of charges that best represent "the overall picture" of what occurred in a situation,[48] being in "broad terms reflective of what had happened".[49] Prosecutors have identified five ways that charges can be representative.

The first is to represent *criminality*. There are two ways prosecutors have attempted to ensure that they exercise their charging discretion in way that is representative of criminality. The first is to represent the criminality of any given *situation*. Representing the criminality of a situation means that prosecutors endeavour to capture the "essence of what happened on the ground"[50] through a curated set of charges that can be said to be representative of other uncharged acts.[51] "I ensured", remarked one prosecutor, "that we had forcible transfer, deportation, crimes of sexual violence, murders […] [I] wanted to make sure that every crime was represented somehow in that indictment".[52] Another noted that if investigations revealed incidences of "severe torture", then "the right thing to do would be to add it [to the indictment] because those victims suffered it".[53] A more self-reflective approach was offered by a different prosecutor which highlights the importance of *personal satisfaction* with how they are doing their job. The prosecutor conceded that it was impossible to satisfy even an objective observer "that you got [the charges] absolutely correct", but they personally needed to "have at least some sense of confidence that you were depicting at least a *bona fide* approximation of what had happened".[54]

At the ICC, the principle of representing criminality been enshrined in regulatory and policy documents. Regulation 34(2) of the *Regulations*

47 Interview with P12.
48 Interview with P12.
49 Interview with P7.
50 Interview with P14.
51 Interview with P5; Interview with P8.
52 Interview with P8.
53 Interview with P20.
54 Interview with P7.

of the Office of the Prosecutor obliges the 'joint team' to select incidents in its provisional case hypothesis that are "reflective of the most serious crimes and the main types of victimisation".[55] The *Policy Paper on Case Selection and Prioritisation* purports to commit the Prosecutor to "[representing] as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished".[56]

One of the ways through which prosecutors have attempted to satisfy themselves that they are representing a situation's criminality is through a focus on those they believe to be the 'most responsible'. The rationale for this is that persons who are purportedly the 'most responsible' are likely "responsible for a wider range of crimes over a wider area", allowing charges against them to "reflect crimes against thousands, tens of thousands of people"[57] without spending resources on multiple prosecutions of lower-ranked individuals to achieve the same *intended* representative effect.

Of course, successfully prosecuting those apparently 'most responsible' requires evidence that is probably difficult to come by. The long-standing practice of pyramidal prosecutions targets lower-ranked perpetrators with the intention of using their evidence (or the investigation into them) to develop evidence that might lead to the successful prosecution of individuals higher up a chain of command (which may or may not exist). This approach was notably adopted (although not without controversy) at the ICTY.[58] At the ICTR, it was not so relevant as "the perpetrator[s] [were] actually on the ground".[59] The ICC-OTP has expressly stated the importance of a 'build upwards strategy' in the 2012-2015 *Strategic Plan*,[60] which was a change from the original (and criticised) policy articulated in 2009 of 'focused investigations and prosecutions' under which

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55 ICC, *Regulations of the Office of the Prosecutor*, 23 April 2009, Regulation 34(2) (https://www.legal-tools.org/doc/a97226).

56 ICC-OTP, *Policy Paper on Case Selection and Prioritisation*, September 2016, para. 45 (https://www.legal-tools.org/doc/182205).

57 Interview with P12.

58 Interview with P12; Interview with P10.

59 Interview with P16.

60 ICC-OTP, *Strategic Plan: June 2012-2015*, 11 October 2013, para. 43 (https://www.legal-tools.org/doc/954beb).

prosecutors would "select for prosecution those situated at the highest echelons of responsibility".[61] The policy of engaging in pyramidal prosecutions has also been established in the *Policy Paper on Preliminary Examinations* and the *Policy Paper on Case Selection and Prioritisation*.[62]

The principle of representing criminality through the exercise of the charging discretion is also arguably relevant to the prosecution of individual *accused*. In this respect, one prosecutor noted that they tried to craft their indictments so that they were representative "in terms of being reflective of the totality of the criminal conduct of the accused".[63] An experienced ICC prosecutor reflected that "it would be wrong to use your discretion to only charge somebody […] [with] […] forcible transfer if they've killed and tortured people, even if it might be easier",[64] reflecting the belief that a proper exercise of the charging discretion should not artificially represent the criminality of the conduct that the prosecution reasonably believes to have been committed. Under this approach, greater emphasis is placed on the individual accused's conduct in the laying of charges, as prosecutors seek to ensure that they represent the crimes they were allegedly responsible for. In practice, and in particular with respect to those individuals allegedly 'most responsible' for crimes, the distinction between representing the criminality of a situation and the criminality of an accused may not be significant.

Consistent with a desire to represent the criminality of a situation or an accused, a comparatively limited amount of evidence regarding alleged crimes of sexual violence or crimes against children – or evidence suggesting such crimes occurred comparatively rarely – does not necessarily mean they will receive less attention in the exercise of a prosecutor's charging discretion. One prosecutor, reflecting on their experiences at the ICTY, recalled that "if I put all of the […] evidence that I had on the table that was developed during the course of the investigation, and categorised it into […] piles according to crime, probably the smallest stack of evidence, statements and the like, would have been crimes of sexual vio-

61 ICC-OTP, *Prosecutorial Strategy: 2009-2012*, 1 February 2010, p. 6 (https://www.legal-tools.org/doc/6ed914).

62 ICC-OTP, *Policy Paper on Preliminary Examinations*, November 2013, fn. 72 (https://www.legal-tools.org/doc/acb906); ICC-OTP, *Policy Paper on Case Selection and Prioritisation*, September 2016, p. 14 (https://www.legal-tools.org/doc/182205).

63 Interview with P12.

64 Interview with P20.

lence".[65] Similarly, another prosecutor recalled that a decision was "certainly" made in the early days of the ICTY and ICTR to "in a sense privilege the investigation of sexual offences", "[b]ecause left to just a normal unfolding of events, the massive numbers of homicides, of murders, would have dwarfed the appearance of severity of sexual crimes".[66] Had that decision not been taken, the same prosecutor remarked, sexual violence "might not have featured as prominently as I believed it should [have], considering the impact that it had on the level of criminality in these countries".[67] The ICC adopted a similar approach in its *Policy Paper on Sexual and Gender-Based Crimes*, where it committed itself to laying charges for sexual and gender-based crimes "wherever there is sufficient evidence to support such charges",[68] irrespective of the number of alleged offences. The same applies to crimes directed against children or disproportionately affecting them.[69]

But, of course, the assessment of what is 'representative' of criminality is subjective and underpinned by a raft of personal factors. To take the charging of sexual and gender-based violence as an example, one need only point to the Women's Initiatives for Gender Justice challenging the ICC-OTP's 'failure' to prosecute a raft of crimes (including crimes of sexual violence and gender-based crimes);[70] the general criticism levelled against the ICTY-OTP to do the same; and Cecily Rose's criticism that the SCSL-OTP failed to properly plead forced marriage and crimes of sexual violence.[71] With this in mind, the ICTY prosecutor's comment that prose-

65 Interview with P8.

66 Interview with P7.

67 Interview with P7.

68 ICC-OTP, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, p. 6 (https://www.legal-tools.org/doc/7ede6c).

69 ICC-OTP, *Policy on Children*, November 2016, p. 2 (https://www.legal-tools.org/doc/c2652b).

70 ICC, Situation in the Democratic Republic of the Congo, Pre-Trial Chamber, Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence for leave to participate as amicus curiae with confidential annex 2, 10 November 2006, ICC-01/04-316 (https://www.legal-tools.org/doc/ceb093). 'Failure' is put in inverted commas for the purposes of indicating that something can only be assessed as a 'success' or a 'failure' if there is some binding standard to assess it by, which there is not.

71 Cecily Rose, "Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-based Crimes", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 2, p. 368.

cutors should "have at least some *sense* of confidence" that their charges represent the criminality of the situation is particularly poignant[72] as that is the most that can ever be achieved in what is ultimately a subjective exercise.

The second category is representing the *geographical spread* of alleged crimes. Prosecutors have attempted to represent this through the exercise of the charging discretion.[73] In this respect, prosecutors have tried to exercise the charging discretion in such a way that the locations in which alleged crimes have been committed are, they believe, reflected in the charges laid or incidents scheduled. There are three reasons for this.

The first reason is that representing the geographic spread of alleged criminal offences may show the existence of a plan or policy, which may in turn prove that the conduct was part of a 'widespread or systematic' attack constituting a crime against humanity.[74] A 'plan or policy' or 'large-scale' requirement is also included in the *Rome Statute* with respect to war crimes under Article 7. In that respect, representing the geographic spread of alleged offences is not so much a discretionary choice, but rather a tool used to prove beyond reasonable doubt a defendant's guilt.

The second reason is that a failure to represent the geographic spread of alleged offences has been considered (in what is again a subjective assessment) *unfair*. One prosecutor recounted that the ICTY-OTP deployed the historian András Reidlmayer and the demographer Ewa Tabeau to Bosnia, in part, so as not "to leave out the municipalities" the prosecutors were not going to lead detailed evidence on, because it was considered "important to show that they too were impacted by the crimes".[75] The same prosecutor considered that "it would have been unfair just to pick" a limited number of areas on which to focus.[76] In this light, 'fairly' representing the geographical spread of alleged offences was considered to outweigh the time gained to spend on other matters should less areas be pursued at trial.[77] At the ICTR, Hassan Jallow recognised the

72 Interview with P7. Emphasis added.

73 Interview with P5; Interview with P12; Interview with P9.

74 ICTY, *Prosecutor v. Dragoljub Kunarać et al*., Appeals Chamber, Judgment, 12 June 2002, IT-96-23 and IT-96-23/1-A, para. 65 (https://www.legal-tools.org/doc/029a09).

75 Interview with P8.

76 Interview with P8.

77 Interview with P8.

need for indictments to cover all of Rwanda's administrative regions on the basis that a failure to do so could be seen as discriminatory, biased, or flush with favouritism.[78]

The third reason is a desire on the part of a prosecution office to properly respond to the public's perception about where offences have taken place. With respect to the work of the ICTR, one prosecutor noted that the Office wanted to cover "each of the […] regions of Rwanda" as well as "the major killing sites that everyone thinks of if you know Rwandan topography".[79]

The third category of representation concerns *structural commission*. Some prosecutors have attempted to represent the structural means through which alleged offences were committed in the exercise of their charging discretion. The need for such an approach was expressly adopted at the ICTR, where Jallow thought it important to prosecute members of different social organisations to demonstrate the breadth of societal participation on the Rwandan atrocities. "The Prosecutor [Jallow] consciously decided", Alex Obote-Odora notes, "to include all of the various groups represented in the atrocities to ensure that different types of involvement were covered".[80] As such, the ICTR-OTP pursued cases concerning the government, military, clergy, and the media; as well as lower-level territory administration officials such as the *bourgmestres* and mayors.[81]

ICTY prosecutors also attempted to represent the structural means through which alleged offences were committed through their charging decisions. The *Milošević* indictments, for example, were drafted in such a way that they "fairly and appropriately reflected each of those avenues of perpetration that he engaged in", including his alleged use of the Ministry of the Interior, paramilitaries, and political leaders.[82]

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78 Hassan Jallow, "Prosecutorial Discretion and International Criminal Justice", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 153.

79 Interview with P9.

80 Alex Obote-Odora, "Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, 2nd edition, Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 56 (https://www.legal-tools.org/doc/f5abed).

81 Interview with P9.

82 Interview with P8.

The fourth category of representation is *temporal spread*. There is some minor evidence to support the proposition that prosecutors may also attempt to represent the time over which alleged offences were committed in the exercise of the charging discretion. An SCSL prosecutor noted that they tried to ensure their indictments represented the alleged crimes "*in tempore*" (in addition to representing their criminality and geographic spread).[83] This approach suggests prosecutors may wish to ensure that the alleged offences that are the subject of the charging discretion cover their respective court's temporal jurisdictional mandate.

The fifth category of representation is *alleged victims*. Prosecutors have also attempted to represent the types of alleged victims in the exercise of the charging discretion.[84] As one prosecutor pondered, "[a]re we responding to what the affected community suffered?"[85]

A desire to represent the alleged victims has prompted prosecutors to creatively employ the charging discretion where it was unclear whether the law covered the harms the alleged victims were alleged to have suffered. In the *Galić* indictment,[86] the Prosecutor charged the offence of 'unlawfully inflicting terror upon civilians'. Cryer termed the Prosecution's characterisation of this crime 'novel', as it had not been established before by an international criminal tribunal that such a crime existed.[87] As one prosecutor recalled, "what was important from our perspective in making that allegation was that the *victims are different* […] [b]y killing and wounding some civilians, you terrorise not just those who were wounded, but the rest of the civilian population".[88] In this light, the Prosecution recognised that harm had been suffered by a class of persons where it was ambiguous whether such harm gave rise to criminal liability. The prosecutor additionally observed that this expansion of the law – al-

83 Interview with P5.

84 Interview with P12; Interview with P14; Interview with P19.

85 Interview with P14.

86 ICTY, *Prosecutor v. Stanislav Galić*, OTP, Indictment, 26 March 1999, IT-98-29-I (https://www.legal-tools.org/doc/527ac8).

87 Robert Cryer, "*Prosecutor v. Galić* and the War Crime of Terror Bombing", in *Israeli Defence Forces Law Review*, 2006, vol. 2, p. 80.

88 Interview with P19. Emphasis added.

beit in a slightly different way to what the Prosecution intended[89] – served the objective of general deterrence.[90]

13.3.2. Or Fewer Charges?

While the above factors can generally be classed as encouraging an increase in the number of charges faced by individual accused, some of them – and many others – also militate in favour of defendants facing a *fewer* number of criminal allegations.

13.3.2.1. The Likely Sentence

Prosecutors have, for example, considered excluding charges if they believe the alleged offender is likely to receive a *fair* sentence, with fewer counts, taking into account the uncharged conduct. One prosecutor questioned whether it was necessary to spend time proving additional charges and additional elements if they believed that the alleged offender would nevertheless receive a "fair sentence".[91] The prosecutor also noted that they did "not at all favour the kitchen sink approach of charging every single possible charge you can" in circumstances where more serious conduct also involved "relatively mild mistreatment", wondering aloud whether "is it really necessary if you're charging the person with murder, and that's […] your prime case, to charge every little possible act you could? I don't think so".[92] Similarly, prosecutors have considered excluding charges if they believe the alleged offender is likely to receive a *lengthy* sentence, with fewer counts, taking into account the uncharged conduct. This approach has a greater punitive element than the first identified approach, however it is entirely plausible that a *fair* sentence would be a *lengthy* sentence. One prosecutor demonstrated the relevance of this consideration by reflecting on the *Milošević* indictments. "Why did you bother with these huge indictments?", they recalled people wondering,

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89 The Chamber rejected the argument that "that actual infliction of terror is an element of the crime of terror", observing instead that "the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended": ICTY, *Prosecutor v. Stanislav Galić*, Trial Chamber, Judgment, 5 December 2003, IT-98-29-T, paras. 70, 134 (https://www.legal-tools.org/doc/eb6006).

90 Interview with P19.

91 Interview with P20.

92 Interview with P20.

"[w]hy decide to cover three wars in ten years? Wouldn't it have been enough simply to decide to prosecute Milošević for some single event, and have him sent away to prison for life for that, and then use the time, the resources, the money, to do more cases?".[93] This, they believed, would have been an "entirely plausible, entirely satisfactory argument" and a "perfectly proper approach", yet added that this was not to say it would have been the *correct* approach.[94]

13.3.2.2. Macro Managerial Considerations

One can also not disregard *macro managerial considerations*. External demands to complete the work of tribunals expediently fall into this category, as do budgetary and resource limitations. The discretion prosecutors have is how to work within them. At the ICTY, these restrictions and pressures became a significant influencing factor post the mid-2000 recognition by Carla Del Ponte that the OTP's prosecutorial policy needed to be revised, and the accompanying pressure from President Pillay and the Security Council to expedite the work of the Tribunal. In addition, the amendments to Rule 73*bis*(d) of the ICTY's *Rules of Procedure and Evidence* in July 2003 allowed the Trial Chamber to "fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor"[95] and, in May 2006, "invite the Prosecutor to reduce the number of counts charged in the indictment".[96]

These developments "placed further pressure on the OTP in terms of determining which charges to proceed with"[97] and made one prosecutor wonder "how I was going to […] get justice for the most victims with the limited time that I would have".[98] Reflecting on the prosecutions of Ivan Čermak and Ante Gotovina, a prosecutor remarked that the Trial Chamber's clear policy of trimming prosecutions "so as to wrap up the operation of ICTY as quickly as possible" meant the Office "had to be fairly

93 Interview with P11.

94 Interview with P11.

95 ICTY, *Rules of Procedure and Evidence*, 17 July 2003 (https://www.legal-tools.org/doc/9zo9md).

96 ICTY, *Rules of Procedure and Evidence*, 30 May 2006 (https://www.legal-tools.org/doc/n510a9).

97 Interview with P19.

98 Interview with P8.

prudent in terms of the number of charges that we alleged against an indictee".[99] This meant that they were not charged with "every possible crime and in relation to every possible incident", and the prosecution team was "quite selective in the drafting of the indictment as to what [they] would set out to prove".[100]

Similarly, after the arrest of Radovan Karadžić, the OTP's decision to trim the indictment against him was made in part because "the OTP had been criticised by the judges in the past" and they "had, in a number of other cases, asked the OTP to reduce by a certain percentage the indictments".[101] In the *Karadžić* and *Mladić* prosecutions, the OTP decided to "reduce the number of municipalities" in the indictment, "because if you can prove the criminal intent in 10 municipalities about a widespread and systematic attack against a civilian population, you don't need to prove it in all areas".[102] The decision about which municipalities to exclude from the indictment was based on the strength of the evidence and "gravity in terms of numbers of victims", noting that incidents with direct evidence linking the crime to the alleged perpetrator would be prioritised, even when they involved less victims (the prosecutor also observed that "you would, of course, never take a massive crime out with hundreds of victims").[103]

With the ICTR under comparable pressure to wind up its operations, Hassan Jallow started filing what he termed 'lean and mean indictments'.[104] These indictments, he claimed, contained fewer charges than their predecessors and would presumably take less time to prove.

At the SCSL, a looming completion date was one of the factors militating against the prosecution of Benjamin Yeaten. As described by one prosecutor, "we were expected to get everything done at that point by the end of 2009", and that, in culmination with other factors, meant that it was not possible to join a trial of Yeaten to the trial of Charles Taylor.[105] The

99 Interview with P19.

100 Interview with P19.

101 Interview with P5.

102 Interview with P5.

103 Interview with P5.

104 Hassan Jallow, *The ICTR and the Challenge of Completion*, paper delivered at the T.M.C. Asser Institute, The Hague, 4 October 2006, p. 2.

105 Interview with P9.

same prosecutor later observed that "if you're a temporary court, which is now well-beyond its shelf life according to the sponsors, and you still don't have your major suspects, that's difficult".[106]

13.3.2.3. Trial Management

Trial management also falls into this category of considerations. One prosecutor recalled that, in the preparation of the Bosnia and Herzegovina indictment against Slobodan Milošević, Senior Trial Attorney Dermot Groome "set an arbitrary line that any criminal event where there were less than ten people killed, unless there was something uniquely important about that", would not be included in the indictment.[107] This "shocked" the staff, however the prosecutor could not recall how rigorously the policy was applied.[108] In any event, the prosecutor recalled that roughly the same number of witnesses would be required to prove one person was killed or ten people were killed, and that by focusing on the latter charges they "could get justice for more victims" in the time that was allocated for the trial.[109]

Another ICTY prosecutor, reflecting on the *Karadžić* indictment, bore in mind the collapse of the *Milošević* trial when determining how to abbreviate the indictment. They noted that the decision to abbreviate the indictment was driven in part by a desire "to have a manageable trial", recalling that "we thought that […] we don't want an eight-year trial and we want this to be under control".[110]

13.3.2.4. Judicial Reaction

The *prosecution's relationship with the bench* has also militated in favour of there being a limited number of charges. One prosecutor described how they could "almost feel the judge wince" when they filed "eighty-eight counts" for "about a three-day course of conduct that's basically murder".[111] This, the prosecutor suggested, indicated that laying comparatively minor charges when the course of conduct alleged involved more seri-

[106] Interview with P9.
[107] Interview with P8.
[108] Interview with P8.
[109] Interview with P8.
[110] Interview with P5.
[111] Interview with P20.

ous offences would be an inappropriate use of judicial resources. There is a clear interest in prosecutors having a good, professional, working relationship with the bench. Laying an unreasonable number of charges risks reflecting poorly on a prosecutor's professional judgement and creating an uncomfortable working environment.

13.4. The Challenges of Charge Selection

Section 13.3. has demonstrated that the decision of how many charges to allege against a defendant is deeply context-specific and open to subjective interpretation. There appear to be two factors that need to be considered when deciding, in light of the above, on how to best ensure the quality of these decisions.

The first factor that appears to be relevant in understanding the challenges of charge selection is that international criminal prosecutors are hoping to achieve numerous goals through their charging practices. In 2008, Damaška criticised international criminal courts 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".[112]

One can see this multiplicity of goals reflected in the ways that prosecutors have navigated the issue of how many charges to allege against potential defendants. Should prosecutors be trying to obtain convictions? Should they be attempting to advance the law or record history? Should they be considering the representative effect of their charging decisions, and attempt to reflect the criminality, geographical spread, means of structural commission, temporal spread, or classes of alleged victims? Or all of the above? It is incorrect to proceed on the assumption that these questions have answers.

This leads into the second, and more pragmatic issue. The charging discretion is one that is steeped in subjectivity. 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.[113] People are, quite simply, going to have different ideas about what are or are not relevant considerations in any given situation.

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[112] Mirjan Damaška, "What's the point of international criminal justice?", in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, p. 331.

[113] Schabas, 2016, see above note 4.

In light of the two challenges identified above, it is evident that quality control cannot be simply a question of identifying and applying normative benchmarks. As Jan Klabbers has argued, "[i]t is tempting to give in to the kneejerk deontological reflex and devise ethical codes for experts, a set of rules that would apply to experts, whether they render advice, participate as decision makers or act as gate-keepers between expert knowledge and political decision making".[114] Yet any rules will always be simultaneously over-inclusive or under-inclusive, need to be applied by humans, and be incapable of assigning weights to different considerations while maintaining a necessary level of flexibility. "Important as rules are (legal or otherwise)", argues Klabbers, "they are, eventually, better seen as signposts than as absolutes. They offer guidance and ought to be followed, but not blindly or at all costs".[115]

13.5. Quality Control and the Value of Argument

So then what can be said for ensuring the quality of exercises of the charging discretion? As an alternative to a normative approach, it may be that quality control over the charging discretion can be understood through Thomas Risse's 'logic of arguing' – itself an advancement of Jürgen Habermas's theory of communicative action. Historically, two mainstream theories have attempted to explain why actors engage in the conduct they do. The 'logic of consequentialism', which focusses on rational choice, posits that actors will engage in conduct that complies with norms until such point that it is no longer in their best interests to do so. On the other hand, the 'logic of appropriateness' essentially claims that actors engage in conduct that complies with norms because the norm forms part of their social identity, even though it may not be in their best interests to do so.[116]

Yet Risse was dissatisfied that neither theory appropriately accounted for those situations in which there was ambiguity surrounding the

[114] Jan Klabbers, "The Virtues of Expertise", in Monika Ambrus *et al.* (eds.), *The Role of 'Experts' in International and European Decision-Making Processes: Advisors, Decision Makers, or Irrelevant Actors?*, Cambridge University Press, 2014, p. 90.

[115] Jan Klabbers, "Too Much, Too Little, Too Late? Reflections on Law and Ethics in the EU's Foreign Policy", in Steven Blockmans and Panos Koutrakos (eds.), *Research Handbook on the EU's Common Foreign and Security Policy*, Edward Elgar, 2018, p. 446.

[116] The terms 'logic of consequentialism' and 'logic of appropriateness' are borrowed from Risse's article.

norms that applied to a given problem (if any), or indeed how actors identified the methods through which this ambiguity would be resolved. As such, he claimed, it was necessary to emphasise the argumentative process in which actors engage for the purpose of "truth seeking with the aim of reaching a mutual understanding based on reasoned consensus".[117] The process of communication through argument "is motivated by the desire to find out the "truth" with regard to the facts in the world or to figure out "the right thing to do" in a commonly-defined situation".[118] It is this latter motivation that is relevant to prosecutorial discretion.

Risse identified four preconditions that should be conducive to achieving the desires he described. First is the "existence of a common lifeworld provided by a high degree of international institutionalisation in the respective issue-area". The 'common lifeworld' that Risse referred to "consists of a shared culture, a common system of norms and rules perceived as legitimate, and the social identity of actors being capable of communicating and acting".[119] It is the environment in which actors have been socialised and determines the limits of their understandings. The lifeworld establishes "the forms of the intersubjectivity of possible understanding", something in which actors move within but can never leave.[120] Second, there should be "conscious efforts by actors to construct such a common lifeworld through narratives that enable them to communicate in a meaningful way"; third, "[u]ncertainty of interests and/or lack of knowledge about the situation among the actors"; and fourth, the presence of "[i]nternational institutions based on nonhierarchical relations enabling dense interactions in informal network-like settings".[121] Risse's conclusion was that arguments are more likely to occur in a sphere of interaction the greater the degree of uncertainty actors hold about their own interests and identities; the less common knowledge they possess "about the situation in which they find themselves"; and the "more apparently irreconcil-

[117] Thomas Risse, ""Let's Argue!": Communicative Action in World Politics", in *International Organization*, 2000, vol. 54, no. 1, pp. 1–2.

[118] *Ibid*., p. 12.

[119] *Ibid*., p. 11.

[120] Jürgen Habermas, *The Theory of Communicative Action: Volume Two: Lifeworld and Systems: A Critique of Functionalist Reason*, Thomas McCarthy trans., Polity Press, 1991, p. 111.

[121] Risse, 2000, p. 19, see above note 117.

able differences prevent them from reaching an optimal rather than a merely satisfactory solution for a widely perceived problem".[122]

It is apparent that Risse's four preconditions are met in the context of international prosecutors exercising the charging discretion. The common lifeworld that international prosecutors occupy is evident through their engagement in the post-1993 efforts to develop systems through which international and hybrid organisations can legitimately usurp the State's monopoly over the use of coercive measures against the subjects of their jurisdiction with respect to the prosecution of genocide, aggression, war crimes, and crimes against humanity. They work in the same cities, crossing paths at conferences, professional gatherings, and social events. Their concerns lie not just with the tribunal in which they work, but the success of international criminal justice more broadly. They are guided by integrity and a desire to do what is best in the circumstances they are confronted with. International prosecutors seek to strengthen the corpus of international criminal law and procedure for the purposes of ending impunity and doing 'justice for the victims'. Yet at the same time, the discretionary power they wield is exercised in, at best, a vague normative framework that provides little to no clear practical guidance. There is ambiguity about the relevant considerations and the weight to be afforded to any of them. Finally, all international prosecutors act within international criminal courts, giving rise to a horizontal structure in which they can communicate and argue with each other on equal footing.

When seen in this light, discretionary choices are not seen as 'right' or 'wrong' in a normative sense. Instead, they can be seen as an attempt by prosecutors to determine the most appropriate conduct in the circumstances in a never-ending cycle of interpretation in which social identities are expressed and constructed, and opinions about what is 'appropriate' come and go.[123] The practice of exercising discretion is better seen as an argument between prosecutors themselves and the broader epistemic community, rather than one in which rules are applied or interests are advanced.

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[122] *Ibid*., p. 33.

[123] Yet, in contrast to Risse, it is unlikely that 'norms' develop through this process. For a powerful attack on the idea that something can be right or wrong (from a moral perspective), see Elizabeth Anscombe, "Modern Moral Philosophy", in *Philosophy*, 1958, vol. 33, no. 124, p. 1.

Importantly, for this collective attempt to identify the right course of action in a circumstance to succeed, the arguments must be "open to other participants and *be public in nature*".[124] This is critical for the purposes of quality control. If prosecutors do not engage with the broader epistemic community, or even each other, regarding the reasons why they took particular decisions, the quality of future decisions cannot be bettered. As such, when prosecutors do make discretionary choices, it is essential from a quality control perspective that they are willing to openly discuss the reasons why they took these decisions. Only then is it possible to fully embrace and learn from the collective knowledge and experience present among the broad international prosecutorial college. Under this approach, quality is not assessed by reference to normative standards, but rather by the willingness of prosecutors to openly discuss the motivations underpinning their decisions and persuade others as to their appropriateness while remaining open to reassessing their position based on what they see as better arguments.

13.6. Conclusion

The charging discretion is complex. This chapter has focussed on merely one aspect of it: the assessment of how many charges to allege against an individual accused. Through the empirical statistical and qualitative surveys in Sections 13.2. and 13.3., this chapter has attempted to reveal the fragmented practices and subjective rationales that have historically informed how the charging discretion has been exercised. Specifically, Section 13.4. argued that attempts to develop normative frameworks through which the quality of these decisions can be assessed are likely to be thwarted by a need for flexibility and context-specificity. In this light, Section 13.5. argued in favour of a new approach to assessing the quality of the charging discretion. When the exercise of discretion is seen as part of a process of argumentation, it becomes possible to see the quality of decisions by the extent to which prosecutors are willing to debate the motivations behind their choices with the broader epistemic community, engage with criticisms, and accept them if they are persuaded by their appropriateness.

Finally, it should be remembered that international prosecutions take place in a lifeworld with a relatively short history. International pros-

[124] Risse, 2000, p. 11, see above note 117.

ecutors do not have hundreds of years of domestic experience, collective knowledge, and a well-refined lifeworld to draw upon when exercising the charging discretion. The lifeworld that does exist needs to be developed. Silence is not conducive to the collective development of knowledge.

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Quality Control in Criminal Investigation

Xabier Agirre, Morten Bergsmo, Simon De Smet and Carsten Stahn (editors)

This book offers detailed analyses on how the investigation and preparation of fact-rich cases can be improved, both in national and international jurisdictions. Twenty-four chapters organized in five parts address, *inter alia*, evidence and analysis, systemic challenges in case-preparation, investigation plans as instruments of quality control, and judicial and prosecutorial participation in investigation and case-preparation. The authors include Antonio Angotti, Devasheesh Bais, Olympia Bekou, Gilbert Bitti, Leïla Bourguiba, Thijs B. Bouwknegt, Ewan Brown, Eleni Chaitidou, Cale Davis, Markus Eikel, Shreeyash Uday Lalit, Moa Lidén, Tor-Geir Myhrer, Trond Myklebust, Matthias Neuner, Christian Axboe Nielsen, Gilad Noam, Gavin Oxburgh, David Re, Alf Butenschøn Skre, Usha Tandon, William Webster and William H. Wiley, in addition to the four co-editors. There are also forewords by Fatou Bensouda and Manoj Kumar Sinha, and a prologue by Gregory S. Gordon.

The book follows from a conference at the Indian Law Institute, and is the main outcome of the third leg of a research project of the Centre for International Law Research and Policy (CILRAP) – the Quality Control Project. Other books produced by the project are *Quality Control in Fact-Finding* (Second Edition, 2020) and *Quality Control in Preliminary Examination: Volumes 1 and 2* (2018). Covering three distinct phases – documentation, preliminary examination, and investigation – the volumes consider how the quality of each phase can be improved. Emphasis is placed on the nourishment of an individual mindset and institutional culture of quality control.

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