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Prosecutorial discretion in international criminal justice

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Prosecutorial Discretion in International Criminal Justice

Cale Davis

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Cale Jordan Davis

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Abbreviations

ACABQ	Advisory Committee on Administrative and Budgetary Questions
CDF	Civil Defence Forces
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Persons
JNA	<i>Jugoslovenska narodna armija</i> (Yugoslav People's Army)
KSC	Kosovo Specialist Chambers
LRA	Lord's Resistance Army
MICT	United Nations Mechanism for International Criminal Tribunals
NGO	Non-Governmental Organisation
NT	Northern Territory (of Australia)
OSCE	Organisation for Security and Cooperation in Europe
OTP	Office of the Prosecutor
RPF	Rwandan Patriotic Front
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SRK	<i>Sarajevsko-romanijski korpus</i> (Sarajevo Romanija Corps)
STL	Special Tribunal for Lebanon
UN	United Nations
UNPROFOR	United Nations Protection Force
US	United States of America

Part I

Theoretical and Methodological Foundations

Chapter 1

Introduction

What have international prosecutors considered when exercising discretion, and why?

1 The Inquiry

“The business of law”, wrote Keith Hawkins, “is the business of making decisions”.¹ Every day, judges, lawyers, police, and bureaucrats make hundreds of thousands of choices that translate law from an abstract series of ideas and notions into practical action. Without people choosing how to implement it, the law would remain undeveloped, lifeless, and irrelevant. These decisions are made by people, just like you.

Despite ‘the business of law’ being the making of decisions, international criminal law scholarship has historically exhibited two problems that overlook the importance of this fundamental activity. The first is that legal scholars have historically ignored the “inner workings” of international criminal tribunals.² While the practice of international criminal law demands practitioners make countless decisions each day, the ways that these decisions are made and the underlying assumptions and motivations that inform them are cloaked in mystery. When decisions are made, they are regularly attributed to organisations rather than people in a manner which

1 Keith Hawkins, ‘On Legal Decision-Making’ (1986) 43(4) *Washington and Lee Law Review* 1161, 1162.

2 Nigel Eltringham, *Genocide Never Sleeps: Living law at the International Criminal Tribunal for Rwanda* (Cambridge University Press, 1st ed, 2019), 4. Eltringham’s introduction lays out a theoretical foundation for the study of practices which has inspired and informed that which is contained here. See also Jens Meierhenrich, ‘The Practice of International Law: A theoretical analysis’ (2014) 76(1) *Law and Contemporary Problems* 1, 4.

neglects the role of human agency in their production. Bureaucracies are personified and treated as ‘super people’ that possess their own views and the power to act independent of human volition.³ In both scholarship and official documents from international criminal justice organisations alike, regular references are made to ‘The Office of the Prosecutor *opening an investigation*’, ‘The Trial Chamber *deciding*’, or ‘The Prosecutor *arguing*’. In reality, of course, they did no such thing. Instead, the work of any number of individuals has been conflated into a bureaucratic whole in an abstraction which diverts attention from the role that people play in the implementation of law and the determination of action. Metaphors such as this are not merely harmless conveniences, but shape how observers perceive and make sense of the world around them.⁴ The act of personifying international criminal law organisations (or indeed any organisation) simplifies complex internal processes and the nuances of individual behaviour by glossing over the reality that any decision said to be made by a bureaucracy or any view which is ascribed to it is, in actuality, a decision taken or a view formed by people within smaller bureaucratic and social units that each possess their own complex internal dynamics. International criminal justice scholarship has largely ignored this.

The second problem is that international criminal justice scholarship is dominated by a ‘traditional’ or formalist approach which treats the law and its effects as independent from those who put it into motion.⁵ This means that while significant effort has been expended on the interpretation and synthesis of jurisprudence, other questions related to what the law is for and who it serves have largely been ignored.⁶ In other words, comparatively little attention has been given to the social circumstances under which law is created and put into effect as opposed to the attention given to traditional

3 Nigel Eltringham, *Genocide Never Sleeps: Living law at the International Criminal Tribunal for Rwanda* (Cambridge University Press, 1st ed, 2019), 14.

4 George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 2nd ed, 2003).

5 See, generally, Kieran McEvoy, ‘Beyond Legalism: Towards a thicker understanding of transitional justice’ (2007) 34(4) *Journal of Law and Society* 411; and Jens Meierhenrich, ‘Book Review: William Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone’ (2008) 102(3) *American Journal of International Law* 696, 699.

6 Kieran McEvoy, ‘Beyond Legalism: Towards a thicker understanding of transitional justice’ (2007) 34(4) *Journal of Law and Society* 411, 417. See also Jens Meierhenrich, ‘The Practice of International Law: A theoretical analysis’ (2014) 76(1) *Law and Contemporary Problems* 1, 6.

doctrinal questions about the law's substance.

Recent calls have been made to overcome the knowledge gap that exists at the level of individual action in the workings of international criminal justice to gain a better insight into how the field as a whole is constantly created and recreated through daily human activity. Kieran McEvoy, for example, called for scholarship to build a 'thicker' account of international criminal law that "contemplates a greater willingness to give space to actors other than the state or 'state-like' institutions in justice provision", and at the same time recognise that traditional approaches to law are not appropriately "grounded in the 'real world' in which law operates".⁷ Similarly, Jens Meierhenrich argued that legal scholarship must now turn towards studying how international criminal tribunals are "produced, reproduced, and reconfigured as a result of the particular contingent beliefs, preferences, and strategies of individuals (as well as collectivities) acting *within* them as well as *upon* them".⁸ As the most fundamental elements of any form of social organisation, focussing on individuals' actions within international criminal justice will provide better critical reflection on the "actions, motivations, consequences, philosophical assumptions, or power relations which inform legal actors and shape legal institutions", contributing to a more nuanced, "thicker" picture of how law exists in theory and operates in practice.⁹

This thesis is an attempt to do just that by exploring international criminal justice through the lens of *practice*. Practices are those "recurrent and meaningful work activities—social or material—that are performed in a regularised fashion and which have a bearing, whether large or small, on a social phenomenon" or "routinised [types] of behaviour which [consist] of several elements, interconnected to one another: forms of bodily activities, forms of mental activities, 'things' and their use, a background knowledge in the form of understanding, know-how, states of emotion and motivational knowledge".¹⁰ Situating research within the 'doing' of international crim-

7 Kieran McEvoy, 'Beyond Legalism: Towards a thicker understanding of transitional justice' (2007) 34(4) *Journal of Law and Society* 411, 440.

8 Jens Meierhenrich, 'Book Review: William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone*' (2008) 102(3) *American Journal of International Law* 696, 700.

9 Kieran McEvoy, 'Beyond Legalism: Towards a thicker understanding of transitional justice' (2007) 34(4) *Journal of Law and Society* 411, 413.

10 Jens Meierhenrich, 'The Practice of International Law: A theoretical analysis' (2014) 76(1) *Law and Contemporary Problems* 1, 13, 19; Andreas Reckwitz, 'Towards a Theory of Social Practices: A development in culturalist theorising' (2002) 5(2) *European Journal of Social Theory* 243, 249.

inal justice helps to bridge theory and practice and overcome what Meierhenrich called “the twin dangers of ‘imagination without knowledge’ and ‘knowledge without imagination’”—the problem of academics not knowing what life is really like ‘on the ground’ in international courts and practitioners not keeping abreast of the latest academic developments in their field.¹¹ Practice-based research invites engagement with the pragmatic issues confronted by international criminal lawyers on a daily basis. This engagement with the practices of daily life can unmask the thoughts expressed within them and the “inarticulate, practical knowledge that makes what is to be done appear ‘self-evident’ or commonsensical”, leading to a thicker understanding of why people engage in particular conduct and how they go about their daily activities.¹² An analysis of practices allows the social world of international criminal justice to be understood as a “vast array or assemblage of performances made durable by being inscribed in human bodies and minds, objects and texts, and knotted together in such a way that the results of one performance become the resource for another”.¹³ A practice-based approach to international criminal justice can therefore reveal the “actions, motivations, consequences, philosophical assumptions, or power relations which inform legal actors and shape legal institutions”.¹⁴

This thesis is concerned with exploring the motivations and assumptions that underpin one particular practice: prosecutorial decision-making. In the context of international criminal law, the choices made by international prosecutors are particularly important. These are the people with the sole power to investigate, accuse, and prosecute people for crimes in international criminal courts. For this reason, they have been called the ‘gatekeep-

11 Jens Meierhenrich, ‘The Practice of International Law: A theoretical analysis’ (2014) 76(1) *Law and Contemporary Problems* 1, 2.

12 Jens Meierhenrich, ‘The Practice of International Law: A theoretical analysis’ (2014) 76(1) *Law and Contemporary Problems* 1, 23, paraphrasing R G Collingwood, *The Idea of History* (Oxford University Press, 1st ed, 1961), 214; Vincent Pouliot, ‘The Logic of Practicality: A theory of practice of security communities’ (2008) 62(2) *International Organisation* 257, 258.

13 Paul Roberts and Nesam McMillan, ‘For Criminology in International Criminal Justice’ (2003) 1(2) *Journal of International Criminal Justice* 315, 316; Davide Nicolini, *Practice Theory, Work, and Organisation: An introduction* (Oxford University Press, 1st ed, 2012), 2.

14 Kieran McEvoy, ‘Beyond Legalism: Towards a thicker understanding of transitional justice’ (2007) 34(4) *Journal of Law and Society* 411, 413.

ers¹⁵ and ‘engine rooms’¹⁶ of the international criminal justice system and burdened with the responsibility of ensuring international criminal courts fulfil their broad and unwieldy mandates.¹⁷ Some of the questions they need to decide are very consequential, such as “who should I charge?” or “what am I going to charge them with?”. Others are less so, like “am I going to appeal this legal error?” or “what sentencing range should I agree to?”. Yet any choices these people make will, in their own large or small ways, affect what international criminal justice is, how it develops, and what it does. For this reason, prosecutorial decision-making is an important field of study.

Many of the choices that international prosecutors make come about through the exercise of *discretion*. Discretion is the act of reaching a reasoned decision about the appropriate course of action to pursue.¹⁸ This act of reasoning is one of the most fundamental elements of any legal system and differentiates those decisions made on impulse or through arbitrary means from those that come about through the application of knowledge.

Despite this, what international prosecutors consider when exercising discretion, and the more pertinent question of what the motivations and assumptions are that inform why they consider these factors in the first place, are largely unknown. International prosecutorial discretion is a ‘black box’.¹⁹ First, it has never been the subject of a multi-jurisdictional, empir-

15 Lovisa Bådagård and Mark Klamberg, ‘The Gatekeeper of the ICC: Prosecutorial strategies for selecting situations and cases at the International Criminal Court’ (2017) 48(5) *Georgetown Journal of International Law* 639.

16 Birju Kotecha, ‘The International Criminal Court’s Selectivity and Procedural Justice’ (2020) 18(1) *Journal of International Criminal Justice* 107, 107.

17 Luc Reydam and Jed Odermatt, ‘Mandates’ in Luc Reydam, Jan Wouters and Cedric Ryngaert, *International Prosecutors* (Oxford University Press, 1st ed, 2012) 81, 81.

18 This definition is explained further in chapter 2, specifically in section 3. However, at this point it is important to highlight that ‘reasoned decision’ refers not to the means through which a decision is *communicated* (such as a judgment, a policy paper, a preliminary examination report, a speech, or anything similar) but rather to a decision that is *reasoned*. Discretion is what occurs inside the mind of a decision-maker and is invisible to the outside world. The reference to ‘reasoned’ explicitly excludes those decisions that are made arbitrarily or impulsively. Instead, it requires them to be reached through what Daniel Kahneman and Amos Tversky called ‘slow thinking’ that involves the controlled and effortful weighing-up of factors and possible outcomes in the context of what is deemed appropriate. See, on the topic of ‘slow thinking’, Daniel Kahneman, ‘Maps of Bounded Rationality: Psychology for behavioural economics’ (2003) 93(5) *The American Economic Review* 1449, 1450-1452.

19 This concept is taken from Marc Miller and Ronald Wright, ‘The Black Box’ (2008)

ical, practice-based study. Scholarship concerning prosecutorial discretion has instead been concerned with other themes. For example, prosecutorial discretion has been approached from the perspective of policy development. This branch of scholarship broadly advocates for prosecutorial decision-making practice to be changed in order to reach particular goals (such as more transparency, the protection of the environment, consistency, or the careful tailoring of justice responses to the needs of particular communities).²⁰ Those contributions from the perspective of the law, on the other hand, are concerned instead with the limits of decision-making authority and the controls that are placed upon it (such as the development of accountability mechanisms or the interpretation of statutory terms like ‘gravity’ or ‘interests of justice’ that ICC prosecutors need to think about when commencing investigations or prosecutions).²¹ These two categories are not mutually exclusive, and are linked by a common distance between

94(1) *Iowa Law Review* 125, who wrote about prosecutorial discretion in a domestic context.

- 20 See, for example, Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart, 1st ed, 2020) (who advocates in favour of a transparent and principled exercise of prosecutorial discretion); Birju Kotecha, ‘The International Criminal Court’s Selectivity and Procedural Justice’ (2020) 18(1) *Journal of International Criminal Justice* 107 (who invites the ICC prosecutors to be more consistent in their selection of situations and cases and think more about how they can represent affected communities); Eliana Teresa Cusato, ‘Beyond Symbolism: Problems and prospects with prosecuting environmental destruction before the ICC’ (2017) 15(3) *Journal of International Criminal Justice* 491 (who reflects on the merits of ICC prosecutors pursuing prosecutions for crimes against the environment); and Lovisa Bådagård and Mark Klamberg, ‘The Gatekeeper of the ICC: Prosecutorial strategies for selecting situations and cases at the International Criminal Court’ (2017) 48(5) *Georgetown Journal of International Law* 639 (who identify prosecutorial strategies in selecting situations and cases).
- 21 See, for example, Triestino Mariniello, ‘Judicial Control over Prosecutorial Discretion at the International Criminal Court’ (2019) 19(6) *International Criminal Law Review* 979 (who explores the power Pre-Trial Chamber judges have over a prosecutor’s selection of a situation); Talita De Souza Dias, ‘“Interests of justice”: Defining the scope of prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court’ (2017) 30(2) *Leiden Journal of International Law* 731 (who explores the meaning of the phrase ‘interests of justice’ in the context of a prosecutor’s initiation of an investigation or prosecution); Cale Davis, ‘Political Considerations in Prosecutorial Discretion at the International Criminal Court’ (2015) 15(1) *International Criminal Law Review* 170 (also concerning the meaning of ‘interests of justice’); and Jenia Turner, ‘Policing International Prosecutors’ (2012) 45 *International Law and Politics* 175 (who is concerned with accountability mechanisms).

the authors and the people making the decisions they are concerned with.

Second, prosecutors themselves have also not revealed much about their discretion. The recent flood of policy papers from ICC prosecutors aimed at increasing the transparency of decision-making does little to reveal what motivators and assumptions guide discretion. They merely provide ground for speculation about what prosecutors *might* have considered when making specific choices and act as a smokescreen to obscure *what* prosecutors actually considered, *how* factors were considered, and *why* they were considered. This is not to impugn any bad faith on the part of the people who released these papers, but rather to point out that, without evidence, what people *say* they will consider does not necessarily equate to what they *did* consider and there are difficulties in trying to distil underlying motivators from a set of documents that do not reveal how any of the factors contained within them were applied in real-life practice. There is therefore a stark contrast between the importance of prosecutorial discretion to the constitution, development, and effects of international criminal justice on the one hand, and the general knowledge about how these decisions arise on the other.

This thesis is an attempt at cracking open the ‘black box’ of international prosecutorial discretion. Its purpose is twofold. First, it seeks to identify some of the many factors that prosecutors have considered when making various decisions over the course of criminal proceedings. Second, it seeks to reveal why prosecutors have understood these factors to be relevant to their decision-making in the first place. To do so, it explores the reasons or motivations that explain the relevance of these factors to particular decisions, and the assumptions prosecutors carry about their role and the nature and purpose of international criminal justice. This thesis therefore identifies how these motivations and assumptions inform prosecutorial decision-making and shape the institution that is international criminal justice.

2 Methodology

2.1 Data collection

This thesis focuses on the experiences of prosecutors at four courts: the ICTY, ICTR, SCSL, and ICC. These four courts were chosen for four reasons. First, they represent the temporal spread of modern international criminal law. The creation of the ICTY in mid-1993 marked the birth of

modern international criminal justice. Since then, there has not been a day where none of these four courts were in existence. The temporal spread of these courts therefore allows this thesis to capture a quarter of a century of international prosecution experience. The second reason is that these courts represent the three institutional forms taken by international criminal courts. They are a mix of Chapter VII courts (the ICTY and ICTR), internationalised or 'hybrid' tribunals (the SCSL), and treaty-based courts (the ICC). The inclusion of these four courts allows for the legal frameworks that relate to various choices to be compared and contrasted across as many institutions as practically possible, and ensures that this research is institutionally diverse. Third, the ICTY, ICTR, and SCSL are some of the most commonly-cited sources for jurisprudence by the ICC.²² While international prosecutors do not directly produce this jurisprudence, these referencing patterns do suggest that these institutions are afforded a special status in terms of their collective contributions to the field. Finally, the fourth reason is that these courts were simply the easiest to obtain data for. While it would have been interesting to broaden the scope of this study to include other courts, such as the ECCC and the STL, it was significantly more difficult to obtain relevant, first-hand data for them because prosecutors were more difficult to contact and those that were reached were not willing to be interviewed.

The choice of these four courts does raise two issues that the reader should be aware of. First, this selection risks reinforcing the incorrect belief that international criminal law is *only* about what happens within international criminal courts. International criminal law is about more than that. There are increasingly more domestic prosecutions for international crimes (such as prosecutions concerned with the Rwandan genocide in France; prosecutions for crimes against humanity involving the Yazidis in Germany; or the Swiss prosecution of Alieu Kosiah for offences committed in the context of the Liberian civil war). A study of prosecutorial discretion in domestic jurisdictions regarding the prosecution of international crimes would be a welcome addition to the literature, however, in the interests of size and complexity, this thesis focusses exclusively on decision-making before international criminal courts. Second, every international criminal court is unique in its staffing, organisation, legal framework, and historical context. Comparisons between different courts are difficult to make and it is impos-

22 Stewart Manley, 'Referencing Patterns at the International Criminal Court' (2016) 27(1) *European Journal of International Law* 191, 199.

sible to say that any selection of courts is representative of anything except the most abstract concepts (in this case, temporal spread and institutional form). All this said, neither of these caveats undermine the value of research into these four courts. No comparable study into prosecutorial discretion has ever been done before, and in that sense, this thesis is something of a 'pilot project' that may serve as a foundation for more empirical research into prosecutorial discretion at other institutions in the future.

This thesis focuses on the experiences of those prosecutors who held (or hold) the rank of Senior Trial Attorney and above. These prosecutors were selected because they were (or are) in charge of trial teams or are otherwise well-placed within prosecution offices to make the most consequential choices within the context of international criminal proceedings. Their experiences making these decisions are unmatched by any other class of people within international prosecution offices.

In terms of data, this thesis gives priority to first-hand accounts of the practice of decision-making. This reliance on first-hand accounts ensures that this research is as closely grounded in practice as possible. There is, however, very limited public data of this nature apart from a small number of interviews, speeches, books, or journal articles featuring international criminal prosecutors from the courts and class that this research is concerned with. As such, this research draws significantly upon the author's personal interviews conducted between March and September 2018 to gain insights into the practice of exercising prosecutorial discretion.

Interview subjects were determined by compiling a list of all senior trial attorneys and above on the basis of judgment cover sheets and additional research, and attempts were made at identifying the contact details for all of them. Invitations for interviews were sent to a total of 65 people. The interview invitation made clear that this thesis would not contain any personally identifying material, nor would the unredacted transcripts of the interviews be made public. This was done in order to encourage people to agree to an interview and speak openly without fear of repercussion. The invitation also made clear that the purpose of the interview would be "finding out what you personally have considered important when confronted with the need to make specific decisions, factors that have influenced your decision-making, and why". Prosecutors therefore were on notice regarding what would be discussed.

In total, 5 people declined to be interviewed, 13 people were believed to be contacted directly but did not respond, 11 people were believed to be contacted indirectly but did not respond, preliminary discussions were held

with 4 people but for various reasons no interview took place, and 2 people agreed to interviews but they never took place. In total, 30 people were interviewed for this research. 2 of these people, however, did *not* hold the rank of Senior Trial Attorney or above, but were nevertheless well-placed within prosecution offices to provide accurate insights into decision-making. As such, when quotes are used in this thesis, the interviewees are cited as either ‘P*n*’ (designating that they were a Prosecutor), or ‘S*n*’ (designating that they were a Special interviewee).

In terms of demographics and backgrounds, 48 of the 65 invitees were male; and 17 out of 65 were female. 26 interviewees were male and 4 were female. 50 of the invitees were from ‘common law’ legal systems and 15 were from ‘civil law’ legal systems. 25 of the interviewees were from ‘common law’ legal systems and 5 were from ‘civil law’ legal systems.²³ 6 interviewees had experience at the ICC; 23 at the ICTY; 11 at the ICTR; and 5 at the SCSL. 13 interviewees had experience at more than one institution, which is why the sum of these numbers is greater than the number of people interviewed. 7 interviewees have experience as Chief Prosecutors.

The interviews were conducted either in person, over the phone, or via video call and the audio was recorded. The recordings spanned 18 hours, with an average interview length of 1 hour and 1 minute. Each interview began with the author recalling that no quotes from the interview used in this thesis would be attributed to the interviewee directly by name or through other specifically-identifying material. The interviews were semi-structured and open. Two questions formed the foundation for the discussions. The first substantive question each interviewee was asked was to the effect of ‘what discretions do you consider were the most important in your role as an international prosecutor?’. The responses given were noted down (charging people; selecting witnesses; and so on), and then used as the structure for the remainder of the interview. Each prosecutor was then asked what they considered when exercising the discretions that they identified. The discussions were principally directed by what the interview subjects believed it was important to talk about (though on some occasions they needed to be

23 These labels are only loose descriptions. Very few, if any, jurisdictions are clearly common law or civil law. See Mirjan Damaška, *The Faces of Justice and State Authority: A comparative approach to the legal process* (Yale University Press, 1st ed, 1986), 3, and George Fletcher, ‘The Influence of the Common Law and Civil Law Traditions on International Criminal Law’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 1st ed, 2009) 104, 104.

pulled back to the topic). Various follow-up questions were asked in order to further explore the topics that the prosecutor had raised; or to explore those topics that *other* prosecutors had raised in order to gain the interviewee's views on those opinions. Particular care was taken, however, not to lead any of the interview subjects into answers to either of the two primary questions.

No methodology is ever free from limitations, and this one is no different. In particular, there are four important limitations that need to be highlighted to remove any doubt about what this research demonstrates. First, the interview data is naturally limited to those prosecutors who agreed to participate in an interview. Those people who were not interviewed may, and in all likelihood would, have revealed even more considerations. This research certainly makes no claim to being a comprehensive and definitive record of all considerations all senior prosecutors took into account when exercising discretion. Second, access to *current* senior prosecutors was limited by staff within the various prosecution offices. Several prosecutors at the ICC OTP tentatively agreed to be interviewed pending approval of other staff within the office, which was not granted. Instead, staff made available for interviews three specific (and high-ranked) prosecutors of their own choosing.²⁴ Three current MICT prosecutors declined to be interviewed on the basis that another, more senior, prosecutor within the Office had already been interviewed who was either better placed or better positioned to “explain the practice” in the Office; or who spoke “on behalf of others in the OTP”.²⁵ While the cooperation of the staff at the offices is greatly appreciated (they could easily have made *no* current prosecutors available for interviews at all), it is important to realise that the insights in this thesis from current senior prosecutors is restricted to that which comes from prosecutors who other people allowed to be interviewed.²⁶ Most of the interviewees were therefore retired, or had moved on to different areas of practice. Third, the methodology does not allow comparisons to be made between prosecutors from particular institutions or from different professional backgrounds. Finally, the methodology does not allow any generalisations to be made about ‘the paradigmatic international prosecutor’. Instead, this study shows what different prosecutors have individually considered important, and thus foregrounds the complex and rich array of

24 These three people had originally been approached by the author for an interview.

25 Emails on file with author.

26 The issue of transparency is discussed further on page 239.

factors that motivate individual action.

2.2 Data analysis

The interview data was analysed with the assistance of MAXQDA qualitative data analysis software.²⁷ Open coding progressed in two stages. The first stage involved coding the interview transcripts according to the choice that was being discussed. The second stage involved coding the factors the interviewee considered relevant to the choice being discussed. Throughout this thesis, these factors are referred to as ‘thematic windows’.

The thematic windows can be typologised into three different categories, as shown in figure 1.1. These three categories demonstrate that the considerations that have informed prosecutorial decision-making occupy very different conceptual physical and temporal spaces, and act as a structure for the following chapters. The first category are those considerations that are *functional*. Functional considerations are primarily concerned with what happens in the courtroom and cease to be relevant upon the close of proceedings. It is this category which is probably best associated with the limited functions of prosecutors within the framework of a traditional criminal proceedings: the daily grind of court work encompassing questions of evidence; the wellbeing of participants; workload management; and so on. *Normative* considerations—the second category—are conceptually quite distinct. Unlike functional considerations, normative considerations are concerned with the world outside the doors of courtrooms. They have a relevance that survives the close of proceedings and endures for an indeterminate time. This category therefore includes considerations which concern the development or transformation of legal and societal norms through the development of ‘law’ or the recording of history. Finally, *strategic* considerations share traits of both functional and normative considerations. They exist somewhere between the courtroom and the world outside, being both connected with the proceedings but also distant from them. Temporally, they concern matters which are relevant in the short-to-medium term. These strategic considerations cover those factors which represent responses to perceived threats, seek to pursue particular goals which would affect other proceedings, or respond to external demands or pressures.

The analytical methodology adopted for this research, for the purposes of identifying how these ‘thematic windows’ revealed the motivations and

27 Verbi Software, *MAXQDA2020* (2019).

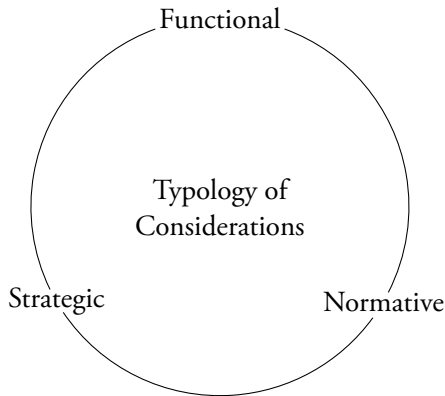


Figure 1.1: A typology of considerations relevant to the exercise of prosecutorial discretion.

assumptions that informed discretion, was inspired by critical discourse analysis. Critical discourse analysis broadly seeks to not only describe reality, but also to explain how it is the product of opaque structures or forces that are reproduced in and by discourse.²⁸ As a method, it allows implicit knowledge to be revealed within discourse and “can provide valuable insights into what is taken as given, as common sense”.²⁹ This methodology is particularly concerned with exploring the relationship between discourses and power and, more specifically, how texts (broadly interpreted to include interview transcripts) “arise out of and are ideologically shaped by relations of power and struggles over power”,³⁰ or the “role of discourse in the (re)production and challenge of dominance”.³¹

28 Norman Fairclough, ‘Critical Discourse Analysis’ in James Gee and Michael Handford (eds), *The Routledge Handbook of Discourse Analysis* (Routledge, 1st ed, 2012) 9, 9.

29 Norman Fairclough, *Critical Discourse Analysis: The critical study of language* (Longman, 1st ed, 1995), 6.

30 Norman Fairclough, *Critical Discourse Analysis: The critical study of language* (Longman, 1st ed, 1995), 132. See also Ruth Wodak, ‘What CDA Is About: A summary of its history, important concepts, and its developments’ in Ruth Wodak and Michael Meyer (eds), *Methods of Critical Discourse Analysis* (Sage, 1st ed, 2001) 1, 2.

31 Teun van Dijk, ‘Principles of Critical Discourse Analysis’ (1993) 4(2) *Discourse and*

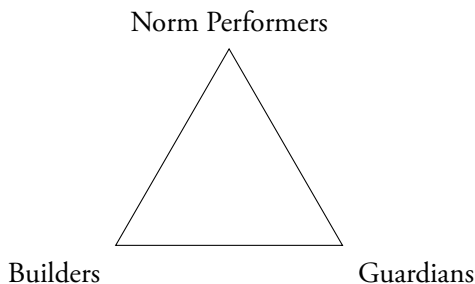


Figure 1.2: A typology of the three prosecutorial roles that are evidenced by decision-making. These are developed further in chapter 8, section 2.

The focus of critical discourse analysis on relationships of power allowed for the motivations and assumptions about power that shape discretion to be explored in the data. In particular, the following chapters explore how discretion has been informed by the *roles* and *relationships* that international prosecutors have adopted. This thesis identifies that decision-making appears to have been influenced by prosecutors adopting three roles. The first is the role of the *norm performers*, in which they have sought to affirm, project, or internalise procedural and moral norms. The second is that of the *builder*, through which they engage in the construction of law, history, institutions, and power. Finally, they have been *guardians* when they have sought to act in the best interests of institutions, people, and concepts. These three role identities are developed further in chapter 8 (particularly in section 2), but the general argument is that these roles and relationships can be used to explain why factors have been considered relevant in the exercise of discretion and help to explain why prosecutors have made particular choices.

For clarity, it should be pointed out that not all prosecutors adopt all of these roles all of the time. Further, it is not possible, on the basis of the data relied upon in this thesis, to meaningfully compare and contrast the roles adopted by *specific* prosecutors and identify whether some prosecutors lean more heavily towards certain roles, and in which circumstances. That is not the purpose of this research.

Society 249, 249. Emphasis removed.

It should also be highlighted that the approach deployed to analyse the data in this thesis cannot be properly called critical discourse analysis. Critical discourse analysis is more than a methodology. It is also a programme of work in which analysts adopt the perspective “of those who suffer most from dominance and inequality”; targeting “the power elites that enact, sustain, legitimate, condone, or ignore social inequality and injustice”.³² As a programme, it has the express aim of transforming the structures that lead to this repression in political interventions with an explicitly-stated policy agenda.³³

No such agenda is adopted here. Critical discourse analysis is deployed to the extent to which it reveals the hidden assumptions and motivations about the prosecutorial role that have led to various factors being considered in the exercise of discretion, with a particular focus on the roles and relationships that prosecutors have adopted. The purpose in revealing this hidden knowledge is merely to uncover why choices are made. For this reason, the methodology deployed here is merely inspired by critical discourse analysis in the sense that it is concerned with understanding the assumptions and motivations about the role of the prosecutor hidden within the data, rather than fully embracing the political programme of change, transformation, or emancipation that accompanies it.

This is certainly not to suggest, of course, that prosecutors are apolitical in their decision-making or the form of critical discourse analysis developed by Fairclough and others is irrelevant to the study prosecutorial discretion. There are many important questions to be asked about the ways in which prosecutorial decision-making can be amended to bring about change and transform patterns of domination and inequality. Yet they are also questions for other research.

32 Teun van Dijk, ‘Principles of Critical Discourse Analysis’ (1993) 4(2) *Discourse and Society* 249, 252. See also Norman Fairclough, ‘Critical Discourse Analysis’ in James Gee and Michael Handford (eds), *The Routledge Handbook of Discourse Analysis* (Routledge, 1st ed, 2012) 9, 10.

33 See Terry Locke, *Critical Discourse Analysis* (Continuum, 1st ed, 2004), 2; Teun van Dijk, ‘Principles of Critical Discourse Analysis’ (1993) 4(2) *Discourse and Society* 249, 252; and Ruth Wodak, ‘What CDA Is About: A summary of its history, important concepts, and its developments’ in Ruth Wodak and Michael Meyer (eds), *Methods of Critical Discourse Analysis* (Sage, 1st ed, 2001) 1, 9.

3 Contribution to Knowledge

This thesis makes four original contributions to the scholarship on discretion and, more specifically, international prosecutorial discretion.

First, it introduces a new, practice-based conception of *discretion* that breaks from that historically adopted within the legal paradigm. It argues that understanding discretion as the act of reaching a reasoned decision about the appropriate course of action to pursue allows for research to capture the diversity of forces that influence how decisions are made. It therefore emancipates the study of legal discretion from the confines of constraint-based approaches, such as those that define discretion by reference to ‘spaces’ in which decision-makers can exercise free choice. This approach allows scholarship to better capture the inherent nuance of reasoning in decision-making practices.

Second, it is the first multi-jurisdictional study, concerned with key prosecutorial choices across the life of criminal proceedings, that explores, using first-hand evidence, what international prosecutors have considered in the exercise of their discretion. The value of a multi-jurisdictional study is not that the findings in this thesis can be generalised to all prosecutors; nor is it that motivations and assumptions of prosecutors from different courts can be compared and contrasted. Instead, the value is that it allows the experiences of a large number of prosecutors to be captured, allowing themes to be identified among individuals *regardless* of the courts that they work for or have worked for. Thus, despite involving prosecutors from multiple jurisdictions, the focus remains tightly on the motivations and assumptions behind *individual action*, because it is necessary to understand the drivers of individual action in order to understand how individual action shapes international criminal law and its institutions. This thesis therefore provides an original insight into how prosecutors have made decisions, as opposed to exploring decision-making from policy-based or legal perspective confined to specific jurisdictions.

Third, it deepens the collective understanding about how international prosecutors make choices. By using the notion of power to explore prosecutors’ assumptions and motivations about role identities and relationships, this thesis contributes to a better understanding of why decisions are reached. It therefore also adds nuance to the collective understanding about the role of international prosecutors in international criminal justice.

Finally, this thesis offers some suggestions regarding the practical value of understanding prosecutorial roles beyond simply appreciating why deci-

sions are made. It suggests that roles provide a useful tool for prosecutors to reflect upon in order to assess the appropriateness of their decisions. It argues that the relevance of roles to decision-making opens up new avenues for decision-making to be controlled. Finally, it proposes that supplementing the goal-based approach to prosecutorial performance with a role-based approach to prosecutorial performance will be better reflective of the quality of work that international prosecutors are engaged in.

4 Structure

This thesis is divided into three parts. Part I establishes the theoretical and methodological foundations for this research. The following chapter explores the notion of ‘discretion’ and advances an original, practice-based definition of the term. This chapter therefore provides the framework through which ‘discretion’ is understood in the remainder of this thesis.

In Part II, this thesis explores what prosecutors have considered when exercising discretion. The structure of this part was borne out of two considerations. The first, and the most important, is the amount of data that was available for each of the choices prosecutors identified as being important in their work. The choices for which the most data was available were, therefore, those that needed to be made by prosecutors at *all* the tribunals covered by this study. The second consideration was a desire to roughly trace the progress of a criminal proceeding, from the commencement of an investigation through to the filing of an appeal. The interviews—as the primary data source that this thesis draws upon—collectively touched on many more choices than could meaningfully be reflected on here. With these two considerations in mind, some choices discussed by prosecutors have not been included (such as the decision to engage in outreach activities, the transfer of cases to national jurisdictions, the early release of a defendant, or the autonomy to afford to subordinates). Part II therefore addresses the following choices. Chapter 3 concerns the selection of situations and cases; chapter 4 concerns the selection of charges; chapter 5 concerns the negotiation of an outcome with an actual or potential defendant; chapter 6 concerns the selection of witnesses; and finally chapter 7 concerns the decision to appeal.

Finally, Part III offers some reflections on the previous chapters. It explores the roles that prosecutors have assumed when exercising discretion and motivated their decision-making. It also offers some reflections on why

it is important for scholars and practitioners to appreciate the function of these roles.

Chapter 2

Understanding Discretion

I think probably, to be scientific and precise about this, it might be better if you indicated what you mean by ‘prosecutorial discretion’.

INTERVIEW WITH P15

1 Introduction

This chapter establishes the conceptual framework through which this thesis approaches the study of discretion contained in the following chapters. To do so, it zooms out from the topic of prosecutorial discretion and engages with the preliminary theoretical question of what is meant by ‘discretion’. In a break from the legal paradigm of conceptualising discretion as an imagined space for free choice bounded by various restrictions, the novel argument advanced here is that discretion should be principally understood as the *act of reaching a reasoned decision about the appropriate course of action to pursue*. The legal paradigm’s conception of discretion draws an arbitrary distinction between forces that do constrain discretion and those that do not. This runs contrary to how decision-making is understood in other scientific fields and offers a distorted image of how decision-making works in practice. As such, any analysis of decision-making that takes as its starting point a constraint-based conception of discretion promoted by the legal paradigm (such as one defining discretion by reference to rules or as a grant of power or authority) will invariably fail to capture the gamut of forces that affect how discretion is exercised. The concept of discretion advanced here, however, invites a nuanced understanding of the forces that

operate on decision-makers in practice, while staying true to the notions of choice, judgement, and discernment that emerge from the word's etymological origins. This chapter therefore provides the theoretical foundations that enable the zooming-in on international prosecutorial discretion in the rest of this study. This conceptual framework invites a critical look at the well-worn topic of prosecutorial discretion, promising to provide new insights into how choices are made by the gatekeepers to the international criminal justice system and what role identities shape the decisions that they make.

2 Conceptualising Discretion

What does it mean for someone to have 'discretion'?¹ Understanding discretion's core features requires tracing the word's etymological roots back to the late 2nd and early 3rd century. In his defence of Christians against the Carthaginian magistracy's accusations of infanticide, baby-eating, incest, and 'illegal existence', the religious scholar Tertullian retorted against the unfairness of the Christian God in persecuting his followers. God, he argued, did not hasten to distinguish between those who accepted him and those who did not, nor hesitate to perhaps treat non-believers with "all the plagues of the world".² Tertullian's use of the word *discretionem* in this context concerned God's capacity to distinguish—a connotation which, today,

1 This is the same question that was posed by Ronald Dworkin, "The Model of Rules" (1967) 35 *University of Chicago Law Review* 14, 32.

2 Tertullian, 'Apologeticum', chapter 41, section 2, contained in and translated by T R Glover, *Tertullian, Minucius Felix* (Harvard University Press, 1st ed, 1931), 188-189:

Hoc, inquit, et in deum vestrum repercutere est, si quod et ipse patiatur, propter profanos etiam suos cultores laedi. Admittite prius dispositiones eius, et non retorquetis. Qui enim semel aeternum iudicium destinavit post saeculi finem, non praecipitat discretionem, quae est condicio iudicii, ante saeculi finem. Aequalis est interim super omne hominum genus et indulgens et increpans.

"But this", you say, "can be retorted upon your God too, since He Himself because of the profane suffers His own worshippers to be injured". First admit His disposition of events, and then you will not turn this against Him. For He who has ordained eternal judgement once for all after the end of the world does not hasten to make that separation (which is the essence of the judgement) before the end of the world. Meantime He treats all mankind equally, both in concession and in warning.

discretion still carries. A later use of *discretio* in the Vulgate Bible introduced the notion of discernment, in the context of God granting people various skills (in this case, the “prophetic ability to evaluate prophecies”).³ Early uses of *discretion* (in French) concern the ideas of wisdom and sound judgement.⁴ When ‘discretion’ entered the English language some time before 1235, it was used to refer to judicial determinations. The Statutes of King Henry III, Edward I, and Edward III, for example, make numerous references to the discretion of judges to make decisions, award compensation, and impose penalties.⁵

In modern parlance, discretion is used principally in senses concerning sound judgement. Two of the three senses listed in the *Oxford English Dictionary*, the authoritative record of the *history* of the English language, still maintain this connection: those senses relating to “judgement or decision”, and those relating to the faculty of being discreet; the third sense, concerning separation and distinction, still maintains a connection with Tertullian’s use of *discretionem* in 197.⁶ Discretion, therefore, needs to be understood principally as an action in which people reason and make what they believe to be appropriate decisions. However, the relationship between this faculty of reasoning and the context in which it is deployed has caused writers within different research paradigms to refine their understanding of discretion. The result is that discretion is understood differently both

See also D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 8, and *Oxford English Dictionary* (Oxford University Press, 3rd ed, 2013), ‘discretion’.

- 3 *Vulgate Bible*, 1 Corinthians, chapter 12, verse 10, available at *Perseus Digital Library* <<https://www.perseus.tufts.edu/hopper/>>, with the translation from *Vulgate Bible (Douay-Rheims Translation)* <<http://www.gutenberg.org/files/8300/8300-h/8300-h.htm#Book53>>:

Alii operatio virtutum alii prophetatio alii discretio spirituum alii genera linguarum alii interpretatio sermonum.

To another the working of miracles: to another, prophecy: to another, the discerning of spirits: to another, diverse kinds of tongues: to another, interpretation of speeches.

- See also Craig Keener, *1-2 Corinthians* (Cambridge University Press, 1st ed, 2005), 101.
- 4 *Oxford English Dictionary* (Oxford University Press, 3rd ed, 2013), ‘discretion’.
- 5 See, for example, *The Provisions of Merton* (1235), s 4, *The Statutes of Gloucester* (1278), and *Statute the Second* (1350), s 3, all contained in *The Statutes of the Realm* (Dawsons, 1st ed, 1810) vol 1.
- 6 *Oxford English Dictionary* (Oxford University Press, 3rd ed, 2013), ‘discretion’.

within and between different scholarly fields.

The following subsections explore how discretion is understood in different fields. Subsection 2.1 describes how discretion is understood within the legal paradigm. It argues that the prevailing understanding that pits discretion and rules as two alternative decision-making models and treats discretion as an imagined space is flawed. If it is accepted that the presence of rules removes discretion by directing an outcome or procedure, then *any* force which directs an outcome or procedure must *also* be seen as removing discretion regardless of the form that force takes. Subsection 2.2 describes what these other forces are and how discretion is inevitably affected by forces that exist outside the norms-focussed legal paradigm. This chapter advances an action-oriented conception of discretion in section 3, that allows a nuanced analysis of decision-making practices by accounting for the roles of these normative and social forces and lays the foundation for the exploration of power and role identities contained in the rest of this thesis.

2.1 Discretion in the legal paradigm

The legal paradigm recognises two senses of the word ‘discretion’. In the first sense, discretion is a grant of power or authority to make a decision. H L A Hart, for example, identified that ‘discretion’ can mean “the authority to choose”.⁷ In the second sense, discretion refers not to the power to make a decision, but to the way in which decisions are made. This leads to the confusing situation where someone can have discretion (in the first sense) to exercise discretion (in the second sense) in making a decision. Thus, there is a distinction between a prosecutor *having* the discretion to select charges and the prosecutor *exercising* discretion to select charges. The problem is that both of these senses are very closely related in that a power to make a decision (discretion the first sense) will necessarily relate to how the decision is made (discretion in the second sense) because the grant of authority will often limit the decisions that an individual can take. A prosecutor might have the authority to select charges, for example, so long as those charges are permitted under a relevant statute. In such a case, the grant of decision-

7 H L A Hart, ‘Discretion’ (2013) 127 *Harvard Law Review* 652, 657. Hart was not alone in recognising this connotation. See also Ronald Dworkin, ‘The Model of Rules’ (1967) 35 *University of Chicago Law Review* 14, 32; and Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from law and social science’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 1.

making authority is inseparable from the issue of how those decisions are made. There is thus little difference between the two senses.

To understand why the understanding of discretion within the legal paradigm is problematic, it is useful to reflect on the relationship between law and decision-making. The legal paradigm has strong parallels with Max Weber's bureaucracy.⁸ Weberian bureaucracy distributes decision-making power in "a stable way [that] is strictly delimited by rules concerning the coercive means, physical, sacerdotal, or otherwise which may be placed at the disposal of officials".⁹ The demands of efficiency dictate that the bureaucratic machine must continue to function "precisely, unambiguously, continuously, and with as much speed as possible", necessitating the development of "calculable rules" to ensure decisions are made "without regard for persons".¹⁰ All human emotions are expelled from an official's decision-making thought processes, dehumanising the application of official power, leaving a system of governance that is predictable, efficient, and equitable.

If law is understood in this way as a system of rules (formal or otherwise), legal analyses tend to exclude from their scope any matter that is not governed by those rules.¹¹ Therefore, under the legal paradigm, discretion and rules present two alternative decision-making models.¹² On the one hand, there is the system of decision-making that is regulated by rules, statutes, and legislation; and on the other, there is that which requires personal judgement.

In this light, prosecutorial discretion within the context of international criminal law typically looks something like this. Prosecutors have the authority to make decisions. Some of these decisions are subjected to rules that demand prosecutors consider various factors. Article 53 of the *Rome Statute* is perhaps the best example, which requires prosecutors to consider

8 Martha Feldman, 'Social Limits to Discretion: An organisational perspective' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 163, 164.

9 Max Weber, 'Bureaucracy' in H H Gerth and C Wright Mills, *From Max Weber: Essays in sociology* (Oxford University Press, 1st ed, 1946) 196, 196.

10 Max Weber, 'Bureaucracy' in H H Gerth and C Wright Mills, *From Max Weber: Essays in sociology* (Oxford University Press, 1st ed, 1946) 196, 215-216.

11 Peter Mascini, 'Discretion from a Legal Perspective' in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 121, 124; D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 2.

12 Michael Adler and Stewart Asquith, 'Discretion and Power' in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 9, 15.

jurisdiction, admissibility, the gravity of the crime, the interests of the victims, and the interests of justice in opening an investigation or commencing a prosecution. Statutory rules may be supplemented by judicial interpretations. ICC judges have, for example, understood that the ‘gravity’ of a situation requires an assessment of the scale, nature, manner of commission, and impact of the alleged crimes.¹³

Beyond these rules, prosecutors can exercise free choice and are protected by guarantees of institutional and functional independence. Institutional independence “is concerned both with the status of the prosecutorial institution acknowledged in the statute as well as the formal independence from other actors—states, international organisations, NGOs—including other organs of the court”.¹⁴ Kevin Heller observed that “[s]tatus as a separate organ of the tribunal is critical to prosecutorial independence, because it means that the other organs—the Registry and the judiciary—do not have the formal authority to issue binding directives to the OTP concerning prosecutorial strategy”.¹⁵ The *Rome Statute*, for example, establishes that the Prosecutor is a separate organ of the Court (under article 34); has full control over the management and administration of their office (under article 42(2)); and is prohibited from seeking or acting on instructions from any other source (under article 42(1)). Functional independence, on the other hand, concerns a prosecutorial actor’s ability to exercise their role free from the pressures of other actors, be they states, other organs of the court, or otherwise. The statutes of the ICTY and the ICTR established that the Prosecutor “shall act independently” (in article 16(2) of their respective statutes). The *Rome Statute* contains a similar provision in article 42(1). At the ICC, for example, the Prosecutor has the sole capacity to open investigations and bring charges. Even the referral of a situation to the Prosecutor by a state or the United Nations Security Council creates no obligation on them to open an investigation into it. Judges have been hesitant to encroach upon this independent power. After Fatou Bensouda decided not

13 See *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (Decision on the Application for judicial review by the government of the Comoros)* (ICC, Pre-Trial Chamber, ICC-01/13, 16 September 2020), [20].

14 Luc Côté, ‘Independence and Impartiality’ in Luc Reydam, Jan Wouters, and Cedric Ryngaert (eds), *International Prosecutors* (Oxford University Press, 1st ed, 2012) 319, 324–325.

15 Kevin Heller, ‘Role of the International Prosecutor’ in Cesare Romano, Karen Alter, and Chrisanthi Avgerou (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 1st ed, 2013) 669, 673.

to open an investigation into the *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, judges merely ‘requested’ her to reconsider this decision. After reconsidering her decision, and coming to the same conclusion, the judges found that her reconsideration was not ‘genuine’ but decided against requesting another reconsideration on the basis that the law “does not establish with sufficient clarity the exact distribution of prerogatives between the Prosecutor and the pre-trial chamber”.¹⁶ Functional independence is also protected by provisions such as article 70 of the *Rome Statute*, which criminalise attempts to impede, intimidate, or corruptly influence court officials. It may also be protected through the operation of a court’s ‘inherent jurisdiction’ enabling the prosecution of contempt.¹⁷

The legal paradigm therefore encourages the simplistic view of discretion. It exists when the decision-maker has no rules upon which they can rely to determine the procedure that needs to be followed or the conclusions that needs to be reached. It is a negative concept, capable of definition only by reference to the existence of law.

Discretion, then, is often conceptualised through the use of a space metaphor, which sees it as an imagined space in which the decision-maker can exercise free-choice. Keith Hawkins, for example, expressly referred to it as “the space... between legal rules in which legal actors may exercise choice”.¹⁸ Kenneth Davis, the famous American scholar whose work ushered in a proliferation of rules in the context of sentencing and parole reform in the 1970s,¹⁹ argued that discretion existed when the “effective limits” on an official’s power left them “free to make a choice among possible courses of action or inaction”.²⁰ J L Jowell called it “the room for decisional manoeu-

16 *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (Decision on the Application for judicial review by the government of the Comoros)* (ICC, Pre-Trial Chamber, ICC-01/13, 16 September 2020), [111].

17 See, for example, *Prosecutor v Duško Tadić (Judgment on allegations of contempt against prior counsel, Milan Vujin)* (ICTY, Appeals Chamber, IT-94-I-A-R77, 31 January 2001), [13].

18 Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from law and social science’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 11.

19 Robert Baldwin and Keith Hawkins, ‘Discretionary Justice: Davis reconsidered’ (1984) *Public Law* 570, 570; National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (National Advisory Commission on Criminal Justice Standards and Goals, 1st ed, 1973), for example 3, 26, 243.

20 Kenneth Davis, *Discretionary Justice: A preliminary inquiry* (Louisiana State

vre”, and Robert Goodin saw discretion as a “lacuna in a system of rules”.²¹ Perhaps the most famous invocation of the space metaphor, however, was Ronald Dworkin’s claim that discretion is like a “hole in a doughnut” as “an area left open by a surrounding belt of restriction”—a metaphor that is as deceptive as it is easy to visualise.²² All of these definitions posit that discretion is a “residual notion, defined in terms of its opposite”—to understand the scope of discretion, the analyst must first understand the scope of the law.²³ Discretion is what is left over when rules have dictated the mandatory procedures, considerations, or outcomes.

The apparent trend in the legal paradigm is to treat the legal system as a body that needs to be inoculated from the virus that is discretion. Just as Weberian bureaucracy strives for predictability, efficiency, and equality, the law must abolish (to the extent possible) the threat that discretion poses to the achievement of these values. “The attitude so often encountered”, wrote D J Galligan, “that while [discretion’s] presence may be inevitable, it is at the same time slightly deviant”.²⁴ Davis’s assessment of discretion, for example, reflects his belief that discretion is “a corrupting force, a nasty growth, that constantly erodes the basis of ‘justice’”.²⁵ There are three lines of argument that explain the desire to curtail discretion.

The first is that the mistrust of discretion is symptomatic of an underlying mistrust in power and authority. Zenon Bankowski and David Nelken argued that concerns about discretion should not be seen as problems concerning law, economics, organisations, or otherwise, but rather viewed as an “index to anxiety” over society’s concerns about “unregulated decision-making”.²⁶ Concerns about discretion, they wrote, form part of the broader problem of “distrust of power endemic in western capitalist so-

University Press, 1st ed, 1969), eBook.

- 21 J L Jowell, ‘The Legal Control of Administrative Discretion’ (1973) *Public Law* 178, 179; Robert Goodin, ‘Welfare, Rights, and Discretion’ (1986) 6(2) *Oxford Journal of Legal Studies* 232, 234.
- 22 Ronald Dworkin, ‘The Model of Rules’ (1967) 35 *University of Chicago Law Review* 14, 32.
- 23 Robert Goodin, ‘Welfare, Rights, and Discretion’ (1986) 6(2) *Oxford Journal of Legal Studies* 232, 233.
- 24 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 1.
- 25 Robert Baldwin and Keith Hawkins, ‘Discretionary Justice: Davis reconsidered’ (1984) *Public Law* 570, 571.
- 26 Zenon Bankowski and David Nelken, ‘Discretion as a Social Problem’ in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 247, 247.

cieties because of their relatively partial, open, but ultimately unjustifiable hierarchies”.²⁷ Kenny Yang observed, for example, that “[d]iscretion can be dangerously synonymous with unchecked power”.²⁸ Charles Breitel, who at the time was sitting on the Appellate Division of the New York Supreme Court, cautioned that arbitrariness, discrimination, oppression, inequality, corruption, and the emergence of a “police state” were some of the ‘great hazards’ that discretion exposes society to.²⁹

Second is the concern that discretion leads to arbitrariness and ‘injustice’; a risk to the integrity of the law by unsealing a Pandora’s box of politicisation and caprice. Davis argued that discretion was the cause of “the greatest and most frequent” injustices, where “emotions of deciding officers”, “favouritism”, and the “imperfections of human nature” lay waste to any hope of fairness and equality in decision-making.³⁰ Peter Mascini highlighted the ‘unpredictability’ of discretion and the risk that it posed to the “consistency and legitimacy” of official decisions.³¹ Discretion opens the door to officials deciding matters on the basis of personal, context-specific, and idiosyncratic considerations resulting in the fate of a matter resting on “largely unknowable factors”.³² This is the sort of justice Richard Schmidt referred to as *kadijustiz* (a concept later popularised by Weber)³³ to describe decisions meted out by a judge “without any reference to rules or norms but in what appears to be a completely free evaluation of the particular merits of every single case”.³⁴ Anni Pues further observed that discretion is often seen

27 Zenon Bankowski and David Nelken, ‘Discretion as a Social Problem’ in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 247, 247.

28 Kenny Yang, ‘Public Accountability of Public Prosecutions’ (2013) 20(1) *Murdoch University Law Review* 28, 57.

29 Charles Breitel, ‘Controls in Criminal Law Enforcement’ (1960) 27(3) *The University of Chicago Law Review* 427.

30 Kenneth Davis, *Discretionary Justice: A preliminary inquiry* (Louisiana State University Press, 1st ed, 1969), eBook.

31 Peter Mascini, ‘Discretion from a Legal Perspective’ in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 121, 124.

32 M P Baumgartner, ‘The Myth of Discretion’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 129, 157.

33 Richard Schmidt, ‘Die deutsche Zivilprozessreform und ihr Verhältnis zu den ausländischen Gesetzgebungen’ (1908) 1 *Zeitschrift für Politik* 245, 266; Max Weber, ‘Bureaucracy’ in H H Gerth and C Wright Mills, *From Max Weber: Essays in sociology* (Oxford University Press, 1st ed, 1946) 196, 216.

34 Max Rheinstein, ‘Introduction’ in Max Rheinstein (ed), *Max Weber on Law in Economy and Society* (Cambridge University Press, 1st ed, 1954) xxv, xlvi, quoted

as a threat to the integrity of the law because it risks opening the door to a decision-maker (specifically an international prosecutor) becoming ‘politicised’.³⁵ The alternative and more-desirable vision of governance implicit in this line of criticism is of rule-based processes that would be more ridged and mechanical—“perhaps even oppressively so”—but also more standardised, consistent, and orderly.³⁶

Third is a belief that by basing decisions on rules, as opposed to discretion, this will afford more ‘legitimacy’ to the process or to the outcome.³⁷ Pierre Bourdieu observed that when decision-makers purportedly base their decisions on reasoned interpretations of texts—thereby denying the existence of their creative capacity—they pay homage to the “cult of the text” and disguise what are otherwise “naked exercises of power”.³⁸ Decisions are legitimised by the existence of purportedly objective standards to which decision-makers can use to support their actions. In the context of prosecutorial discretion specifically, the belief that an international prosecutor’s legitimacy will be assisted through the ‘padding out’ of discretion with more rules, better-defining existing rules, or more strictly detailing the decision-making framework in other ways has been widely adopted.³⁹

These three arguments have given rise to the popular and often-heard

in David Matza, *Delinquency and Drift* (Transaction, 2nd ed, 1990), 118. See also Intisar Rabb, ‘Against Kadijustiz: On the negative citation of foreign law’ (2015) 48(2) *Suffolk University Law Review* 343, 348-349.

- 35 Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart, 1st ed, 2020), 3.
- 36 M P Baumgartner, ‘The Myth of Discretion’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 129, 129.
- 37 See, for example, Peter Mascini, ‘Discretion from a Legal Perspective’ in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 121, 121.
- 38 Pierre Bourdieu, ‘The Force of Law: Toward a sociology of the judicial field’ (1987) 38(5) *Hastings Law Journal* 814, 851, 818.
- 39 See, for example, Allison Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *American Journal of International Law* 510, 541; James Goldston, ‘More Candour About Criteria: The exercise of discretion by the Prosecutor of the International Criminal Court’ (2010) 8(2) *Journal of International Criminal Justice* 383, 402; Luc Côté, ‘Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law’ (2005) 3(1) *Journal of International Criminal Justice* 162, 168; Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart, 1st ed, 2020), generally; and Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl Academic ePublisher, 2nd ed, 2010), generally.

belief that “the proper legal strategy is to keep [discretion] to a minimum” through the growth of regulation.⁴⁰ This is what Davis believed was necessary to curtail the “greatest and most frequent injustices” he believed were caused by unnecessary discretionary power. Through “earlier and more elaborate... rule-making and in better structuring and checking [the exercise] of discretionary power”, he hoped, the destructive potential of discretion could be progressively mitigated.⁴¹ Jan Klabbbers even went so far as to label the desire to regulate discretionary conduct a “kneejerk deontological reflex” stemming from a concern that discretionary conduct will not be free from political influence.⁴² The space for free choice that discretion apparently affords decision-makers needs to be lessened. Around the field in which the decision-makers can roam free, fences need to be built to keep them under progressively stricter control.

Yet while it has often been recognised that it is simply impossible to regulate for all factual circumstances decision-makers may encounter,⁴³ the belief persists that more regulation is better. In 1976, Charles Thomas and W Anthony Fitch observed that many prosecutors *themselves* thought that it was feasible and desirable to develop comprehensive prosecutorial guide-

40 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 1.

41 Kenneth Davis, *Discretionary Justice: A preliminary inquiry* (Louisiana State University Press, 1st ed, 1969), eBook, quoted in Robert Baldwin and Keith Hawkins, ‘Discretionary Justice: Davis reconsidered’ (1984) *Public Law* 570, 571.

42 Jan Klabbbers, ‘The Virtues of Expertise’ in Monika Ambrus et al, *The Role of ‘Experts’ in International and European Decision-Making Processes: Advisors, decision makers, or irrelevant actors?* (Cambridge University Press, 1st ed, 2014) 82, 90.

43 See, for example, Roscoe Pound, ‘Discretion, Dispensation, and Migration: The problem of the individual special case’ (1960) 35(4) *New York University Law Review* 925, 926-927; Dan Kahan, ‘Reallocating Interpretive Criminal-Lawmaking Power within the Executive Branch’ (1998) 61(1) *Law and Contemporary Problems* 47, 49; Norman Abrams, ‘Internal Policy: Guiding the exercise of prosecutorial discretion’ (1971) 19(1) *UCLA Law Review* 1, 2; Carl Schneider, ‘Discretion and Rules’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 61; Keith Hawkins, ‘On Legal Decision-Making’ (1986) 43(4) *Washington and Lee Law Review* 1161, 1173; Andrew Ashworth, ‘The “Public Interest” Element in Prosecutions’ (1987) *Criminal Law Review* 595, 606; Zenon Bankowski and David Nelken, ‘Discretion as a Social Problem’ in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 247, 261. Even Davis conceded that “[r]ules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice”, though he also believed it was responsible for “nine-tenths of injustice in our legal system”: Kenneth Davis, *Discretionary Justice: A preliminary inquiry* (Louisiana State University Press, 1st ed, 1969), eBook.

lines.⁴⁴ In the context of international criminal law, significant effort has been expended on identifying the ‘limits’ of prosecutorial discretion, with many concluding that the adoption of prosecutorial guidelines or policies would be a welcome development.⁴⁵ Staff within the ICC OTP have themselves been prolific in producing a veritable number of policy documents that purport to structure decision-making. One senior prosecutor within the Office even remarked in the context of being interviewed for this research that “you want to make sure that you limit your own discretion” and that “any good Chief Prosecutor will want to have his or her hands tied”.⁴⁶

Arguably the most broad-ranging and vague rule that purports to constrain discretionary conduct is the principle that public officials should exercise their powers ‘in the public interest’. This general rule is manifested in various forms. The principle that public officials hold their power on trust and for the benefit of the society that granted them that office is not a new one and has long formed a central tenet of public administrative theory, at least in common-law jurisdictions. As early as 1690, John Locke argued in his *Second Treatise of Civil Government* that executive discretionary power is vested in officials “for the public good”.⁴⁷ Edmund Burke, in 1835, expressed this obligation in terms of a trust relationship under which public officials acted as ‘trustees’ of power for the public beneficiary.⁴⁸ By the end of the 18th century, in fact, “a large and well developed body of primarily common law doctrine” had developed in England and Wales that placed public officials in a legally-actionable fiduciary relationship with the pub-

44 Charles Thomas and W Anthony Fitch, ‘Prosecutorial Decision Making’ (1976) 13(3) *American Criminal Law Review* 507, 517.

45 See, for example, Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart, 1st ed, 2020); Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl Academic ePublisher, 2nd ed, 2010); Allison Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *American Journal of International Law* 510; Philippa Webb, ‘The ICC Prosecutor’s Discretion Not to Proceed in the “Interests of Justice”’ (2005) 50 *Criminal Law Quarterly* 305; Luc Côté, ‘Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law’ (2005) 3(1) *Journal of International Criminal Justice* 162.

46 Interview with P26.

47 John Locke, *Second Treatise of Government* (1690) s 160. See also Floyd Mechem, *A Treatise on the Law of Public Offices and Officers* (Callaghan, 1st ed, 1890), 1-2.

48 Edmund Burke, *The Works of Edmund Burke, with a Memoir* (George Dearborn, 1st ed, 1835) vol 1, 496. See also Bruce MacFarlane, ‘Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency’ (2001) 45 *Criminal Law Quarterly* 272, 297.

lic.⁴⁹ In the 1783 case of *R v Bembridge*, judges of the Court of the King's Bench in England and Wales established so much by holding that the defendant—an accountant within the office of the Receiver and Paymaster-General who knowingly concealed from auditors various amounts owing to the office—was a “trustee for the public” and liable for prosecution by the King. Such a rule, they held, “is essential to the existence of the country”.⁵⁰ More recently, on the other side of the Atlantic, judges at the Supreme Court of New Jersey held that public officials, “as fiduciaries and trustees of the public... are under an inescapable obligation to serve the public with the highest fidelity”, and must “exercise their discretion not arbitrarily but reasonably”.⁵¹ Like in *Bembridge*, the judges held that this principle was necessary for the functioning of the state, arguing that its existence was “essential to the soundness and efficiency” of the government.⁵² While the same principle has not found footing in civil law jurisdictions, the underlying idea that government should serve the public has. In Germany, for instance, sovereign powers are granted to officials who are loyal to, and serve, the public.⁵³ Internationally, the *United Nations Convention against Corruption*⁵⁴—which currently has 187 parties—illustrates the general applicability of this principle by being based on the premise that powers attached to a public office must be exercised for the benefit of the public.⁵⁵

Galligan argued that the relationship between public officials and the public obligated office holders to adopt the “most rudimentary requirements of political morality” when exercising discretionary authority, namely “rationality, purposiveness, and morality”.⁵⁶ He saw that these principles

49 Paul Finn, ‘Public Trusts, Public Fiduciaries’ (2010) 38(3) *Federal Law Review* 335, 336-337.

50 *R v Charles Bembridge* (1783) 3 Doug 327, 331-332.

51 *Driscoll v Burlington-Bristol Bridge Co* 8 NJ 433 (1952), 474-475.

52 *Driscoll v Burlington-Bristol Bridge Co* 8 NJ 433 (1952), 476.

53 *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law for the Federal Republic of Germany], art 33(4).

54 *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005).

55 Rose, Kubiciel, and Landwehr observe that “the improper combination of private interests with a position or power to be exercised for the general public interest constitutes the essence of corruption”: Cecily Rose, Michael Kubiciel, and Oliver Landwehr, ‘Introduction’ in Cecily Rose, Michael Kubiciel, and Oliver Landwehr (eds), *The United Nations Convention against Corruption: A commentary* (Oxford University Press, 1st ed, 2019) 1, 3.

56 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 4-5.

demanded that decision-makers base their choices on consistent, fair, and impartial reasons; that these reasons could be related to the standards that applied to the discretionary authority (namely that there was an intelligible connection to the policies, principles, and rules by which the power was constrained and the purposes for which the authority was granted); and that the decision-maker abide by the “critical conceptions of morality”.⁵⁷ While he conceded that these concepts may be criticised as “hopelessly imprecise”, their value was in their role both as a basis of political morality and the touchstone by which any decision can be scrutinised, as well as the foundations upon which authorities could develop more specific guiding criteria to constrain the exercise of discretionary authority.⁵⁸

Yet the conceptualisation of discretion within the legal paradigm and the solutions to its perceived problems are flawed. The space metaphor, which invites discretion to be seen as a space, room, lacuna, or ‘hole in a doughnut’, invites discretion to be seen as a physical area capable of definition. This metaphor shapes how writers in the legal paradigm perceive discretion and apparently affects their belief that the space is capable of definition.⁵⁹ Dworkin’s doughnut, for instance, instils this misconception by offering a mental image of a physical object in which the space for free choice is clearly distinguishable from the ‘doughnut’ of standards and authorities and positing that rule-based decision-making can be distinguished from discretion (if even only by a Herculean figure capable of discerning all rules and all principles that lead them to the ‘right’ answer).⁶⁰ But con-

57 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 6.

58 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 5 (see, specifically, footnote 3. Here, Galligan recalls that J M Keynes “is said to have remarked that ideas and concepts are like balls of wool with no sharp edges and that rigorous attempts at conceptual precision are likely to inhibit original thought”).

59 For more on how individuals’ conceptions of the world are shaped through metaphor, see George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 2nd ed, 2003) and Bernard Hibbitts, ‘Making Sense of Metaphors: Visuality, aurality, and the reconfiguration of American legal discourse’ (1994) 16 *Cardozo Law Review* 229.

60 It is worth recalling that Dworkin did not believe discretion to exist in those circumstances where a party to a decision by an official is “entitled” to a particular outcome. The reason, he argued, was that even when the “rules” failed to determine the result, “principles” would, and the decision-maker was obliged to take these principles into account (just as if they were rules): see, generally, Ronald Dworkin, ‘The Model of Rules’ (1967) 35 *University of Chicago Law Review* 14.

trary to what the space metaphor suggests, there is no clear divide between rules and not-rules. Both Galligan and Hawkins have pointed out that standards are typically “vague, abstract, or in conflict”.⁶¹ It is only in fringe cases where rules will leave only one interpretation. Bankowski and Nelken, in criticising the hope that rules are the panacea to anxieties about discretion, argued that there is simply “no escape from the problem of discretion” because the distinction between rules and discretion is often “untenable”.⁶² According to Carl Schneider, because “discretion and rules rarely appear in unadulterated form in any large area of legal significance”, the choice is not one between rule-based and discretion-based decision-making, but instead “between different mixes of discretion and rules”.⁶³ Moreover, some people may regard something as a rule, and others might not. The ICC OTP’s various policy papers serve as a good example. The comment referred to earlier from the senior OTP official regarding the desirability of limiting discretion through the policies demonstrate that the policies can be interpreted as binding; but it is also difficult to argue—without reference to other powers such as social pressures—that the hand can tie itself. While internally these policies may be viewed as binding, they nevertheless stem from a pre-existing vagueness in the original grant of discretionary authority that officials have used discretion to fill.⁶⁴

Further, the proliferation of rules only serves to shift discretion towards other issues. Decision-makers must then grapple with the interpretation of the rules. Doris Liebwald reminds us that the “elasticity of legal interpretation can lead to astonishing meanings or changes of meaning of legal terms, concepts and rules”, and that “even the best efforts to reach maximal precision will not result in absolute precise legal texts, because language itself is imprecise and requires interpretation”.⁶⁵ There is no correct way of

61 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 32; Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from law and social science’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 14.

62 Zenon Bankowski and David Nelken, ‘Discretion as a Social Problem’ in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 247, 248.

63 Carl Schneider, ‘Discretion and Rules’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 49.

64 See the discussion contained in D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 12-13.

65 Doris Liebwald, ‘Law’s Capacity for Vagueness’ (2013) 26(2) *International Journal for the Semiotics of Law* 391, 392.

resolving problems caused by the inherent vagueness of language because there is no higher-order normative system to provide answers, meaning that interpretative discretion is here to stay and that eliminating it is an “impossible dream”.⁶⁶ Facts, too, require interpretation. As Hawkins observed, “[e]ven where the meaning of a rule seems clear, the facts upon which the application of a rule may depend have always to be interpreted”.⁶⁷ For example, the *Criminal Code Act 1983* (NT) establishes that ‘serious harm’ is that which “endangers, or is likely to endanger, a person’s life; or that is or is likely to be significant and longstanding”.⁶⁸ Whether harm would be ‘likely’ to cause any of these effects will normally depend upon a lawyer’s personal assessment of the injury or that of a medical expert. Discretion may also be required to interpret vague policy or public opinion.

Perhaps the biggest and most fundamental flaw in the legal paradigm’s conceptualisation of discretion is that it contains a critical failure point that, once triggered, destroys the very prospect of discretion *ever* existing. This same failure point is the one that the legal paradigm’s conception of discretion pins as discretion’s defining feature. The failure point is this: the belief that discretion is defined by an absence of rules (as evidenced by the pervasiveness of the space metaphor). The legal paradigm does not rely on the form of rules to define discretion, but rather their function: they direct the decision-maker on the procedure that must be followed, the considerations that must be made, or the outcome that needs to be reached. Therefore, there should be no distinction made between rules and any *other* force that directs the decision-maker on the same matters. Any distinction would be purely theoretical and ignore the reality that these forces operate to achieve the same practical outcome as rules. The lessons from fields outside the law—such as economics, organisational studies, psychology, and sociology—reveal that these forces are so numerous, so permanent, and so overwhelming that the very notion of discretion simply does not exist if the legal paradigm’s conception of discretion is maintained. Discretion is a vacuum that “invites its own destruction”, to be filled by any number of forces that gush in to fill the void characterised by an absence of rules.⁶⁹ It

66 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 1, 17.

67 Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from law and social science’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 35.

68 *Criminal Code Act 1983* (NT), s 1.

69 Richard Lempert, ‘Discretion in a Behavioural Perspective: The case of a public

is to these other forces this chapter now turns.

2.2 Discretion beyond the legal paradigm

Discretion, observes Richard Lempert, “is not only a property of legal rules; it is also a property of behaviour”.⁷⁰ Rules can be ignored; a rule can be believed to exist when it does not; and “if law is no guide, other social forces may be, and they give rise to patterns of behaviour that look, and in a sociological sense are, more rule-bound than behaviour that is in theory rigorously structured by law”.⁷¹ As discretion is fundamentally concerned with the notion of choice—a concept to which law has no special claim of expertise—advancements in other fields concerning decision-making have influenced how discretion is understood.⁷² It has long been understood that free choice simply does not exist, and that “[a] thousand limitations... encompass and hedge us even when we think of ourselves as ranging freely and at large”.⁷³ Discretion needs to be understood in this light. *Any* decision, be it derived from the conscious application of rules or the purported enjoyment of discretion, will be affected by any number of forces. Therefore, it is important to recognise that discretion will be “shaped by a variety of constraints, human, organisational, or economic, operating beyond rules”.⁷⁴ This subsection draws attention to just some of these other forces, to further the argument that discretion should not be defined by reference to the constraints upon a decision-maker’s capacity to choose.

housing eviction board’ in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1st ed, 1992) 185, 187.

70 Richard Lempert, ‘Discretion in a Behavioural Perspective: The case of a public housing eviction board’ in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1st ed, 1992) 185, 187.

71 Richard Lempert, ‘Discretion in a Behavioural Perspective: The case of a public housing eviction board’ in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1st ed, 1992) 185, 187.

72 Martha Feldman, ‘Social Limits to Discretion: An organisational perspective’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 163, 167.

73 Benjamin Cardozo, *The Growth of the Law* (Yale University Press, 1st ed, 1924), 61, quoted in Carl Schneider, ‘Discretion and Rules’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 49.

74 Keith Hawkins, ‘On Legal Decision-Making’ (1986) 43(4) *Washington and Lee Law Review* 1161, 1173. See also Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from law and social science’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 38 and D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 124.

Turning to sociology, the first force that acts as a constraint on a decision-maker's capacity to exercise free choice is their *habitus*. The *habitus*, as conceived by Pierre Bourdieu, is a "system of durable, transposable dispositions, which integrates past experiences and functions at every moment as a matrix of perception, appreciation, and action, making possible the accomplishment of infinitely differentiated tasks".⁷⁵ An individual's *habitus* conditions them to be disposed towards particular conduct and outcomes while at the same time presenting the course of action to be followed as obvious and natural. These dispositions "can be objectively 'regulated' and 'regular' without in any way being the produce of obedience to rules, objectively adapted to their goals without presupposing a conscious aiming at ends or an express mastery of the operations necessary to attain them and, being all this, collectively orchestrated without being the product of the orchestrating action of a conductor".⁷⁶ Therefore, while an individual's *habitus* is the product of their history, it does not present itself as such. As Émile Durkheim observed in one of his lectures on the reform of secondary French education:

"[F]or in each one of us, in differing degrees, is contained the person we were yesterday, and indeed in the nature of things it is even true that our past *personae* predominate, since the present is necessarily insignificant when compared with the long period of the past because of which we have emerged in the form we have today. It is just that we don't directly feel the influence of these past selves precisely because they are so deeply rooted within us. They constitute the unconscious part of ourselves".⁷⁷

In the *habitus*, "the sediment of individual and collective trajectories" are

75 Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1977) [trans of: *Esquisse d'une théorie de la pratique, précédé de trois études d'ethnologie kabyle*], 82-83.

76 Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1977) [trans of: *Esquisse d'une théorie de la pratique, précédé de trois études d'ethnologie kabyle*], 72.

77 Émile Durkheim, *The Evolution of Educational Thought: Lectures on the formation and development of secondary education in France* (Peter Collins, Routledge, 2nd ed, 2006) vol 2 [trans of: *L'Évolution pédagogique en France*], 11, quoted in Pierre Bourdieu, *The Logic of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1990) [trans of: *Le sens pratique*], 56.

transformed into second nature.⁷⁸ It is constituted by “the active presence of the whole past”.⁷⁹ All an individual’s past experiences, from what they have been formally taught to what they have seen, heard, felt, or otherwise witnessed creates the reality they occupy, the way they think, and the window through which they perceive the world. The *habitus* imbues its occupant with a “spontaneity without consciousness or will”,⁸⁰ generating “inclinations, propensities, and tendencies” without revealing that these are not as natural as they appear.⁸¹ The result is that an individual’s *habitus* defines the horizon of possible conduct, allowing only for “bounded creativity” within the realm of that permitted by an actor’s historical experiences.⁸² It therefore instils a path-dependency on decision-makers.⁸³ The effect of the *habitus*, therefore, is to deny anyone the ability to truly exercise free choice.

A decision-maker’s history has been accepted as a constraint on their capacity for free choice in other ways. Carl Schneider observed that “[d]ecision-makers, after all, do not live and work in a vacuum; they are inevitably products of their environment”—through their training, “lawyers and judges acquire habits of thought that limit the range of arguments that they will find acceptable and the kinds of decisions that they will be willing to advocate and reach”.⁸⁴ Hawkins observed the power of what he termed the ‘decision-frame’, or the “structure of knowledge, experience, values, and meanings that the decision-maker shares with others and brings to a choice”.⁸⁵ This frame, he argued, was of critical importance in informing how decision-makers identify relevant information, organise facts, and interpret them.⁸⁶

78 Vincent Pouliot, ‘The Logic of Practicality: A theory of practice of security communities’ (2008) 62(2) *International Organisation* 257, 273.

79 Pierre Bourdieu, *The Logic of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1990) [trans of: *Le sens pratique*], 56.

80 Pierre Bourdieu, *The Logic of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1990) [trans of: *Le sens pratique*], 56.

81 Vincent Pouliot, ‘The Logic of Practicality: A theory of practice of security communities’ (2008) 62(2) *International Organisation* 257, 274.

82 Davide Nicolini, *Practice Theory, Work, and Organisation: An introduction* (Oxford University Press, 1st ed, 2012), 5, 225-226.

83 Vincent Pouliot, ‘The Logic of Practicality: A theory of practice of security communities’ (2008) 62(2) *International Organisation* 257, 273, citing Pierre Bourdieu, *Méditations pascaliennes* (Seuil, 1st ed, 2003), 231.

84 Carl Schneider, ‘Discretion and Rules’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 80-81.

85 Keith Hawkins, ‘On Legal Decision-Making’ (1986) 43(4) *Washington and Lee Law Review* 1161, 1191.

86 Keith Hawkins, ‘On Legal Decision-Making’ (1986) 43(4) *Washington and Lee Law*

Economics uses the concept of ‘bounded rationality’ to describe how decision-makers are unable to assess all alternatives and all information prior to making a decision. Their discretion is constrained by their own memory, attention-span, and mental capacity, among other things.⁸⁷ Decision-makers “cannot achieve perfect, purposive rationality” when making choices, but instead must accept that they have certain inherent constraints that limit their ability to exercise true free choice.⁸⁸ For example, the natural desire of people to make sense of the world around them demands that they categorise facts, problems, events, encounters, and so on in order for them to function. This process of categorisation, observes Schneider, “in effect become rules of decision which govern, or at least influence, how issues are resolved”.⁸⁹

Psychology provides yet more insights into how choices are constrained by forces beyond rules. For example, decision-makers are generally biased towards avoiding losses. This tendency has been called “one of the most robust human biases”.⁹⁰ People are more likely to avoid risk than embrace potential. This gives rise to the *status quo* bias, which posits that “individuals have a strong tendency to remain at the *status quo*, because the disadvantages of leaving it loom larger than advantages”.⁹¹ William Samuelson and Richard Zeckhauser observed the pervasiveness of the *status quo* bias.⁹² When presented with a series of options that do not specify the risk and opportunity attached to outcomes, decision-makers are more likely to stay with the choice they made before, rather than to adopt an alternative course of action.⁹³

Review 1161, 1195.

- 87 Martha Feldman, ‘Social Limits to Discretion: An organisational perspective’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 163, 168.
- 88 D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 121.
- 89 Carl Schneider, ‘Discretion and Rules’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 83.
- 90 M Ena Inesi, ‘Power and Loss Aversion’ (2010) 112(1) *Organisational Behaviour and Human Decision Processes* 58, 59.
- 91 Daniel Kahneman, Jack Knetsch, and Richard Thaler, ‘Anomalies: The endowment effect, loss aversion, and status quo bias’ (1991) 5(1) *Journal of Economic Perspectives* 193, 197-198.
- 92 William Samuelson and Richard Zeckhauser, ‘Status Quo Bias in Decision Making’ (1988) 1(1) *Journal of Risk and Uncertainty* 7, 41.
- 93 William Samuelson and Richard Zeckhauser, ‘Status Quo Bias in Decision Making’ (1988) 1(1) *Journal of Risk and Uncertainty* 7, 35-36, 41.

Organisational dynamics, too, affect the choices that decision-makers make. Discretion is often exercised within a complex network of overlapping organisational structures. Decisions are rarely the product of one individual, but rather the product of the actions of multiple people and their own previous decisions.⁹⁴ Power structures alter the behaviour of decision makers. Subordinates are expected to obey orders from and meet the expectations of their superiors.⁹⁵ Decision-makers may choose to repeat their previous decisions in factually similar situations rather than make different choices because of efficiency requirements, dodging responsibility, boredom, or laziness.⁹⁶ Ginevra Richardson, Anthony Ogus, and Paul Burrows have observed that decision-makers may feel the need to adopt a cooperative approach out of a “desire to win the approval of colleagues”, leading to individuals concentrating disproportionately “on certain aspects of their job in order to receive the approval of their superiors”.⁹⁷ In some cases, this desire for acceptance can be caused by the way in which a decision-maker is appointed. This is perhaps most obvious in the United States. The US has a practice of electing chief prosecutors: in 2005, 85% of chief prosecutors reported that they had been elected to the position.⁹⁸ Their status as elected officials, with their re-election contingent upon the ongoing support of the voting public, has been observed to pressure them towards increasing conviction rates.⁹⁹

Finally, how individuals perceive their role and the purpose for which they were granted discretionary authority affects the decisions that they

94 Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from law and social science’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 1, 27; Keith Hawkins, ‘On Legal Decision-Making’ (1986) 43(4) *Washington and Lee Law Review* 1161, 1172.

95 Ginevra Richardson, Anthony Ogus, and Paul Burrows, *Policing Pollution: A study of regulation and enforcement* (Clarendon Press, 1st ed, 1982), 185.

96 Carl Schneider, ‘Discretion and Rules’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 82.

97 Ginevra Richardson, Anthony Ogus, and Paul Burrows, *Policing Pollution: A study of regulation and enforcement* (Clarendon Press, 1st ed, 1982), 185.

98 Steven Perry, ‘Prosecutors in State Courts, 2005’ (National Survey of Prosecutors, NCJ 213799, Bureau of Justice Statistics, 1 July 2006) <<http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1124>>, 3.

99 See, for example, Stephanos Bibas, ‘Transparency and Participation in Criminal Procedure’ (2006) 81(3) *New York University Law Review* 911, 935; Abbe Smith, ‘Can You Be a Good Person and a Good Prosecutor?’ (2001) 14(2) *Georgetown Journal of Legal Ethics* 355, 390.

make.¹⁰⁰ Galligan argued that the “basic duty” of any official with decision-making authority was to “realise and advance the objects and purposes for which his power has been granted”.¹⁰¹ The choices available to a decision-maker are therefore directed by their understanding of their role and the role of their institution more broadly.

These are just vignettes of some of the forces that constrain an official’s decision-making capacity. There are countless others. This reality highlights the difficulty inherent in defining discretion by reference to constraints. Doing so inevitably requires an arbitrary distinction to be drawn between forces that apparently do constrain free choice and those that do not. Section 3 therefore proposes an action-oriented conception of discretion that allows it to be understood as a practice *independent* of specific constraints that embraces the complex reality that these constraints exist and shape individual action.

3 Discretion as a Practice

Two main arguments have so far been established to demonstrate the problems that come from conceptualising discretion by reference to constraints. First, any such understanding must draw an arbitrary line between those forces that apparently do constrain discretion, and those that do not. Discretion and rules are not two different models of decision-making. The lawyer’s obsession with rules and regulation has merely created the misconception that rules provide a degree of constraint on free choice that is somehow more powerful than all of the social forces outside of the legal paradigm that were addressed in subsection 2.2. Second, the logic behind a constraint-based understanding of discretion means that discretion is self-destructive. Once constraints start being identified, they appear everywhere, eventually leading to the (correct) conclusion that decision-makers are never truly able to exercise free choice. While the conclusion is not problematic, conceptualising discretion so as to deny the conclusion is. Therefore, any effort to analyse discretion from the perspective of the constraints upon a decision-maker will take as its point of departure a distorted and restricted image of how decision-making actually works. Moreover, any policy recommen-

¹⁰⁰ John Bell, ‘Discretionary Decision-Making’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 89, 91; D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 12.

¹⁰¹ D J Galligan, *Discretionary Powers: A legal study of official discretion* (Clarendon Press, 1st ed, 1986), 30.

dations flowing from such an analysis will inevitably fail to appreciate the complex web of forces that operate upon decision-makers.

In order to overcome these problems, discretion should be understood as the act of reaching a reasoned decision about the appropriate course of action to pursue. In this context, 'reasoned decision' refers to a decision that is reasoned. It does not refer to a decision, formal or otherwise, communicated to another in the form of a policy paper, press statement, preliminary examination report, or something similar. Whether a decision arising from discretion is *communicated* is irrelevant for the purposes of this definition. To be clear: 'reasoned decision', as used here, does not refer to any document, speech, or anything else that communicates a decision. There is an important distinction between the physical activity of *communicating* the reasoning for a decision and the mental activity of *reasoning* which produces the decision referred to in this definition. Discretion is about what takes place inside the mind of a decision-maker and not the form in which these mental processes manifest in something observable. Discretion, by its nature, is invisible to the outside world.

Further, *decisions* that arise as a *result* of discretion may manifest in observable action or invisible silences. Discretion can result in *both* action and inaction. A change of action is the clearest indication that discretion has been exercised. If the ICC Prosecutor opens an investigation into the *Situation in Afghanistan*, for example, it is obvious that they have exercised discretion. Many 'big' actions, such as opening an investigation, charging someone, or appealing, are clear indicators that discretion has been exercised. In normal practice, no professional of basic competence would do any of these things without putting some degree of thought into whether their decision is appropriate!

Silences or inaction are, in contrast, far more difficult to ascribe to an exercise of discretion. Moreover, it is possible that of all the exercises of discretion made by decision-makers around the world every day, decisions not to act are more numerous than those which result in action. This highlights a problem: when there is *no* change in action, it can be difficult (or impossible) to identify whether a decision has been made or discretion has been exercised. For example, if a particular charge is not included on an indictment, this may be caused by a prosecutor *deciding* not to include the charge (in which case discretion has been exercised) or simply not thinking about it (meaning that discretion was not exercised because no reasoned decision was made to exclude it). It may also be the case that a prosecutor decides *not* to decide something. Preliminary examinations at the ICC are

sometimes left open for many years without any indication that they are under active consideration. The preliminary examination into Colombia has been open since June 2004—over 17 years—without any decision having been made on whether an investigation should be formally opened or the preliminary examination closed. If, at a particular time, it was decided that no decision should be made on the future of a preliminary examination, this would be an exercise of discretion; however if it was simply the case that a preliminary examination was ignored without any decision being made on its future, this would not be. As such, it is very difficult to distinguish between silences or inaction arising as a result of discretion and silences or inaction arising simply because the decision-maker made no decision. The definition of discretion adopted in this thesis accepts that silences may be the product of decisions. Silences are no less important to the bureaucratic process than observable actions.

A second problem, related to both actions and inactions, is that without being able to peer into the mind of the decision-maker, people might incorrectly assume the reasons which inform a decision. Silences, in particular, leave the door open to speculation about the reasons for the inaction and invite them to be derived or inferred from the surrounding context. In reality, of course, there may be *no* reasons, or the reasons that people might ascribe to the silence might miss the ball completely. For this reason, first-hand, empirical, qualitative, research plays an important role in identifying what decisions have been made—regardless of whether they manifest in observable action or not—and why.

This definition of discretion advanced here has practical and theoretical benefits over the constraint-based model adopted within the legal paradigm. These advantages are demonstrated by reference to the elements of the definition. First, the approach adopted here establishes that discretion is an *act*. Exercising discretion is something that people do every day. The definition advanced here directs attention not to the way decision-making is theoretically curtailed, but to how it exists in practice. It invites a nuanced inquiry that respects the potential for both unity and diversity in the process of decision-making. It enables the capturing of the rich and complex nature of decision-making practices as they are found in the real world. In turn, it promises to provide an analytical foundation that is more grounded in reality and in-tune with day-to-day decision-making than a model which relies upon a limited and arbitrary conception of the factors that affect how choices are made.

Second, it emphasises that decisions need to be *reasoned*. The reference

to reason respects discretion's etymological roots. As H L A Hart observed, to exercise discretion is not to indulge "personal or momentary whim" or fancy; instead, discretion is "an intellectual virtue: it is a near-synonym for practical wisdom or sagacity or prudence".¹⁰² Discretion demands that a decision-maker reflect on the various courses of action available to them and put a degree of thought into the choice they are making. This process of reasoning is what distinguishes decisions reached through discretion from decisions reached through arbitrary, intuitive, or impulsive means. Discretion therefore relies upon what Daniel Kahneman and Amos Tversky called 'System 2' cognition, or what Kahneman would later call 'slow thinking'.¹⁰³ The act of exercising discretion is not automatic or effortless; instead, it is controlled, effortful. This aspect of reasoning expressly sheds the presumption that decision-makers are affected by the same forces in the same ways and makes no reference to *how* a decision-maker can (or should) reason. This omission respects that decision-making is a highly context-dependent and individualised action. People reason in different ways. They relate to rules in different ways. They have different backgrounds, different experiences, different office dynamics, different desires, different financial concerns, and countless other attributes that define them as individuals. It would be wrong to presume a homogeneity of forces and arrogant to presume that discretionary conduct is constrained by some and not by others. Therefore, the definition offered here simply does away with reference to specific constraints.

Finally, the reasoning is conducted by reference to what the decision-maker believes is *appropriate*. Appropriateness introduces into the notion of discretion an attention to the role that social forces play in determining individual action. Inspired by James March and Johan Olsen's 'Logic of Appropriateness', Zachary Oberfield argued that "the heart of an individual's decision-making process" consists of socio-psychological outcomes such as "identities, attitudes, and motivations".¹⁰⁴ Decision-making, he claimed, "begins with the identities held by decision-makers" and that "if we want to understand how people act, we need to understand how they see them-

102 H L A Hart, 'Discretion' (2013) 127 *Harvard Law Review* 652, 656-658.

103 Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for behavioural economics' (2003) 93(5) *The American Economic Review* 1449, 1450-1452.

104 Zachary Oberfield, 'Discretion from a Sociological Perspective' in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 177, 177-178.

selves".¹⁰⁵ The role identities that people adopt therefore provide the starting points for how they determine whether conduct will be appropriate. These social roles provide reasons for individual behaviour.¹⁰⁶

The definition of discretion advanced here therefore explicitly distinguishes between two ways that decisions can be made. Decisions can be made either through discretion; or they can be made through other means that do not involve the application of reason or reference to appropriateness. Thus, all acts of *discretion* involve making a *decision*; but not all *decisions* arise through an exercise of *discretion*.

4 Conclusion

This chapter has argued that discretion should be understood principally as the act of reaching a reasoned decision about the appropriate course of action to pursue. The prevailing understanding of discretion within the legal paradigm that relies upon the space metaphor to argue that discretion is a space in which a decision-maker can exercise free choice surrounded by a belt of restriction is problematic for two reasons. First, it draws an arbitrary distinction between those forces which apparently do constrain discretion (notably rules) and those that do not. However, the lessons from decision-making studies outside of the law reveal that a decision-maker is *never* free of constraints on their decision-making capacity. Therefore, any constraint-based conception of discretion takes as its starting point a distorted view on how decision-making operates in reality. Second, if the legal paradigm's constraint-based understanding of discretion is to be maintained, the notion of discretion self-destructs once it is realised that the forces that bind decision-makers are so numerous and so powerful that they can never truly exercise free choice. As such, the novel, practice-based understanding of discretion advanced here offers a more nuanced and accurate portrayal of how decisions are made. This understanding respects the notions of choice, judgement, and discernment embodied in the word's etymological roots, while shifting the spotlight onto the question of how decisions are reasoned without making any claim as to the power, or universal applicability, of specific constraints. Armed with this conceptual framework, it is now possible

105 Zachary Oberfield, 'Discretion from a Sociological Perspective' in Tony Evans and Pieter Hupe (eds), *Discretion and the Quest for Controlled Freedom* (Palgrave Macmillan, 1st ed, 2020) 177, 180.

106 David Watson, 'Discretion, Moral Judgement, and Integration' in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann, 1st ed, 1981) 229, 232.

to zoom in on international prosecutorial discretion and commence the inquiry into the tacit understandings that shape prosecutorial discretion in international criminal justice.

Part II

The Practice of International Prosecutorial Discretion

Chapter 3

Selecting Situations and Cases

[T]oday we are the, you know, the flavour of the day. Today everyone is looking at us and paying attention to us and we're the big deal today. But this is not going to last. The attention to us, the interest in us, the support for us, is not going to last. We have to move quickly to be relevant. We can't sit on this and take forever, because the events are going to move quickly and people are going to lose interest.

INTERVIEW WITH P24

1 Introduction

In the life of an international criminal prosecution, the selection of situations and cases are the first major choices that international prosecutors make. They are also the two prosecutorial decisions which have the most material impact on international criminal justice and are lightning rods for attention. It is no surprise that, of all the choices discussed in this thesis, the selection of situations and cases occupy the special position of being the most debated, having given rise to a veritable mountain of academic commentary, media attention, and official documentation. After all, when a prosecutor selects a situation or a case they are raising a claim about the authority and capacity of international criminal justice to effectively address the crimes that they will allege, and wading into a quagmire where power politics and state cooperation threaten to derail any attempt to move the proceedings forward.

In the context of this thesis, ‘situations’ are those instances of suspected criminal conduct prior to the identification of any alleged perpetrators; and ‘cases’ are particular instances of alleged criminal conduct allegedly committed by specific individuals. It may seem peculiar that the selection of situations and cases are being discussed in the same chapter. This is intentional. There are two reasons why these two issues should be discussed simultaneously. First, despite the concept of ‘situation’ now typically being associated with the *Rome Statute*, the ICC has no monopoly on its meaning; and ‘situations’ and ‘cases’ are terms of art rather than terms of science. There is absolutely nothing preventing ‘situation’ from being understood as relating either to broad or narrow geographic or temporal frames. However, if the concept of ‘situation’ as typically understood under the *Rome Statute* (a geographically expansive concept often covering entire states over several years) was applied to the ICTY, ICTR, or SCSL, it would be difficult to say prosecutors selected any situations at all as the conflicts in the former Yugoslavia, Rwanda, and Sierra Leone were chosen for them. Yet clearly, within these geographically and temporally expansive conflicts certain ‘situations’ were selected—think, for example, of the Lašva Valley, Omarska and Keraterm camps, Butare commune, or the Bo District, each of which became the subject of prosecutions. Similar choices are made by ICC prosecutors, who select conduct for prosecution within situations, such as events in Bossangoa, Timbuktu, or IDP camps in Northern Uganda. In other words, the selection of ‘situations’ is always going to be a question of whether prosecutors want to look deeper into potentially criminal conduct with the intention of identifying and potentially prosecuting the people allegedly responsible for what took place. The second reason is that it is practically impossible to select situations without also selecting the cases that constitute it. The selection of any situation will be informed by particular instances of criminality constituting cases. At the ICC, this is made explicit in several ways. During the preliminary examination phase, staff will select potential cases.¹ They will assess whether any of these cases are being prosecuted domestically for the purposes of assessing complementarity.² They will assess the admissibility of “the case” before opening an investigation.³ Therefore, for the

1 Office of the Prosecutor, ‘Regulations of the Office of the Prosecutor’ (International Criminal Court Office of the Prosecutor, 23 April 2009), r 33.

2 Office of the Prosecutor, ‘Policy Paper on Preliminary Examinations’ (International Criminal Court Office of the Prosecutor, November 2013), [8].

3 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 53(1)(b).

purposes of this thesis, ‘situations’ and ‘cases’ have been given intentionally flexible and broad definitions so as to allow for different criminal jurisdictions to be discussed together in a way which reflects the focus prosecutors have on instances of alleged criminality.

This chapter reveals what has influenced prosecutors when they were selecting situations and cases. Before explaining those factors, this chapter begins by outlining, in section 2, the legal framework in which these decisions are made in order to provide context to those considerations. It then describes and analyses twelve factors that have influenced prosecutorial decision-making, as revealed through interviews with current and former senior prosecutors. Some of these factors are functional, and they are discussed in section 3: the prospects of a successful investigation; the likelihood of a defendant being arrested; trial management; and the wellbeing of an actual or potential defendant. Other factors are normative, and they are discussed in section 4: setting an historical record; the expression of norms; and ensuring that the selected situations and cases are representative of the alleged criminality. Finally, prosecutors have also considered strategic factors. These factors, discussed in section 5, concern existential threats posed to international criminal courts; avoiding accusations of bias; previous representations made by prosecutors; and the need to close tribunals.

This chapter concludes by reflecting on what these thematic windows reveal about how prosecutorial choices have been informed by the different roles prosecutors have adopted.

2 The Legal Framework

A prosecutor’s selection of situations and cases is governed by the broadest legal framework of all the choices discussed in this thesis. Given that the selection of situations and cases is wildly consequential and will affect an incalculable number of stakeholders, it is not surprising that people have tried to closely regulate prosecutorial decision-making. While it is not the purpose of this thesis to engage in a detailed analysis of these legal frameworks (the selection of situations and cases is also, unsurprisingly, one of the most studied issues in international criminal law), four core elements warrant discussion: the mandates of tribunals, the notion of gravity, the focus on those ‘most responsible’, and the value of policy documentation. These four elements are the major themes that have emerged with respect to the legal framework, and their roles in affecting decision-making need to

be contextualised.

The first element of the legal framework that governs how prosecutors select situations and cases are the original mandates of the tribunals for which they work. Mandates explain why tribunals are established and what their architects want them to achieve. While they are not ‘legal’ criteria in the sense that they oblige prosecutors to consider any of them directly when making decisions, they situate tribunals within historical narratives, frame discourses, and provide criteria for debating the successes and failures of courts. As such, “[t]he mandate of an international tribunal is in the first place the mandate of its prosecutor”.⁴ Even though the mandates of international criminal courts are loosely concerned with every choice prosecutors make, it is useful to discuss them once here in the context of the first major decisions prosecutors make in the life of a criminal proceeding.

The goal of bringing justice and accountability to perpetrators and redress to victims is one of the most common goals shared by international criminal courts. The *Rome Statute’s* Preamble establishes that the state parties “[affirm] that the most serious crimes of concern to the international community as a whole shall not go unpunished”.⁵ When establishing the ICTY, the UN Security Council representatives noted in both of the Tribunal’s founding resolutions that they were “[d]etermined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them”.⁶ The resolution establishing the ICTR has a similarly worded statement.⁷ Security Council representatives also expressed the belief that the establishment of the ICTY and the ICTR would ensure that any violations of international humanitarian law (and, in the case of the ICTR, genocide) would be effectively redressed.⁸ When writing to the President of the Security Council to request the United Nations’ assistance in establishing the SCSL, the Permanent Representative of Sierra Leone to the United Nations noted that the purpose of the SCSL was to “bring to credible justice those members of the Revolutionary United Front

4 Luc Reydamas and Jed Odermatt, ‘Mandates’ in Luc Reydamas, Jan Wouters and Cedric Ryngaert, *International Prosecutors* (Oxford University Press, 1st ed, 2012) 81, 82.

5 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), Preamble.

6 SC Res 808 (1993), UN SCOR, UN Doc S/Res/808 (1993) (22 February 1993); SC Res 827 (1993), UN SCOR, UN Doc S/Res/827 (1993) (25 May 1993).

7 SC Res 955 (1994), UN SCOR, UN Doc S/Res/955 (1994) (8 November 1994).

8 SC Res 827 (1993), UN SCOR, UN Doc S/Res/827 (1993) (25 May 1993); SC Res 955 (1994), UN SCOR, UN Doc S/Res/955 (1994) (8 November 1994).

(‘RUF’) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages”.⁹ In their response, Security Council representatives noted that a “strong and credible court” would bring justice and accountability.¹⁰

Another common goal shared by the ICTY, ICTR, SCSL, and ICC is the restoration and maintenance of peace. The crimes the ICC has jurisdiction over are characterised in *Rome Statute*, in a rhetorical flourish, as threatening “the peace, security, and well-being of the world”.¹¹ Their prevention and punishment is meant to ensure that international peace is maintained. The ICTY and the ICTR were created to help the Security Council meet its goal of maintaining or restoring peace.¹² When the representative of Sierra Leone requested UN assistance with respect to the SCSL, he did so noting a court would “ensure lasting peace”.¹³ Security Council representatives subsequently recognised that a court would contribute to the maintenance and restoration of peace; ensure lasting peace; and that the situation in Sierra Leone constituted a threat to international peace and security in the region.¹⁴

The goal of deterrence is similarly common. One of the reasons for establishing the ICC was the prevention of that court’s core crimes.¹⁵ Security Council representatives stated with respect to the ICTY and the ICTR that they were determined to put an end to the crimes within those courts’

9 Alhaji Ahmad Tejan Kabbah, *Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council (Letter dated 12 June 2000)*, UN Doc S/2000/786 (12 June 2000).

10 SC Res 1315 (2000), UN SCOR, UN Doc S/Res/1315 (2000) (14 August 2000).

11 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), Preamble.

12 The founding resolutions of these tribunals state that the Security Council was “[c]onvinced that in the particular circumstances... the prosecution of persons responsible for serious violations of international humanitarian law would contribute to... the restoration and maintenance of peace”: SC Res 827 (1993), UN SCOR, UN Doc S/Res/827 (1993) (25 May 1993); SC Res 955 (1994), UN SCOR, UN Doc S/Res/955 (1994) (8 November 1994). See also SC Res 808 (1993), UN SCOR, UN Doc S/Res/808 (1993) (22 February 1993).

13 Alhaji Ahmad Tejan Kabbah, *Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council (Letter dated 12 June 2000)*, UN Doc S/2000/786 (12 June 2000).

14 SC Res 1315 (2000), UN SCOR, UN Doc S/Res/1315 (2000) (14 August 2000).

15 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), Preamble.

statutes;¹⁶ noting particularly that they believed the establishment of the tribunals and the prosecution of persons responsible for the crimes would “contribute to ensuring that such violations are halted”.¹⁷ Sierra Leone’s representative hoped that once the SCSL was established, the UN would send a “rapid response team of inquiry to Freetown” to “send the right signals to the perpetrators of the violations that they will not continue committing atrocities with impunity”.¹⁸

There are some unique mandates that are not shared by all international criminal tribunals. Only the ICTR and the SCSL have the mandated purpose of contributing to reconciliation. The ICTR was the first international criminal tribunal with reconciliation within its mandate.¹⁹ Security Council representatives were convinced that, in the special circumstances of Rwanda, the establishment of the Tribunal would “contribute to the process of national reconciliation”.²⁰ The SCSL was the second court to embody this goal, with Security Council representatives recognising that the court would “contribute to the process of national reconciliation”.²¹ The promotion and protection of human rights also formed part of the SCSL’s mandate. The representative of Sierra Leone noted that he believed crimes committed by the RUF diminished respect for human rights.²² However, Security Council representatives did not refer to human rights in their SCSL-related resolutions.

It is tempting to see the ending of impunity as one of the long-standing goals of international criminal justice. It is not. Only in recent years has

16 SC Res 808 (1993), UN SCOR, UN Doc S/Res/808 (1993) (22 February 1993); SC Res 827 (1993), UN SCOR, UN Doc S/Res/827 (1993) (25 May 1993); SC Res 955 (1994), UN SCOR, UN Doc S/Res/955 (1994) (8 November 1994).

17 SC Res 827 (1993), UN SCOR, UN Doc S/Res/827 (1993) (25 May 1993); SC Res 955 (1994), UN SCOR, UN Doc S/Res/955 (1994) (8 November 1994).

18 Alhaji Ahmad Tejan Kabbah, *Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council (Letter dated 12 June 2000)*, UN Doc S/2000/786 (12 June 2000), enclosure.

19 Luc Reydam and Jed Odermatt, ‘Mandates’ in Luc Reydam, Jan Wouters and Cedric Ryngaert, *International Prosecutors* (Oxford University Press, 1st ed, 2012) 81, 93.

20 SC Res 955 (1994), UN SCOR, UN Doc S/Res/955 (1994) (8 November 1994).

21 SC Res 1315 (2000), UN SCOR, UN Doc S/Res/1315 (2000) (14 August 2000).

22 Alhaji Ahmad Tejan Kabbah, *Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council (Letter dated 12 June 2000)*, UN Doc S/2000/786 (12 June 2000).

it emerged as a goal of international criminal courts. In the early 1990s, a period which saw the creation of a multiplicity of courts with jurisdiction over international crimes, “[c]riminal responsibility for atrocities in conflict—not impunity—became the watchword of a new movement”.²³ Neither the ICTY nor the ICTR statutes contained any reference to ‘impunity’; nor does the term appear in their founding Security Council resolutions. The notion of ‘ending impunity’ had, however, started appearing in formal discussions regarding the creation of the ICC since at least August 1995, when members of the International Commission of Jurists expressed “[their] desire to ensure that the International Criminal Court has the ability to enforce the Rule of Law, protect human rights, and end impunity”.²⁴ Today it is enshrined in the famous preambular paragraph expressing the determination of the state parties “to put an end to impunity for the perpetrators of these crimes”.²⁵ The SCSL, too, was established with the ending of impunity in mind, with Security Council representatives recognising the court would end impunity (a recognition recalled in the cooperation agreement between the UN and Sierra Leone).²⁶

The second element of the legal framework governing the selection of situations and cases is the notion of ‘gravity’. As a concept that should guide prosecutorial decision-making, gravity finds its earliest mention in the ICTY OTP’s ‘Goldstone Criteria’ of 1995. These criteria are reported to have contained a number of features that might indicate conduct constituted a ‘serious violation’ of the law.²⁷ The amendment to Rule 11*bis* of the ICTY’s *Rules of Procedure and Evidence* in December 2002 also allowed the Prose-

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- 23 Morten Bergsmo, ‘The Theme of Selection and Prioritisation Criteria and Why it is Relevant’ in Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl Academic ePublisher, 2nd ed, 2010) 7, 7.
- 24 International Commission of Jurists, ‘The International Criminal Court’ (Position Paper No 3, International Commission of Jurists, August 1995) <<https://www.legal-tools.org/doc/92e277/>>, 2.
- 25 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), Preamble.
- 26 SC Res 1315 (2000), UN SCOR, UN Doc S/Res/1315 (2000) (14 August 2000); *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, opened for signature 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002), Preamble.
- 27 Claudia Angermaier, ‘Case Selection and prioritisation criteria in the work of the International Criminal Tribunal for the Former Yugoslavia’ in Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Forum for International Criminal and Humanitarian Law; International Peace Research Institute, Oslo, 1st ed, 2009) 29, 32.

ctor to refer to a national jurisdiction those cases that were of an insufficient gravity, essentially forcing prosecutors to turn their minds to whether the situations and cases before them were grave enough to warrant their continued prosecution before the international tribunal. At the ICC, the Prosecutor should consider the ‘gravity’ of a case as a prerequisite to its admissibility under article 17(1)(d), as well as under article 53(1)(c) and (2)(c) with regard to the opening of an investigation. The ICC Prosecutor considers matters of “scale, nature, manner of commission, and impact” relevant to this assessment, as written in the *Regulations of the Office of the Prosecutor*.²⁸ ICC prosecutors have clarified their understanding of these terms elsewhere, notably in the 2013 *Policy Paper on Preliminary Examinations* and the 2016 *Policy Paper on Case Selection and Prioritisation*.²⁹ The definition of these terms is largely identical in both documents. However, the need to consider the “the degree of participation and intent of the perpetrator (if discernible at this stage)” and the “the sufferings endured by the victims” were removed from the *Policy Paper on Case Selection and Prioritisation*. The *Policy Paper on Case Selection and Prioritisation* also added several considerations focussed on the environment that were not present in the 2013 *Policy Paper on Preliminary Examinations*, such as “the destruction of the environment or of protected objects”; “environmental damage inflicted on the affected communities”; “the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land”.³⁰ The ICC Prosecutor has also expressed a desire to focus on sexual and gender-based crimes, crimes against children, and crimes against cultural heritage, noting these categories of offences are among the ‘gravest’ in the *Rome Statute*.³¹

28 Office of the Prosecutor, ‘Regulations of the Office of the Prosecutor’ (International Criminal Court Office of the Prosecutor, 23 April 2009), r 29(2).

29 Office of the Prosecutor, ‘Policy Paper on Preliminary Examinations’ (International Criminal Court Office of the Prosecutor, November 2013); Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ (International Criminal Court Office of the Prosecutor, September 2016).

30 Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ (International Criminal Court Office of the Prosecutor, September 2016), 12-13.

31 “The Office recognises that sexual and gender-based crimes are amongst the gravest under the *Statute*” (Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (International Criminal Court Office of the Prosecutor, June 2014), 5); “[i]n general, crimes against or affecting children will be regarded as particularly grave, given the commitment made to children in the *Statute*, and the fact that children enjoy special recognition and protection under international law” (Office of the Prosecutor, ‘Policy on Children’ (International Criminal Court Office of the Prosecutor, November 2016), 2); and “attacks against cultural heritage of this

Not too much effort should be expended on trying precisely explain what ‘gravity’ means for a very simple reason: ‘gravity’ is a term that suffers from ‘non-linear vagueness’. This vagueness arises because, first, whether a situation or a case is grave depends on the assessment of a number of different criteria; and second, these criteria cannot be comparatively weighted.³² Gravity cannot provide a firm benchmark for assessing whether situations or cases should be pursued. This is not to say that gravity has no practical value. It does: by directing a prosecutor’s attention to the gravest conduct (however that is assessed), it acts as a mechanism through which the conduct that is the subject of prosecutions becomes, at least in theory, progressively less-severe over time in comparison to the first prosecution. Gravity gives hope to the expressive potential of international courts by providing a tool through which the threshold for what conduct is deemed appropriate by would-be perpetrators is progressively lowered. Gravity is flexible, and must remain flexible, if it is hoped that international courts can deter would-be perpetrators through the progressive transformation of the norms governing appropriate conduct.

The third feature of the framework governing the selection of situations and cases is the emphasis placed on those cases concerning those ‘most responsible’ for the alleged crimes. This focus emerged over time at the ICTY. This was driven, in part, by Antonio Cassese’s belief that the ICTY needed to “go after the leaders”, expressed to Richard Goldstone in the form of a draft resolution by the ICTY judges which left no doubt that they were “totally against his prosecutorial strategy” of conducting ‘pyramid’ prosecutions to gradually build evidence that would enable the prosecution of higher-ranked alleged offenders.³³ The indictments against Ratko Mladić and Radovan Karadžić five months later arguably demonstrate that the resolution had its intended effect. The pressure from the judges was also confirmed by Louise Arbour in 1998, when she noted that the withdrawal of charges against fourteen persons in the *Omarska* and *Keraterm* cases was done in accordance with prosecutors’ “investigative focus on per-

distinction are particularly grave”(Office of the Prosecutor, ‘Draft Policy on Cultural Heritage’ (International Criminal Court Office of the Prosecutor, 22 March 2021), [43]).

32 See, for a detailed explanation of the conditions for non-linear vagueness to arise, Arthur Burks, ‘Empiricism and Vagueness’ (1946) 43(18) *Journal of Philosophy* 477, 482.

33 Heikelina Stuart and Marlise Simons, Interview with Antonio Cassese, on *The Judge: Interview with Antonio Cassese* (2009) The Prosecutor and the Judge <<https://www.press.uchicago.edu/Misc/Chicago/9789085550235.html>>.

sons holding higher levels of responsibility”.³⁴ While neither the ICTY nor the ICTR statutes required the Prosecutor(s) to focus on the most senior leaders, United Nations Security Council representatives adopted several resolutions that imposed this requirement.³⁵ With respect to the SCSL, the representative of Sierra Leone suggested the court use a blend of international and Sierra Leonean criminal law “to catch the leaders of the violence and atrocities committed”.³⁶ Security Council representatives suggested the court have jurisdiction over persons “who bear the greatest responsibility for the commission of the crimes”.³⁷ While the Secretary-General considered that a focus instead on “the more general term ‘persons most responsible’”;³⁸ the *Statute* ultimately adopted the Security Council representatives’ formulation³⁹ and in doing so became “the first international tribunal to use ‘greatest responsibility’ as its standard for prosecuting alleged perpetrators”.⁴⁰ For their part, the ICC Prosecutor has committed to prosecuting those ‘most responsible’ by tasking investigatory teams to identify this class of perpetrators in their case hypotheses.⁴¹ The focus has also been stated in various strategic plans.⁴²

The fourth feature is the proliferation of policy documentation relating to the selection of situations and cases. In October 1995, Goldstone

34 ICTY OTP, ‘Statement by the Prosecutor following the withdrawal of the charges against 14 accused’ (Press Statement, CC/PIU/314-E, 8 May 1998) <<http://www.icty.org/en/press/statement-prosecutor-following-withdrawal-charges-against-14-accused>>.

35 See SC Res 1503 (2003), UN SCOR, UN Doc S/Res/1503 (2003) (4 September 2003); SC Res 1534 (2004), UN SCOR, UN Doc S/Res/1534 (2004) (26 March 2004), [5].

36 Alhaji Ahmad Tejan Kabbah, *Annex to the letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council (Letter dated 12 June 2000)*, UN Doc S/2000/786 (12 June 2000), enclosure.

37 SC Res 1315 (2000), UN SCOR, UN Doc S/Res/1315 (2000) (14 August 2000), [3].

38 *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, UN Doc S/2000/915 (4 October 2000), [29].

39 *Statute of the Special Court for Sierra Leone*, art 1.

40 Luc Reydams and Jed Odermatt, ‘Mandates’ in Luc Reydams, Jan Wouters and Cedric Ryngaert, *International Prosecutors* (Oxford University Press, 1st ed, 2012) 81, 106.

41 Office of the Prosecutor, ‘Regulations of the Office of the Prosecutor’ (International Criminal Court Office of the Prosecutor, 23 April 2009), r 34(1).

42 Office of the Prosecutor, ‘Strategic Plan, 2016-2018’ (International Criminal Court Office of the Prosecutor, November 2015), [35]; Office of the Prosecutor, ‘Strategic Plan, 2019-2021’ (International Criminal Court Office of the Prosecutor, 17 July 2019), 19.

produced a list of criteria that concerned the selection of cases for investigation and prosecution at the ICTY.⁴³ Five criteria were set out to determine who attention should be focussed on. These criteria related to the alleged offender; whether the alleged conduct was serious; policy considerations; practical considerations; and “other relevant considerations”⁴⁴—the first two (and potentially the last⁴⁵) being relevant to the assessment of criminality. Each criteria contained a list of factors that were relevant to their assessment.⁴⁶ The ICC Prosecutor’s *Policy Paper on Case Selection and Prioritisation*, *Policy Paper on Sexual and Gender-Based Crimes*, *Policy on Children*, and *Draft Policy on Cultural Heritage* all contain guidelines for what

43 The MICT OTP declined to grant access to this document on the basis that disclosure “would undermine the Mechanism’s free and independent decision-making process” (pursuant to article 10(3)(e) of the *Access Policy for the Records held by the Mechanism for International Criminal Tribunals*, MICT Doc MICT/17 (12 August 2016): Email from Najwa Nabti to Cale Davis, 7 September 2018. Though the OTP was asked for an explanation why the disclosure of the ‘Goldstone Criteria’ would be contrary to this provision, none was received. It is interesting that, 23 years later and after the dissolution of the ICTY, the release of the ‘Goldstone Criteria’ was seen to undermine free and independent decision-making at the MICT.

44 Claudia Angermaier, ‘Case Selection and prioritisation criteria in the work of the International Criminal Tribunal for the Former Yugoslavia’ in Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Forum for International Criminal and Humanitarian Law; International Peace Research Institute, Oslo, 1st ed, 2009) 29, 31.

45 Requiring consideration of “the particular statutory offence or parts thereof, that can be charged”; the “theory of liability and legal framework of each potential suspect”; and “to what extent the case fits into a larger pattern-type of ongoing or future investigations and prosecutions”.

46 As described in Claudia Angermaier, ‘Case Selection and prioritisation criteria in the work of the International Criminal Tribunal for the Former Yugoslavia’ in Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Forum for International Criminal and Humanitarian Law; International Peace Research Institute, Oslo, 1st ed, 2009) 29, 31-32, the factors related the alleged offender concern their “position in hierarchy under investigation; political, military, paramilitary or civilian leader; leadership at municipal, regional or national level; nationality; role/participation in policy/strategy decisions; personal culpability for specific atrocities; notoriousness/responsibility for particularly heinous acts; extent of direct participation in the alleged incidents; authority and control exercised by the suspects; the suspect’s alleged notice and knowledge of acts by subordinates; arrest potential; evidence/witness availability; media/government/NGO target; and potential roll-over witness/likelihood of linkage evidence”. Those concerning the conduct direct attention to the “number of victims; nature of acts; area of destruction; duration and repetition of the offence; location of the crime; linkage to other cases; nationality of perpetrators/victims; arrest potential; evidence/witness availability; showcase or pattern crime; and media/government/NGO target”.

prosecutors should consider when selecting situations and cases.

Despite the production of policy papers being somewhat in vogue (particularly at the time of writing in mid June 2021, as Fatou Bensouda is expected to release two policy papers in the same month), there are two reasons to be cautious of placing too much importance on them when it comes to reverse-engineering or predicting prosecutorial decisions. The first is that the ‘Goldstone Criteria’ appear to have had limited practical application. While one prosecutor noted that these criteria were applied “even within the political restraints” in which the ICTY was operating,⁴⁷ there are compelling reasons to support Morten Bergsmo’s contradictory conclusion that the criteria were not applied consistently or not applied at all.⁴⁸ At least, this seems to hold true for the period after Goldstone departed the Tribunals. When Goldstone left in 1997, these criteria were still known.⁴⁹ Yet as time progressed, other prosecutors were not aware of the existence of these criteria within a document,⁵⁰ or not aware of the criteria at all.⁵¹ One prosecutor described that, although they were familiar with the criteria, they did not become aware of them during their time at the ICTY and denied having seen them in a document.⁵²

The second reason is that policy documentation does not appear useful in helping prosecutors reach a reasoned decision about the appropriate course of action to pursue. The *Policy Paper on Case Selection and Prioritisation* has rightfully been criticised for allowing the Prosecutor to use the criteria to essentially justify any course of action.⁵³ While their content no doubt does inform prosecutorial decisions to some incalculable degree, their value lies elsewhere. Their importance is less in providing a framework for the decision-making process, but more in allowing the Prosecutor to promote the illusion that their scope for free choice is limited and hide behind Pierre

47 Interview with P10.

48 Morten Bergsmo, ‘Case Selection and Prioritisation Criteria’ in Morten Bergsmo et al (eds), *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (Torkel Opsahl Academic ePublisher, 2nd ed, 2010) 79, 109. See also Frederiek de Vlaming, ‘The Yugoslavia Tribunal and the Selection of Defendants’ (2012) 4(2) *Amsterdam Law Forum* 89, 96.

49 Interview with P22.

50 Interview with P7.

51 Interview with P13.

52 Interview with P21.

53 William Schabas, ‘Feeding Time at the Office of the Prosecutor’ on *International Criminal Justice Today* (23 November 2016) <<https://www.international-criminal-justice-today.org/arguendo/icc-prosecutors-perpetuation-of-the-fiction-of-objectivity/>>.

Bourdieu's 'cult of the text'⁵⁴ to placate critics who find the notion of free choice offensive to the notion of legitimacy.⁵⁵

As such, the legal framework that governs the selection of situations and cases, though broad, is certainly not comprehensive. This means that prosecutors have significant scope to consider a large number of factors when reaching a decision about what they want to do. It is some of these other factors that are the subjects of the following sections.

3 Functional Considerations

3.1 The prospects of a successful investigation

The first factor that prosecutors have considered when selecting situations and cases concerns the prospects of a successful investigation. ICC prosecutors purport not to consider the prospects of a successful investigation when deciding whether to open an investigation.⁵⁶ However, the Prosecutor formalised the need to consider the "operational environment" at the stage of case prioritisation.⁵⁷ The Prosecutor's recognition of the importance of the 'operational environment' was, in the words of one ICC prosecutor, "a very important tell" and "a very important kind of reveal", as previously "[e]verybody kind of thought that that was at play" (Matthew Brubacher, for example, predicted as far back as 2004 that the Prosecutor "will need to consider the likelihood of state cooperation when deciding whether to initiate an investigation"⁵⁸) but the relevance of this factor had not been officially confirmed.⁵⁹

Perhaps unsurprisingly then, the 'operational environment' appears to factor significantly into prosecutorial decision-making. One prosecutor observed that that ICC prosecutors are not engaged in an "abstract exercise" where they could embark on investigations with unrealistic prospects of success, as they "ultimately need to produce cases and trials".⁶⁰ "At the end of the day", another ICC prosecutor remarked, "... pragmatic criteria... tip

54 See page 30.

55 See chapter 2, section 2.1.

56 Interview with P14.

57 Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (International Criminal Court Office of the Prosecutor, September 2016), [49].

58 Matthew Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) 2 *Journal of International Criminal Justice* 71, 88.

59 Interview with P24.

60 Interview with P24.

the balance in one direction or the other”.⁶¹ If prosecutors assess “on all the signals” that there are no prospects of cooperation with respect to the investigation, another prosecutor said, “you say fine, we’ll park that for now” and place investigative resources elsewhere.⁶²

In this light, one senior ICC prosecutor described that some situations are “impregnated by non-cooperation from the outset”, pointing to the *Situation in Darfur* as an example⁶³—though this evidently did not stop ICC Prosecutor Luis Moreno Ocampo from opening an investigation on the basis of the Security Council referral; nor the charging of six defendants, four of whom remain at large, including Sudan’s President, Omar Al Bashir. Similarly, another prosecutor suggested that there would not be any cases stemming from the *Situation in Georgia* due to investigative difficulties. They observed that although the Georgian authorities were “still getting used to us” and “we’re still getting used to them”, a cooperative relationship had developed between them.⁶⁴ In contrast, the prosecutor noted, there is currently “absolutely no prospect of cooperation from Russia” and therefore “very little prospect of cooperation with the *de facto* authorities in South Ossetia”.⁶⁵ The prosecutor observed that this would “shape, to some degree” how ICC prosecutors were going to utilise their resources.⁶⁶ The implicit suggestion appears to be that cases will not be flowing out of the *Situation in Georgia* until there is cooperation between ICC prosecutors and the South Ossetian authorities.

The fact that international prosecutors rely upon the cooperation of domestic authorities to do their jobs effectively should come as no surprise, as stories about the ways in which state authorities can interfere with the work of prosecutors are almost as old as international criminal law itself. Cassese used the metaphor that the ICTY was a ‘giant without limbs’ and needed state authorities to “walk and work”.⁶⁷ The memoir of former ICTY and ICTR Prosecutor Carla del Ponte is replete with examples of creative ways in which domestic authorities can frustrate investigations (“During my eight years in The Hague”, she wrote, “I dedicated the bulk of my time

61 Interview with P26.

62 Interview with P14.

63 Interview with P26.

64 Interview with P14.

65 Interview with P14.

66 Interview with P14.

67 Antonio Cassese, ‘On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9(1) *European Journal of International Law* 2, 3.

to mustering political pressure upon states like Serbia and Croatia to comply with their international obligation to cooperate”).⁶⁸ Much has been written about the effectiveness of types of political leverage to pull state agents into compliance (notably the allure of such things like EU membership) and the inherent difficulty of bringing about rule diffusion and an embodiment of respect for international criminal justice institutions in post-conflict societies where the preconditions for social change may not exist.⁶⁹

The prospect of a successful investigation is also concerned with prosecutorial opportunism. Former ICC Investigations and Prosecutions Coordinator Alex Whiting argued that the Court was ‘reactionary’ and not in complete control of its own destiny.⁷⁰ One prosecutor remarked that they felt as though they were ‘pulled’ towards doing “just” cases that were available to them.⁷¹ They added that while discretionary choices concerning case selection and prioritisation were made, the choices were “just not as big an array as sometimes people depict it”.⁷² They pointed to the *Situation in Côte d’Ivoire* as an example of prosecutors pursuing cases against Laurent Gbagbo and Charles Blé Goudé because the government, under Alasane Ouattara, started cooperating with the Court—“that’s the opportunity that’s been presented to us”, they said.⁷³

Sometimes, the opportunity to pursue a case might come about suddenly and spur prosecutors into making fast decisions. Goldstone’s decision to prosecute Dražen Erdemović is a good example. On 29 February 1996, Erdemović—prompted perhaps by a guilty conscience and a “falling out” with his superior officer—gave a recorded interview to Vanessa Vasic-Janekovic (on deployment for the American Broadcasting Corporation) in which he described his participation in a mass killing at the Pilica collective farm.⁷⁴ When Vasic-Janekovic subsequently phoned her office to report

68 Carla Del Ponte, *Madame Prosecutor: A memoir* (Other Press, 1st ed, 2008), eBook.

69 See, for example, Kei Brodersen, ‘The ICTY’s Conditionality Dilemma’ (2014) 22(3) *European Journal of Crime, Criminal Law, and Criminal Justice* 219; Marlene Spoerri, ‘Justice Imposed: How policies of conditionality effect transitional justice in the Former Yugoslavia’ (2011) 63(10) *Europe-Asia Studies* 1827; and Tina Freyburg and Solveig Richter, ‘National Identity Matters: The limited impact of EU political conditionality in the Western Balkans’ (2010) 17(2) *Journal of European Public Policy* 263.

70 Alex Whiting, ‘The Significance of the ICC’s First Guilty Plea’ on *Just Security* (23 August 2016) <<https://www.justsecurity.org/32516/significance-iccs-guilty-plea/>>.

71 Interview with P24.

72 Interview with P24.

73 Interview with P24.

74 Interview with P10; *Prosecutor v Dražen Erdemović (Letter from Vanessa Vasic-*

on the interview, the call was intercepted by Serb security police who then confiscated the recording of the interview at the airport as Vasic-Janekovic was preparing to fly to Heathrow several days later on 2 March 1996.⁷⁵ Vasic-Janekovic, worried that “she’d really signed Erdemović’s death warrant”, phoned the ICTY OTP “in such a state” to let them know what had happened.⁷⁶ Erdemović was arrested by local authorities the following day. Goldstone subsequently issued a press statement acknowledging that he believed Erdemović was in position to give relevant evidence.⁷⁷ One prosecutor noted that this press statement was also motivated by the idea that “the more publicity that it gets, the less likely the Serbs are to murder him”.⁷⁸ Not long after, Erdemović was surrendered to the Tribunal.⁷⁹ The *Erdemović* case was therefore selected on the basis that it would be a clearly successful (and fast) investigation—thanks largely to Erdemović’s willingness to cooperate—and had the additional attraction of significantly advancing the OTP’s investigations.

The prospects of a successful investigation has also operated in a different way: doubt about whether there are prospects of a successful investigation into conduct allegedly committed by members of a group has also apparently militated *in favour* of prosecutions against people who allegedly victimised members of that group. As one ICTY prosecutor stated:

There was obviously an expectation that if there was to be any sense of public belief in justice, that attention had to be given, even if it was not to the level of intensity, to victimisations of different groups if only, frankly to be very candid, to ascer-

Janekovic to the Registrar, dated 07-01-98, in English) (ICTY, Chamber, IT-96-22-BIS, 14 January 1998); Jovana Gec, ‘Authorities Arrest Man In Connection With Srebrenica Killings’, *Associated Press* (Online), 8 March 1996 <<https://www.apnews.com/c17dceaba654ee4ed0cf7bd6c57d719>>; *Prosecutor v Dražen Erdemović (Transcript of 19 November 1996)* (ICTY, Trial Chamber, IT-96-22-T, 19 November 1996), 192.

75 Interview with P10; *Prosecutor v Slobodan Milošević (Transcript of 6 September 2005)* (ICTY, Trial Chamber, IT-02-54-T, 6 September 2005), 43792 (at line 2).

76 Interview with P10.

77 ICTY OTP, ‘Press Statement by Justice R J Goldstone, Prosecutor of the ICTY’ (Press Statement, CC/PIO-041-E, 7 March 1996) <<http://www.icty.org/en/press/press-statement-justice-rj-goldstone-prosecutor-icty>>.

78 Interview with P10. Emphasis added.

79 ICTY OTP, ‘Erdemović and Kremenović transferred to The Hague’ (Press Release, PC/PIO/053-E, 30 March 1996) <<https://www.icty.org/en/sid/7387>>. At the time, Milošević was negotiating with Richard Holbrooke for some “goodies” from the US, “so he decided it was politically in his favour” to surrender him: Interview with P10.

tain their cooperation—the cooperation of one set of victims, when some of their compatriots might have been perpetrators in other cases.⁸⁰

In other words, situations can be selected to ‘test the waters’ and see whether, once the tables of justice are turned on victims, they will be willing to cooperate in investigations against their own.

The reason why prosecutors have considered the prospects of a successful investigation being conducted when selecting situations and cases appears to be largely attributable to the reason that successful investigations are a source of symbolic capital. Symbolic capital is any property that observers recognise and value through the operation of their shared set of beliefs.⁸¹ Honour, respect, integrity, and credibility are all examples. Symbolic capital acts “like a veritable magical power” by disposing actors towards particular courses of action.⁸² The symbolic capital held by a judge, for example, disposes lawyers to bow before them in the courtroom or to respect and abide by their decisions. Symbolic capital therefore only has value to the extent that actors can “perceive, know, and recognise” it.⁸³ This ability to perceive, to know, and to recognise is produced through previous experiences which dispose people towards treating symbolic capital as valuable. Through these “socially constituted ‘collective expectations’ and beliefs”, symbolic capital becomes a source of power.⁸⁴

Successful investigations are an important source of symbolic capital in international criminal law for both prosecutors and their respective courts. Their symbolic value arises from the goals that they were intended to achieve. They are sources of symbolic capital for three reasons. First, thorough and complete investigations display prosecutors’ capabilities and capacities. They demonstrate that the prospect of prosecutions is not illusory; nor is the risk the prosecutor poses to the personal liberty of those who allegedly committed the conduct that they are investigating. Second, thorough and complete investigations therefore serve to re-distribute power between those

80 Interview with P7. Emphasis added.

81 Pierre Bourdieu, *Practical Reason: On the theory of action* (Stanford University Press, 1st ed, 1998), 47.

82 Pierre Bourdieu, *Practical Reason: On the theory of action* (Stanford University Press, 1st ed, 1998), 102-103.

83 Pierre Bourdieu, *Practical Reason: On the theory of action* (Stanford University Press, 1st ed, 1998), 102.

84 Pierre Bourdieu, *Practical Reason: On the theory of action* (Stanford University Press, 1st ed, 1998), 102. See also Pierre Bourdieu, *The Logic of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1990) [trans of: *Le sens pratique*], 119-120.

who allegedly commit criminal offences and prosecutors and their respective courts. They limit the scope for alleged perpetrators to conduct themselves with impunity, free from oversight or the potential for repercussions. Third, the act of conducting an investigation goes some way to validating the effort expended by state representatives and the money invested by states in prosecutors and their respective courts. In comparison, incomplete or superficial investigations, or no investigations at all, are less likely to provide validation on the basis that the effort and money that had been expended with the intention of the prosecutor and the court meeting their mandates had not resulted in the intended outcome, leaving the prosecutor and the tribunal tarnished by their ineffectiveness. These displays of capacity, capability, power, and effort serve to contribute to the prosecutor's respect and the respect afforded to their court by those who desire for their mandates to be executed. When a prosecutor considers the prospects of a successful investigation, they are therefore serving both their own interests and that of their tribunal.

3.2 Likelihood of arrest

Whether a potential defendant is likely to attend court has been considered relevant to selecting cases. As stated by one prosecutor, sometimes the decision whether or not to charge is “based upon whether you were ever going to get the defendant”.⁸⁵ “We wanted a real live person in the [ICTY's] prison”, said another.⁸⁶ “I felt it was critical before spending a lot of resources mounting individual cases”, yet another prosecutor remarked, to consider “through what means we were likely to manage to get them brought to the jurisdiction of the Tribunal”.⁸⁷ The ICC Prosecutor has also emphasised that the likelihood of a potential defendant entering custody (or attending court through other means) is relevant to selecting cases. In the *Policy Paper on Case Selection and Prioritisation*, she noted that the “potential to secure the appearance of suspects before the Court” is relevant to case selection.⁸⁸

85 Interview with P21. See also Interview with P7 (“[T]hat brings me to one of the criteria for the selection of cases in my opinion, is the likelihood of being able to bring the prosecutors to trial”); and Interview with P11 (“And defendant availability. Can we lay hold of him?”).

86 Interview with P10.

87 Interview with P7.

88 Office of the Prosecutor, ‘Policy Paper on Case Selection and Prioritisation’ (International Criminal Court Office of the Prosecutor, September 2016), 17.

There are two reasons why the likelihood of a potential defendant being arrested has affected how prosecutors select which cases to pursue. First, numerous international prosecutors have emphasised that gaining custody over defendants demonstrates the success of their court. This, like the prospects of a successful investigation referred to in the previous section, is strongly connected to the idea that the display of capacity, capability, power, and validating activity serves to contribute to the prosecutor's and the respective tribunal's symbolic capital. At the ICTY, for example, Goldstone's desire to demonstrate the success of the Tribunal affected his decision to request Germany defer the prosecution of Duško Tadić to the Tribunal. One ICTY prosecutor remarked that the issue of arrests "went to the issue of the very survival of the institution", and that "the very existence of the Tribunal in its early years was very much in doubt in part because of its perceived inability to deliver".⁸⁹ "With not a single defendant then in our holding cells in The Hague," noted Goldstone, "it became more than tempting to obtain an order compelling Germany to defer the prosecution of Tadić to the ICTY".⁹⁰ Such an application was filed on 12 October 1994.⁹¹ The *Duško Tadić* case "wouldn't have happened if he hadn't been arrested in Germany", remarked one prosecutor with knowledge of that indictment, adding "[i]t wasn't that there was ... any strategic policy or prosecutorial policy that led to *Tadić*".⁹² The *Duško Tadić* case was useful "to indicate that the Tribunal could work", the prosecutor observed, remarking that "there were many people who were sceptical as to whether it would operate".⁹³ ICTY prosecutors Mark Harmon (then a Senior Trial Attorney) and Fergal Gaynor (then a Legal Officer) have also written on the relevance of the ability to arrest an accused person to charging decisions, correctly observing that "[w]ithout the physical presence of an accused, trials cannot proceed" and adding that "[w]ithout trials, tribunals cannot function and the goals sought to be achieved by them will not be realised".⁹⁴

89 Interview with P7.

90 Richard Goldstone, 'The International Criminal Tribunals for the Former Yugoslavia and Rwanda' in David Crane, Leila Sadat, and Michael Scharf (eds), *The Founders* (Cambridge University Press, 1st ed, 2018) 55, 65.

91 *Prosecutor v Duško Tadić (Application for Deferral)* (ICTY, Office of the Prosecutor, IT-94-I-D, 12 October 1994).

92 Interview with P10.

93 Interview with P10.

94 Mark Harmon and Fergal Gaynor, 'Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings' (2004) 2(2) *Journal of International Criminal Justice* 403, 408.

David Crane, the former SCSL Prosecutor, was in a similar situation when he commenced his work in Freetown in 2003. One SCSL prosecutor reflected that if they commenced the OTP's prosecutorial agenda with people that were unobtainable, people would consider the process "foolish" and "pretty soon you'd run out of money because you've not shown yourself as having gotten anything done".⁹⁵ Another SCSL prosecutor explained that, when confronted with a choice between prosecuting a higher-level offender who had limited prospects of arrest and trial within an appropriate time frame and a lower-level offender with better prospects of entering custody, "you're going to pick the one you can so that you actually get a case done".⁹⁶

An absence of indictments against particular people can represent stark silences in prosecutorial conduct that can be difficult to ascribe to any particular rationale. Yet one such silence is arguably evidence of this reasoning in operation: the decision by SCSL prosecutors not to indict Benjamin Yeaten, the former head of the Liberian Special Security Services under Charles Taylor. He may not have been indicted based on the difficulty attached to bringing him into custody, casting doubts over the SCSL's success. Described by one prosecutor as "sort of Taylor's executioner", Yeaten was suspected of having killed opposition politician Samuel Dokie and his family, as well as Deputy Ministers John Yormie and Isaac Vaye.⁹⁷ In or around 2004, Yeaten approached the OTP via a surrogate in Lomé seeking to work with the prosecution as a cooperative witness.⁹⁸ OTP staff travelled to Lomé to meet with Yeaten at the national police offices and found him "chained to a tree, sitting in a chair in his underwear".⁹⁹ The OTP staff confirmed with the national police that Yeaten was free to leave, however Yeaten declined and provided a written statement to the effect that "he loved being there, the country was treating him great, and he wasn't under duress although he was handcuffed and chained to a tree sitting in his underwear".¹⁰⁰ In subsequent phone conversations, OTP staff told Yeaten that if he wished to cooperate with the Court, he would have to make his own way to Freetown as staff would not return to Lomé. Nevertheless, some time later, the prospect of *indicting* Yeaten seems to have emerged—and then been dismissed—by different SCSL OTP staff. "[H]ow am I going to

95 Interview with P9.

96 Interview with P9.

97 Interview with P9.

98 Interview with S30.

99 Interview with S30.

100 Interview with S30.

get Yeaten into custody before the Court is done?”, one prosecutor asked rhetorically.¹⁰¹ Additionally, they explained, indicting Yeaten would have raised serious issues concerning how a future trial would be funded and staffed, and recalled wondering “how am I going to tell people the Court has done its work when we still have this loose end?”.¹⁰² Yeaten, of course, was never indicted by the SCSL, and it would appear that this was in part due to the negative image an unenforced arrest warrant would have left on the Prosecutor and the Court.

Early ICC prosecutors felt the need to bring people into custody to demonstrate the success of their court, too. “Institutions need action”, remarked one prosecutor.¹⁰³ They observed that Moreno Ocampo wanted to have one accused in custody within two to three years of taking office, as he considered that ‘life would get easier’ after ‘crossing that river’ because the Court would be in operation.¹⁰⁴ Another prosecutor noted that there was “external pressure” from the state parties who wanted “to see results”,¹⁰⁵ a factor that appears to have been relevant to Moreno Ocampo’s executive decision to indict Lubanga.¹⁰⁶

Second, some ICTY prosecutors wanted to try people who would be physically present to minimise the risk that *in absentia* proceedings would become substitutes for trials—though this does not appear to have been an ongoing concern. Even though UN Secretary-General Boutros Boutros-Ghali swiftly dismissed the idea of trials *in absentia* before the ICTY even came into existence—noting in his report on the draft statute for the Tribunal that “[t]here is a widespread perception that trials *in absentia* should not be provided for in the statute as this would not be consistent with article 14 of the *International Covenant on Civil and Political Rights*”¹⁰⁷—prosecutors still felt that an inability to arrest suspects would lead to their institution allowing and conducting proceedings that might have loosely looked like

101 Interview with P9.

102 Interview with P9. The same prosecutor also indicated that they were unsure about whether Yeaten had made any deals with the SCSL OTP staff on their visit to him in Lomé in or around 2004. This aspect is discussed later in this chapter in section 5.4.

103 Interview with P1.

104 Interview with P1.

105 Interview with P5.

106 This is explained in more detail on page 116.

107 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704 (3 May 1993), [101]. See also Bartram Brown, ‘The International Criminal Tribunal for the Former Yugoslavia’ in M Cherif Bassiouni (ed), *International Criminal Law* (Martinus Nijhoff, 1st ed, 2008) vol 3 69, 94.

in absentia trials. These ‘Rule 61 proceedings’ were seen to have some advantages over not having trials at all. Mohammad Hadi Zakerhossein and Anne-Marie de Brouwer gave the idea lofty praise for its potential for allowing the public to be educated about the conflict while simultaneously protecting the Tribunal’s reputation and giving victims the opportunity to be heard.¹⁰⁸ Prosecutors were less enthusiastic. “We didn’t have any vehicle for *in absentia* trials, nor did we want them”, remarked one.¹⁰⁹ Another described that the issue of unenforced arrest warrants had sparked talk that the ICTY would be transformed to allow for *in absentia* proceedings which, they considered, “would have been a catastrophic abandonment of the entire project” by turning the institution into a “sort of a court of archives”.¹¹⁰

This issue is, fundamentally, one about the role of prosecutors as agents of procedural expressivism. Procedural expressivism involves symbolic, narrative, educative, and transformative functions.¹¹¹ Even though the practice of wanting to avoid *in absentia* proceedings may seem to be related to the production of the truth by cementing trials as discursive spaces in which contests over facts can occur and be adjudicated, this is not the case. In their discourse analysis of the *Karadžić* case, Tim Meijers and Marlies Glasius described how criminal trials act as forums in which different ‘discursive battles’ take place over the scene in which the conflict occurred; the role of the defendant within it; their purpose; and their acts.¹¹² There are compelling reasons to believe that the discursive battles within trials are unlikely to produce accurate or useful historical narratives. Mark Drumbl has identified that international criminal procedure’s narrative power is affected by selective truths, interrupted performances, management strategies, and the practice of plea bargaining.¹¹³ Tristram Hunt argued that it was “both intellectually circumspect and historically dangerous” to claim that tribunals can produce accurate historical narratives because they elevate events and isolate them from their historical context, and are staffed by people who,

108 Mohammad Hadi Zakerhossein and Anne-Marie de Brouwer, ‘Diverse Approaches to Total and Partial *In Absentia* Trials by International Criminal Tribunals’ (2015) 26(2) *Criminal Law Forum* 181, 187-189.

109 Interview with P13.

110 Interview with P7.

111 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 258.

112 Tim Meijers and Marlies Glasius, ‘Expression of Justice or Political Trial? Discursive battles in the Karadžić case’ (2013) 35(3) *Human Rights Quarterly* 720.

113 Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 1st ed, 2007), 173-179.

though “usually highly adept at discovering the limited narrative truth”, and ill-equipped to identify ‘moral truths’.¹¹⁴ Tim Kelsall, in his study of the role of culture, secrecy, and lying at the SCSL, argued that the truth produced during the CDF trial was “intimately connected to questions of power and resistance within the courtroom”.¹¹⁵

Once the idea that contested trials are better at producing ‘the truth’ than one-sided *in absentia* proceedings is put aside, one is left with what is essentially a power struggle to determine what the institutional response to alleged crimes should be detached from any claim about the merits of those responses. Any institutional response—or, for that matter, any response whatsoever—that people have to a conflict is always going to be the product of power struggles, and the desire to avoid *in absentia* proceedings shows that some prosecutors clearly saw themselves as being part of one. Their decision-making was therefore influenced by a desire to marginalise *in absentia* court proceedings and build momentum in favour of the traditional adversarial model of criminal justice. Incidentally, in light of the STL recently running itself broke after spending around a billion dollars on running *in absentia* trials with questions now being asked about whether it was anything more than “an expensive vanity project”,¹¹⁶ this appears to have been a well-founded concern.

3.3 Trial management

One clearly functional reason that affected the selection of situations was prosecutors wanting to have manageable trials and not overcomplicate things. An ICTY 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.¹¹⁷ This apparently “shocked” the staff, though upon reflection the prosecutor could

114 Tristram Hunt, ‘Whose Truth? Objective truth and a challenge for history’ (2004) 15(1) *Criminal Law Forum* 193, 195.

115 Tim Kelsall, *Culture under Cross-Examination: International justice and the special court for Sierra Leone* (Cambridge University Press, 1st ed, 2009), 23, and chapter 6.

116 Mia Swart, ‘“No gleaming success”: Special Tribunal for Lebanon to close because of funding shortage’, *Al Jazeera* (Online), 13 June 2021 <<https://liberties.aljazeera.com/en/special-tribunal-for-lebanon-to-close-its-doors/>>.

117 Interview with P8.

not recall how rigorously Groome's policy was applied.¹¹⁸ 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.¹¹⁹ Another ICTY prosecutor, reflecting on the Karadžić indictment, bore in mind when determining how to abbreviate the indictment that despite the best efforts on the part of prosecutors to keep things moving, Milošević ultimately died shortly before the verdict was delivered. They noted that the decision to abbreviate the Karadžić 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".¹²⁰

The selection of situations and cases has therefore also been influenced by a sense of personal responsibility. Prosecutors should not make life too difficult for themselves. If prosecutors focussed on more situations than they could manage, they run the risk of being seen as hopelessly ambitious and woefully ignorant of the difficulties of running international criminal trials. Moreover, the symbolic capital of their institution would not be helped if they people entrusted to run trials could not do so in an efficient and timely manner.

The length of international criminal proceedings is something of a perennial issue and one of the regular criticisms levelled against international criminal courts. In what is the most disgraceful violation of the maxim that 'justice delayed is justice denied', ICTR defendants Élie Ndayambaje and Joseph Kanyabashi were arrested on 28 June 1995 and did not see their appeal judgment delivered until over twenty years later on 14 December 2015.¹²¹ No one can reasonably justify that. Trials are, admittedly, much shorter—but still long enough to be of concern. Alette Smeulers, Barbora Holá, and Tom van den Berg calculated that the time from indictment to trial judgment at the ICTY was 5.6 years, and at the ICTR 7.6 years.¹²² If the time between arrest and trial judgment is considered, those numbers

118 Interview with P8.

119 Interview with P8.

120 Interview with P5.

121 *Prosecutor v Pauline Nyiramasubuko et al (Judgment)* (ICTR, Appeals Chamber, ICTR-98-42-A, 14 December 2015), [6]-[7].

122 Alette Smeulers, Barbora Holá, and Tom van den Berg, 'Sixty-Five Years of International Criminal Justice: The facts and figures' (2013) 13(1) *International Criminal Law Review* 7, 18.

obviously increase. On that basis, Krit Zeegers calculated that trials at the ICTY took on average six years and two months, and at the ICTR nine years and two months.¹²³ The popular consensus among everyone from practitioners to commentators, Alex Whiting observed in 2009, was that international criminal trials “have frequently been too slow”.¹²⁴ Fast proceedings, he argued, may be better at promoting deterrence, provide victims with catharsis, ensure evidence is not degraded, and keep the international community interested in the conflict and the work of the court.¹²⁵ Payam Akhavan even argued that long, after-the-fact court proceedings “are hardly reassuring to unarmed civilians facing the impending threat of atrocities by notorious militia”.¹²⁶

Of course, there are many reasons that international criminal trials are tediously slow. David Tolbert and Fergal Gaynor believed that the “overly long and unfocused indictments” had become something of a scapegoat for a raft of other issues affecting the expeditious conduct of proceedings, including pre-trial management, witness examination, and judicial notice of common facts.¹²⁷ There is no doubt that they are right, and the blame for this sorry state of affairs should not be placed only on their shoulders. However, given that international criminal courts have been roundly criticised for being incredibly slow, it is not surprising that prosecutors have sought to reduce the time taken for trials while maintaining the symbolic and representational power of the charges they are pursuing.

123 Krit Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and contextualisation* (PhD thesis, University of Amsterdam, 2015), 283.

124 Alex Whiting, ‘In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered’ (2009) 50(2) *Harvard International Law Journal* 323, 323-324.

125 Alex Whiting, ‘In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered’ (2009) 50(2) *Harvard International Law Journal* 323, 330-333. See also Richard Goldstone and Gary Bass, ‘Lessons from the International Criminal Tribunals’ in Sarah Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court* (Rowman and Littlefield, 1st ed, 2000) 51, 53.

126 Payam Akhavan, ‘Are International Criminal Tribunals a Disincentive to Peace? Reconciling judicial romanticism with political realism’ (2009) 31(3) *Human Rights Quarterly* 624, 641.

127 David Tolbert and Fergal Gaynor, ‘International Tribunals and the Right to a Speedy Trial: Problems and possible remedies’ (2009) 27(1) *Law in Context* 33, 35, and generally.

3.4 Wellbeing of an actual or potential defendant

The wellbeing of actual or potential defendants has also affected how prosecutors selected cases. This is most obvious with respect to their health. For example, one experienced ICTY prosecutor characterised the matter of health by reference to a desire to obtain a judgment, noting that they needed to consider an actual or potential defendant's health "if we wanted to make sure to have a judgment during the lifetime of those individuals".¹²⁸ They explained that this consideration became "even more important when Mladić was arrested, because he had had two strokes prior to his arrest, the last one a few days before his arrest, with his left side being paralysed", and that prosecutors needed to determine whether or not the scope of the indictment should be changed in light of those circumstances.¹²⁹ Initially, the scope was not, but prosecutors made another attempt to modify how the the accused was charged.¹³⁰ They applied for the *Mladić* indictment to be severed into two indictments (one for Srebrenica; the other for Sarajevo, the municipalities, and hostages), with the first trial to be conducted on the Srebrenica indictment.¹³¹ The prioritisation of the Srebrenica indictment was due to the comparative clarity of that envisaged case, as well as the prospect of "a maximum sentence at the end".¹³² A prosecutor noted the severance application was "[one-]hundred percent guided by the idea, 'oh, this guy is already half-dead, if I want to get him convicted I have to go for a smaller case'".¹³³

Prosecutors put this more diplomatically in their written severance motion. They drew the Chamber's attention to "Mladić's arrest at this late stage

128 Interview with P5.

129 Interview with P5.

130 The *Mladić* indictment (with the *Karadžić* indictment) had also been amended in 2002 to leave "only the most serious counts" with prosecutors arguing at the time that "these amendments were more in keeping with the current charging practices of the Office of the Prosecutor and reflected the evolving jurisprudence of the Tribunal": ICTY Chambers, 'Amended Indictment Against Radovan Karadžić Unsealed' (Press Statement, JL/PI.S/703-e, 14 October 2002) <<http://www.icty.org/en/press/amended-indictment-against-radovan-karadzic-unsealed>>; ICTY Chambers, 'Amended Indictment Against Ratko Mladić' (Press Statement, JP/PLS/711e, 12 November 2002) <<http://www.icty.org/en/press/amended-indictment-against-ratko-mladic>>.

131 *Prosecutor v Ratko Mladić (Consolidated prosecution motion to sever indictment, to conduct separate trials, and to amend resulting Srebrenica indictment)* (ICTY, Trial Chamber, IT-09-92-PT, 16 August 2011), [7].

132 Interview with P5.

133 Interview with P5.

of the Tribunal's mandate, the need to ensure justice for the victims, the desirability of commencing a trial as soon as possible, and the need to plan for the contingency that Mladić's health could deteriorate".¹³⁴ Prosecutors argued that two separate trials would "maximise the prospects of justice for the victims", allow for more effective management of the proceedings, and "best allow the proceedings to be adapted in case of unforeseen contingencies".¹³⁵ Defence opposed the motion.¹³⁶ Nevertheless, the Trial Chamber judges rejected the motion and observed that it had "received no medical reports to review and considers the parties' submissions in this respect to be speculative and unsubstantiated".¹³⁷ Additionally, the judges did not recognise "considerable interest within both the victim and international community in expeditiously having a judgment issued on the crimes alleged", based on the prosecutors' failure to properly articulate what they meant by "unforeseen circumstances" and support the argument with evidence.¹³⁸ Shortly after, prosecutors applied to reduce the scope of the indictment from 196 scheduled crimes to 106, and were successful in doing so.¹³⁹ This time, however, they did not refer to the health of the accused.

This decision appears to have been influenced by a desire on the part of prosecutors to fulfil the interests of victims in receiving vindication and redress, and put on the record their evidence regarding Mladić's involvement in the conflict. It also seems to have been informed by a desire to avoid a

¹³⁴ *Prosecutor v Ratko Mladić (Consolidated prosecution motion to sever indictment, to conduct separate trials, and to amend resulting Srebrenica indictment)* (ICTY, Trial Chamber, IT-09-92-PT, 16 August 2011), [2]. Clearly, there are arguments advanced in this motion that are inconsistent with P5's statement that the risk of Mladić dying and a desire for a conviction were "[one-]hundred percent" the guiding factors.

¹³⁵ *Prosecutor v Ratko Mladić (Consolidated prosecution motion to sever indictment, to conduct separate trials, and to amend resulting Srebrenica indictment)* (ICTY, Trial Chamber, IT-09-92-PT, 16 August 2011), [3].

¹³⁶ *Prosecutor v Ratko Mladić (Defence response in opposition to the consolidated prosecution motion to sever indictment, to conduct separate trials, and to amend resulting Srebrenica indictment)* (ICTY, Trial Chamber, IT-09-92-PT, 31 August 2011).

¹³⁷ *Prosecutor v Ratko Mladić (Decision on consolidated prosecution motion to sever the indictment, to conduct separate trials, and to amend the indictment)* (ICTY, Trial Chamber, IT-09-92-PT, 11 October 2011), [30].

¹³⁸ *Prosecutor v Ratko Mladić (Decision on consolidated prosecution motion to sever the indictment, to conduct separate trials, and to amend the indictment)* (ICTY, Trial Chamber, IT-09-92-PT, 11 October 2011), [30].

¹³⁹ *Prosecutor v Ratko Mladić (Prosecution submission on reduction of the indictment pursuant to rule 73bis(d))* (ICTY, Trial Chamber, IT-09-92-PT, 18 November 2011), [7], *Prosecutor v Ratko Mladić (Decision pursuant to rule 73bis(d))* (ICTY, Trial Chamber, IT-09-92-PT, 2 December 2011), [15].

repeat of *Prosecutor v Slobodan Milošević* and the criticism that prosecutors had, once again, been unable to conclude a trial before a high-ranking accused died in custody leaving their role in the conflict unresolved. The decision to sever the indictment and prioritise the situation in Srebrenica therefore fulfilled the superficially pragmatic goal of maximising the prospects of the trial being concluded before Mladić died, a goal which was underpinned by a sense of servitude to the alleged victims and the self-interest in avoiding an abortion of the trial upon his death.

In contrast to Mladić, where prosecutors wanted to prosecute him, prosecutors sought to withdraw their indictment against Đorđe Đukić when he was arrested and found to have terminal cancer. In their withdrawal motion, prosecutors argued that “it would be unjust and inhumane to force the accused to stand trial” and it was unlikely the accused would have survived it in any event.¹⁴⁰ After a single judge declined to hear the application on jurisdictional grounds,¹⁴¹ Trial Chamber judges rejected the application on the basis that “nothing in the *Statute* or *Rules* authorises the withdrawal for those reasons [argued by the Prosecution]”.¹⁴² Nevertheless, upon considering the “humanitarian reasons”, the judges authorised the provisional release of the accused.¹⁴³

The notion of wellbeing is broader than just the notion of health. It also encompasses other aspects of a defendant’s (or a potential defendant’s) life. For example, one prosecutor described how charging someone with a criminal offence can have devastating consequences for the personal and public lives, regardless of whether they are ultimately convicted. Prosecutors “can really damage someone’s life”, they remarked, reiterating shortly after that “[y]ou can really damage someone” to reinforce the point.¹⁴⁴ Another early ICTY prosecutor, reflecting on the speed at which external forces were trying to make the prosecutors produce an indictment, noted that care needed to be taken when exercising the charging discretion because “[i]t’s a hell of

140 *Prosecutor v Đorđe Đukić (Motion to withdraw the indictment)* (ICTY, Trial Chamber, IT-96-20-T, 19 April 1996), 2; Interview with P4.

141 *Prosecutor v Đorđe Đukić (Decision declining jurisdiction to withdraw an indictment)* (ICTY, Trial Chamber, IT-96-20-T, 19 April 1996). The single judge was of the opinion that as Đukić had already entered a plea, only the Trial Chamber could be properly seized of the application.

142 *Prosecutor v Đorđe Đukić (Decision rejecting the application to withdraw the indictment and order for provisional release)* (ICTY, Trial Chamber, IT-96-20-T, 24 April 1996).

143 *Prosecutor v Đorđe Đukić (Decision rejecting the application to withdraw the indictment and order for provisional release)* (ICTY, Trial Chamber, IT-96-20-T, 24 April 1996).

144 Interview with P3.

a responsibility to indict somebody as a war criminal”, as the effect of an indictment will be “upending their lives completely”.¹⁴⁵ Beyond the fact that charging a defendant casts over them the looming spectre of a criminal trial and demands that they invest time and resources into defending the allegations, Frédéric Mégret has claimed that proclaiming that a defendant has committed genocide, war crimes, or crimes against humanity is an act of “inchoate stigmatisation”.¹⁴⁶

With all this in mind, it is useful to use the concept of myth to explain the differences between the above decisions and the decision to proceed against Mladić. The concept of myth is used in several places throughout this thesis, but is explained once here. Myths, as understood by Roland Barthes, are a form of speech in which anything with meaning is transformed to represent something else.¹⁴⁷ The UN flag, for example, does not just represent the UN, but also ideals of peace and justice. Myths do not arise naturally, but are instead motivated by the observer’s “whole existence”.¹⁴⁸ Everything the myth observer has experienced informs the myths they will encounter. It is the cumulative power of an observer’s history that means that myths appear to arise naturally. As Barthes explained, “what causes mythical speech to be uttered is perfectly explicit, but it is immediately frozen into something natural; it is not read as a motive, but as a reason”.¹⁴⁹ Myths rob from the observer awareness of their own agency, making the mythical world appear not as their creation, but rather as natural, pre-existing, and factual.

Whereas prosecutors in *Mladić* appear to have emphasised the interests of the victims and their own interests, in the latter examples they appear to have instead emphasised the messages of compassion, humanity, and morality. There are two interests at play here. On the one hand, there are a defendant’s interests. On the other, there are the prosecutor’s interests. The two are not necessarily mutually exclusive. In some situations, they are served through the same action. For example, in *Dukić*, the defendant’s interests in being released from the Tribunal’s custody in the last stage of his life *and* the Prosecutor’s interest in not being seen as immoral or lack-

145 Interview with Pto.

146 Frédéric Mégret, ‘Practices of Stigmatisation’ (2013) 76(3) *Law and Contemporary Problems* 287, 300.

147 This thesis does *not* use ‘myth’ in the sense of stories or narratives, as it was used by people such as Claude Lévi-Strauss (or Stephen Fry).

148 Roland Barthes, *Mythologies* (Vintage, 3rd ed, 2009), 142.

149 Roland Barthes, *Mythologies* (Vintage, 3rd ed, 2009), 154.

ing compassion were both served by the decision not to proceed with his case. Prosecutors have therefore been conscious of how their decisions affect the wellbeing of accused and how their treatment of defendants produced myths that reflect on themselves and affect their own symbolic capital, both in terms of their compassion and morality, but also in terms of their ability to meet the interests of victims.

4 Normative Considerations

4.1 Setting an historical record

Hannah Arendt once claimed that trials have no place in making historical records: no matter how noble this “ulterior purpose” is, she argued, nothing should distract the law from its main business of weighing charges, rendering judgments, and meting out condign punishments.¹⁵⁰ Irrespective of whether criminal trials should produce historical records (*plural*), there is no escaping the fact that they do.¹⁵¹ Aldo Zammit Borda regarded international criminal tribunals to be “epistemic engines” that “systematically and inevitably produce knowledge”.¹⁵² Richard Wilson similarly observed that “it is not a matter of whether the parties produce a historical narrative, but how, to what extent, and using which methods... and with what consequences for the international judges’ determination of guilt or innocence”.¹⁵³

This capacity to produce ‘truth’ has even emerged as one of the main arguments in favour of international criminal trials in the first place. Gary Bass claimed that debunking false histories and establishing the truth are

150 Hannah Arendt, *Eichmann in Jerusalem: A report on the banality of evil* (Penguin, 1st ed, 2006), 253.

151 “Any trial involving top military or political leaders, where the trial record incorporates thousands of documents and the testimony of hundreds of witnesses, can hardly avoid creating a historical record, regardless of the wishes of its protagonists”: Fergal Gaynor, ‘Uneasy Partners: Evidence, truth, and history in international trials’ (2012) 10(5) *Journal of International Criminal Justice* 1257, 1262. See also Barrie Sander, ‘The Method is the Message: Law, narrative authority, and historical contestation in international criminal courts’ (2018) 19(1) *Melbourne Journal of International Law* 299, 300.

152 Aldo Zammit Borda, ‘History in International Criminal Trials: The “crime-driven lens” and its blind spots’ (2020) 18(3) *Journal of International Criminal Justice* 543, 544.

153 Richard Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 1st ed, 2011), 20-21.

“the most important functions of a war crimes tribunal”.¹⁵⁴ Court principals regularly tout the truth-recording features of trials when talking about the benefits of their work.¹⁵⁵ If the preservation of history is held out as one of the primary benefits of international criminal trials, then the role of the prosecutor is critical in determining how these histories are determined and recorded. Ronen Steinke argued that prosecutors are “the central policy-maker with regard to the function of international criminal justice as a ‘referee’ between fiercely opposed historical narratives”.¹⁵⁶

Yet it would be naïve to assume that the international criminal justice process can produce a definitive and accurate account of past events. There now appears to be general agreement within the academic community that the claim that tribunals produce ‘the historical record’ lacks sufficient nuance. Several of the reasons why a more refined understanding of the relationship between history and trials is required have nothing to do with prosecutors, but are features of the criminal justice system. For example, international criminal justice is concerned with individual responsibility, which inherently silences questions of group liability.¹⁵⁷ Their ‘crime-driven lens’ limits how judges interpret events and the scope of their attention, causing blind spots and gaps in narratives.¹⁵⁸ In addition, Richard Wilson highlighted that the approach to evidence at international criminal tribunals is ill-equipped to embrace history, because it decontextualises events and gives prominence to documentary evidence at the expense of other historical accounts.¹⁵⁹ Further, Mark Drumbl observed that rules of evidence “favour the production of logical and microscopic truths over the dialogic and experiential truths that emerge phenomenologically from restorative justice initiatives”.¹⁶⁰ Truth in the context of international criminal trials is bi-

154 Gary Bass, *Stay the Hand of Vengeance: The politics of war crimes tribunals* (Princeton University Press, 1st ed, 2000), eBook.

155 Barrie Sander, ‘History on Trial: Historical narrative pluralism within and beyond international criminal courts’ (2018) 67(3) *International and Comparative Law Quarterly* 547, 549.

156 Ronen Steinke, *The Politics of International Criminal Justice: German perspectives from Nuremberg to The Hague* (Hart, 1st ed, 2012), 38.

157 Barrie Sander, *Doing Justice to History: Confronting the past in international criminal courts* (Oxford University Press, 1st ed, 2021), 62.

158 See, generally, Aldo Zammit Borda, ‘History in International Criminal Trials: The “crime-driven lens” and its blind spots’ (2020) 18(3) *Journal of International Criminal Justice* 543.

159 See, generally, Richard Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 1st ed, 2011).

160 Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University

ased towards that which is produced through a surgically-precise evidential analysis.

Yet there are indisputably also areas where prosecutors influence the historical accounts produced through the criminal justice process. Capacity constraints mean that prosecutors need to be selective in their choice of situations and cases. Barrie Sander has identified two forms of prosecutorial selectivity that inform the production of historical records: factional selectivity (concerning the extent to which individuals from groups are prosecuted) and functional selectivity (concerning the role that indictees played within a conflict).¹⁶¹ Payam Akhavan, a former legal advisor to the ICTY OTP, argued that the demands of selectivity mean that prosecutors should construct the “optimal truth” by constructing an “overall picture of the conflict that provides optimal cathartic and reconciliatory potential”.¹⁶² Individual defendants are transformed into symbols of the wrongdoing of uncharged others, leaving their liability formally undetermined.¹⁶³

A desire to produce an historical record has informed the selection of situations. In this light, one prosecutor expressed that they were in favour of prosecuting as many situations as they could. “The question is”, they began, “once you’ve got enough evidence to send the crook off to Devil’s Island for the rest of his life, why waste any more resources on him when you can use those resources to see more people put behind bars?”.¹⁶⁴ They provided two answers. The first was that the interests of the victims would not be served by such an approach; but also that it would not help to produce “as complete a record” as possible.¹⁶⁵ They recalled that during the *Milošević* case, the Prosecutor would be criticised by people asking “Why did you bother with these huge indictments? Why 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

Press, 1st ed, 2007), 176.

161 Barrie Sander, *Doing Justice to History: Confronting the past in international criminal courts* (Oxford University Press, 1st ed, 2021), 77.

162 Payam Akhavan, ‘Justice in The Hague, Peace in the Former Yugoslavia? A commentary on the United Nations War Crimes Tribunal’ (1998) 20(4) *Human Rights Quarterly* 737, 774-775.

163 See Gary Bass, *Stay the Hand of Vengeance: The politics of war crimes tribunals* (Princeton University Press, 1st ed, 2000), eBook.

164 Interview with P11.

165 Interview with P11.

cases?”¹⁶⁶ The answer, in their eyes, was no. “But did we even consider the alternative?... the answer is no. We didn’t”, they went on, because in their eyes there was no situation that would have definitely convicted him.¹⁶⁷

By considering the historical record in their selection of situations, the prosecutor was therefore concerned with their role as a narrative pioneer and the importance of trials as records of history. However, irrespective of the good intentions that underpin the desire to select situations so as to produce the most complete record of history as possible, it should be recalled that these choices will always be affected by policy considerations. Steinke observed that “[t]he chances of making such choices with any claim to quasi-mathematical objectivity are regrettably slim where ‘historical truth’ and proportions of guilt are concerned”.¹⁶⁸ Coupled with the inherent limitations on the power of international criminal tribunals to produce accurate, complete, and balanced records of the past, there may be good reasons for prosecutors to deemphasise the importance of recording history and embrace other policy motivations that inform their choices of situations and cases.

4.2 Norm expression

Like the recording of history, norm expression has also emerged as one of the more recent justifications for international criminal justice.¹⁶⁹ Norm expression involves the affirmation, projection, and internalisation of moral and legal standards and practices.¹⁷⁰ It is performed by what Martha Finnemore and Kathryn Sikkink called ‘norm entrepreneurs’.¹⁷¹ Contrary to what Finnemore and Sikkink argued, norm entrepreneurs do not require a special intention or institutional platform. As Meijers and Glasius observed, “the things we do and say, and the way we do and say them, convey messages to

166 Interview with P11.

167 Interview with P11.

168 Ronen Steinke, *The Politics of International Criminal Justice: German perspectives from Nuremberg to The Hague* (Hart, 1st ed, 2012), 9.

169 See, generally, Tim Meijers and Marlies Glasius, ‘Trials as Messages of Justice: What should be expected of international criminal courts?’ (2016) 30(3) *Ethics and International Affairs* 429.

170 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 85-87.

171 Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organisation* 887, 896.

others”.¹⁷² Norm entrepreneurship can occur intentionally or unintentionally, by all individuals. The concept of norm entrepreneurship is useful to understanding the role of criminal justice within a society. Émile Durkheim argued that a criminal is not an “utterly insociable creature”, but rather plays a normal role in social life because their crimes demonstrate that “collective sentiments are not only in the state of plasticity necessary to assume a new form, but sometimes it even [contribute] to determining beforehand the shape they will take on”.¹⁷³ When prosecutors and judges engage in norm expression, they are engaging in counter-performances to “the horror and shock caused by criminality as a phenomenon”.¹⁷⁴

Prosecutors have sought to express norms through the exercise of their discretion to select situations and cases. In the most broad and abstract sense, one prosecutor recognised that the act of charging a defendant is “important for norm development”.¹⁷⁵ Two types of norms are often referred to in international criminal law discourse and by prosecutors themselves. The first norm relates to criminal procedure. Through the act of charging a defendant, international criminal prosecutors aspire to ‘end impunity’.¹⁷⁶ They also hope it will transform public morality by deterring would-be perpetrators from criminality.¹⁷⁷ Yet despite their prominence in international criminal law discourse, it is difficult to see how these desires to affect procedural and moral normative transformation have affected prosecutors’ decisions to select situations and cases, because they are simply too abstract and any situation or case selection decision could reasonably be argued to contribute to the development of these norms. If these ‘norms’ do have a value, it is in giving those who believe in international criminal law a superficial and rhetorically attractive sense of purpose, rather than the capacity of these ‘norms’ to practically affect decision-making.

There are, however, three areas where there is a clearer causal link be-

172 Tim Meijers and Marlies Glasius, ‘Trials as Messages of Justice: What should be expected of international criminal courts?’ (2016) 30(3) *Ethics and International Affairs* 429, 429.

173 Émile Durkheim, *The Rules of Sociological Method* (W D Halls, Free Press, 1st ed, 1982) [trans of: *Les règles de la méthode sociologique*], 102.

174 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 87.

175 Interview with P24.

176 Ending impunity was specifically mentioned in Interview with P1, Interview with P3, Interview with P5, Interview with P19, Interview with P22, and Interview with P28.

177 Deterrence was mentioned in Interview with P1, Interview with P9, Interview with P14, and Interview with P15.

tween aspirations of normative transformation and how the discretion to select situations and cases has been, or will be, exercised. The first is with respect to crimes against children. In her 2016 *Policy on Children*, Bensouda committed to bringing charges “wherever the evidence permits” of conscription and enlistment of children into armed groups and their deployment in hostilities; as well as ‘considering appropriate charges’ related to crimes that disproportionately affect children.¹⁷⁸ While there have not been any charges filed that reflect the implementation of this policy since it was released in November 2016, the practice of ICC prosecutors does suggest that they are giving at least some attention to prosecuting situations and cases that concern conduct particularly affecting children. 13 out of the 37 defendants ICC prosecutors have charged are alleged to have committed crimes specifically referring to children in the wording of the relevant charges. While this sounds significant, only 14 out of the ICC prosecutors’ 429 charges fall into this category. With such limited practice, it is not possible to say whether a desire to bring about procedural or normative transformation with regard to crimes against children has materially affected the situations or cases ICC prosecutors are deciding to pursue.

The second, perhaps most well-known, area concerns sexual and gender-based violence. Prosecutors, in particular those from the ICTY and the ICC, have invested significant effort into improving their practices with regard to this class of offences. Specifically, they have directed their attention towards investigating and prosecuting those situations and cases in which there are allegations of sexual and gender-based violence. One ICTY prosecutor 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 violence. Having said that”, they continued, “it was such a significant crime, and it needed to be an integral part of the overall case”.¹⁷⁹ In a similar vein, 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”.¹⁸⁰ Had that decision not been taken, the same

178 Office of the Prosecutor, ‘Policy on Children’ (International Criminal Court Office of the Prosecutor, November 2016), 34-35.

179 Interview with P8.

180 Interview with P7.

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”.¹⁸¹ Bensouda adopted a comparable approach under which her prosecutors would lay charges for sexual and gender-based crimes “wherever there is sufficient evidence to support such charges”,¹⁸² irrespective of the number of alleged offences. One SCSL prosecutor described that gender-based crimes were a “cornerstone” of the SCSL prosecutors’ indictments, and that they were “sending a signal to the world that if you go after women, and children, you’re going to pay a price for it”.¹⁸³

The third, arguably more recent, focus is on cultural heritage. In recent years, there has been an increased interest in this type of offending. This appears to have been in part driven by Bensouda’s decision to prosecute Ahmad Al Faqi Al Mahdi and Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud for the destruction of various historic monuments and buildings in Timbuktu. That said, she was not the first international prosecutor to bring charges for attacks of this nature. One ICTY prosecutor appeared keen to point out that although the Timbuktu prosecutions were presented as “the first time ever that cultural heritage [was] prosecuted at a tribunal”, “we [had] prosecuted the destruction of cultural heritage already many times before but it [was] less visible”.¹⁸⁴ While this is true in the sense that ICTY prosecutors had pursued charges for the shelling of Dubrovnik and of the Stari Most (the famous Mostar Bridge in Bosnia and Herzegovina that was destroyed in 1993), the destruction of significant buildings, and the ruining of various libraries,¹⁸⁵ offences of this nature were “overwhelmingly” charged as acts of persecution as a crime against humanity rather than the more particular war crime of destruction or wilful damage “to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” (under article 3(d) of the *Statute*).¹⁸⁶ Charging the Timbuktu attacks under the more

181 Interview with P7.

182 Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (International Criminal Court Office of the Prosecutor, June 2014), 6.

183 Interview with P2.

184 Interview with P5.

185 See, for an overview, Serge Brammertz et al, ‘Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY’ (2016) 14(5) *Journal of International Criminal Justice* 1143.

186 Haydee Dijkstal, ‘Destruction of Cultural Heritage Before the ICC: The influence of human rights on reparations proceedings for victims and the accused’ (2019) 17(2)

specific war crimes charge was therefore arguably indicative of a desire to give these crimes greater prominence. In this respect, Bensouda explained in her March 2021 *Draft Policy on Cultural Heritage* that the *Al Mahdi* case “was symbolic and sent a strong message that intentional targeting of cultural heritage is a serious crime affecting both the local as well as the international community as a whole that should be duly punished”, and that the Office “can play a central role in galvanising and supporting efforts to document and preserve cultural heritage at risk of destruction”.¹⁸⁷

The selection of situations and cases demonstrates that prosecutors have engaged in all three aspects of norm expression. First, they have *affirmed* norms. Carsten Stahn identified that norm affirmation is closely related to the “affirmation of global humanity”.¹⁸⁸ The rhetoric used by prosecutors with regard to the above three areas demonstrates a common appeal to universal standards. Each of the three policy papers begins with a statement affirming that the conduct to which they relate are of concern to humankind. They therefore situate a prosecutor’s choices in the context of an ongoing historical story; while also confirming that these stories are common to everyone. The emphasis on sexual and gender-based crimes forms part of a narrative in which the international community has been progressively seeking to end impunity for those who commit them;¹⁸⁹ crimes against children are “unimaginable atrocities that deeply shock the conscience of humanity”;¹⁹⁰ and the “protection of cultural heritage has been a long-standing concern of the international community”.¹⁹¹ Second, they have *projected* these norms. Stahn argued that “[n]orm projection labels conduct as an offence and involves behavioural commands”, and pointed in support to David Luban’s claim that the “fundamental message of international criminal norms is that the Great Game of politics, deeply embedded in the human condition, must never again cross moral lines that heretofore

Journal of International Criminal Justice 391, 395.

187 Office of the Prosecutor, ‘Draft Policy on Cultural Heritage’ (International Criminal Court Office of the Prosecutor, 22 March 2021), [6], [9].

188 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 108.

189 Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (International Criminal Court Office of the Prosecutor, June 2014), [1].

190 Office of the Prosecutor, ‘Policy on Children’ (International Criminal Court Office of the Prosecutor, November 2016), 2.

191 Office of the Prosecutor, ‘Draft Policy on Cultural Heritage’ (International Criminal Court Office of the Prosecutor, 22 March 2021), [1].

it has always crossed”.¹⁹² Robert Sloane argued that by punishing perpetrators, “the international community attempts authoritatively to disavow that conduct”.¹⁹³ When prosecutors declare their focus on a particular class of offences, they put the wheels in motion to realise the expressive potential of punishment. Finally, they have attempted to *internalise* norms by grounding them in the international community’s common identity and relying on the pathetic¹⁹⁴ effect of ‘we’ discourse to “build solidarity and create a responsive community”.¹⁹⁵ This act of engaging with their role as norm entrepreneurs demonstrates that prosecutors have accepted a relationship to humanity as a whole in which they have hoped to use their choices to affirm, project, and internalise moral and legal standards.

4.3 Representing criminality

Prosecutors have been conscious of representing criminality in their selection of situations and cases. As one prosecutor pondered, “[a]re we responding to what the affected community suffered?”.¹⁹⁶ The desire to represent criminality has affected the selection of situations and cases in four ways. The first and most well-known way is that prosecutors have chosen to select cases against those ‘most responsible’ for the alleged crimes. 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”¹⁹⁷ without spending resources on multiple prosecutions of lower-ranked individuals to achieve the same intended representative effect. Second, they have considered the temporal spread of situations. An SCSL prosecutor, for example, noted that they tried to ensure their in-

192 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 130; and David Luban, ‘State Criminality and the Ambition of International Criminal Law’ in Tracy Isaacs and Richard Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press, 1st ed, 2011) 61, 75.

193 Robert Sloane, ‘The Expressive Capacity of International Punishment: The limits of the national law analogy and the potential of international criminal law’ (2007) 43(1) *Stanford Journal of International Law* 39, 71.

194 From *pathos*—not in the sense of pity or inadequacy.

195 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 153.

196 Interview with P14.

197 Interview with P12.

dictments represented the alleged crimes “*in tempore*”.¹⁹⁸ Third, they have considered the structural means through which alleged offences were committed when selecting situations and cases. The need for such an approach was expressly adopted at the ICTR, where Hassan 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 noted, “to include all of the various groups represented in the atrocities to ensure that different types of involvement were covered”.¹⁹⁹ As such, ICTR prosecutors pursued cases concerning the government, military, clergy, and the media; as well as lower-level territory administration officials such as the *bourgmestres* and mayors.²⁰⁰ Finally, prosecutors have selected situations to ensure their cases represent the geographic spread of alleged crimes. With respect to the work of the ICTR, one prosecutor noted that the Prosecutor 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”.²⁰¹ A failure to represent the geographic spread of alleged offences has also been considered as ‘unfair’. One prosecutor recounted that the ICTY Prosecutor 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”.²⁰² The same prosecutor considered that “it would have been unfair just to pick” a limited number of areas on which to focus.²⁰³ 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.²⁰⁴

These four methods of representing criminality can be seen through the lens of myth. When prosecutors select situations and cases with these four considerations in mind, they are consciously intending to produce myths. Myth is what makes situations and cases appear representational of other

198 Interview with P5.

199 Alex Obote-Odora, ‘Case Selection and Prioritisation Criteria at the International Criminal Tribunal for Rwanda’ in Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl Academic ePublisher, 2nd ed, 2010) 45, 56.

200 Interview with P9.

201 Interview with P9.

202 Interview with P8.

203 Interview with P8.

204 Interview with P8.

conduct and other individuals. These choices are intended to trigger messages in observers of vindication, validation, and redress. The representational selection of situations and cases can therefore be seen in two ways. It is either an act of altruism, aimed at inspiring in observers these feelings with no expectations as to how observers will later reflect on their work. Or, it is a selfish act intended to enhance a prosecutor's symbolic capital as observers attribute these feelings of vindication, validation, and redress to the prosecutor rather than to themselves through their ignorance of the mythical process through which these meanings that they have ascribed to the prosecutor's conduct have been produced. The reality is likely a mixture of both. Representational charging therefore serves not only the interests of victims and those who desire the vindication, validation, and redress of alleged victims, but also those interests of the prosecutor and their respective court in being attributed as the reason for these positive feelings.

5 Strategic Considerations

5.1 Existential threats

ICTY and ICC prosecutors have selected situations and cases in order respond to existential threats posed to their respective institutions and the field of international criminal law. In practice, these threats have been met by prosecutors making decisions quickly. First, the selection of situations and cases has been motivated by a desire to stave off looming budget cuts. This was the case in the early days of the ICTY. Goldstone recognised in 1995 that a "sense of urgency has arisen with regard to the first indictments" at the Tribunal.²⁰⁵ He had been placed in a difficult position. By November of 1994, high-level OTP staff had been informed that the UN Advisory Committee on Administrative and Budgetary Questions ('ACABQ') was "eager to cut down on any requests [the Prosecutor] made" for funds and "that if [Goldstone and his staff] really wanted to convince the ACABQ that [they] were entitled to a decent budget, [they] should have an indictment out".²⁰⁶ As Goldstone stated, "I was left under no doubt that I should not expect a successful result from the ACABQ if no indictment were issued

²⁰⁵ Richard Goldstone, 'The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action' (1995) 6(5) *Duke Journal of Comparative and International Law* 5, 8.

²⁰⁶ Interview with Pto.

prior to the... meeting”.²⁰⁷

In the circumstances of these pressures, he “exercised discretion in terms of prosecuting lower-level perpetrators”.²⁰⁸ By Goldstone’s own concession, “[Dragan] Nikolić was not an appropriate first person for an indictment by the first international war crimes tribunal, but we had no option. In order for the work to continue, we had to get out an indictment quickly”.²⁰⁹ Goldstone and Deputy Prosecutor Graham Blewitt’s appearance before the ACABQ occurred on 15 February 1995, 103 days after Nikolić was indicted.²¹⁰ The decision to indict Nikolić prior to the ACABQ meeting “worked” and the ICTY OTP received the Prosecutor’s requested budget, though the issuance of the indictment was, in the words of one prosecutor, “hardly for any, what I think a normal prosecutor would decide was a meritorious reason”.²¹¹

The prosecutors who were concerned with the financial sustainability of their tribunals therefore saw indictments as producing the myths that their tribunal was functioning effectively and competently. Indictments had a powerful symbolic effect. They saw them as demonstrating to state representatives that public funds were being spent in the manner intended and that the institution was fulfilling its mandate and had the ongoing potential to do what it was intended to do. As such, indictments provided the means through which prosecutors could act as guardians over their institution and mitigate the risk posed to them by their funders.

Second, the selection of situations and cases has been informed by a hope that prosecutors could maintain public confidence in, and demonstrate the relevance of, their respective courts. At the ICTY in 1995, Gold-

207 Richard Goldstone, ‘The International Criminal Tribunals for the Former Yugoslavia and Rwanda’ in David Crane, Leila Sadat, and Michael Scharf (eds), *The Founders* (Cambridge University Press, 1st ed, 2018) 55, 64.

208 Interview with P4.

209 Richard Goldstone, ‘Prosecuting Rape as a War Crime’ (2002) 34 *Case Western Reserve Journal of International Law* 277, 281.

210 *Prosecutor v Dragan Nikolić (Indictment)* (ICTY, Office of the Prosecutor, IT-94-2-I, 4 November 1994). Goldstone has suggested the meeting took place in November 1994 (Richard Goldstone, ‘The International Criminal Tribunals for the Former Yugoslavia and Rwanda’ in David Crane, Leila Sadat, and Michael Scharf (eds), *The Founders* (Cambridge University Press, 1st ed, 2018) 55, 64), but this seems unlikely as the ACABQ had no record of Goldstone and Blewitt appearing on any other day in that period (Advisory Committee on Administrative and Budgetary Questions, *List of Witnesses* (15 February 1995) (on file with author); Email from Januel Nalupta to Cale Davis, 18 October 2018).

211 Interview with P10.

stone demonstrated the relevance of this consideration by observing that “there have been fairly widespread allegations of cynicism and a lack of resolve on the part of the international community and the United Nations with regard to the Tribunal being rendered effective”, adding that “the value of the Tribunal is not apparent”.²¹² While, he argued, that prosecutors would benefit from having greater time to prepare the indictments, they would “have to compromise in this regard in order to get indictments out quickly”.²¹³ Another prosecutor also observed that the General Assembly, Security Council, international community in a broad sense, as well as the international media had an expectation “that the Tribunal be seen to be doing what it was set up to do, namely to bring people to justice for the crimes that they had committed”.²¹⁴ In this light, it is interesting to note one prosecutor’s observation that Goldstone “was somebody who had the ability to create the illusion that we were doing things”, observing that “you had to try and do something to keep in the public eye and if you didn’t have anything better, that was the way in which it had to work”.²¹⁵

At the ICC, Moreno Ocampo also demonstrated the relevance of this consideration. Mark Kersten has claimed that the opportunity to commence an investigation in northern Uganda, following Ugandan President Yoweri Museveni’s 2003 self-referral to the OTP, was seen by OTP staff as “an important opportunity to demonstrate the vitality of the Court” and to throw cold water on claims the court was ineffective and incapable of executing its mandate.²¹⁶ Kersten cited an anonymous OTP staff member as saying “the Court needed a first successful case on a notorious situation, sooner rather than later, and northern Uganda appeared to be the better candidate for that purpose”.²¹⁷

When the UN Security Council referred the *Situation in Libya* to the ICC on 26 February 2011,²¹⁸ Moreno Ocampo wanted to move quickly in order to demonstrate the relevance of the ICC. The investigation was for-

212 Richard Goldstone, ‘The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action’ (1995) 6(5) *Duke Journal of Comparative and International Law* 5, 8.

213 Richard Goldstone, ‘The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action’ (1995) 6(5) *Duke Journal of Comparative and International Law* 5, 8.

214 Interview with P4.

215 Interview with P13.

216 Mark Kersten, *Justice in Conflict* (Oxford University Press, 1st ed, 2016), 173.

217 Mark Kersten, *Justice in Conflict* (Oxford University Press, 1st ed, 2016), 172.

218 SC Res 1970 (2011), UN SCOR, UN Doc S/Res/1970 (2011) (26 February 2011), [4].

mally opened on 2 March 2011, just four days later, in what was a blindingly fast decision in comparison to speed at which other preliminary examinations have moved.²¹⁹ One prosecutor, noting that “no one saw [the referral] coming”, recounted how they saw Moreno Ocampo’s thinking regarding the speed of the investigation:

[T]oday we are the, you know, the flavour of the day. Today everyone is looking at us and paying attention to us and we’re the big deal today. But this is not going to last. The attention to us, the interest in us, the support for us, is not going to last. We have to move quickly to be relevant. We can’t sit on this and take forever, because the events are going to move quickly and people are going to lose interest.²²⁰

The prosecutor observed that prosecutors had a “strategic priority to enhance the legitimacy of the institution to move quickly”.²²¹ Regardless of whether the legitimacy of the institution was helped or hindered by Moreno Ocampo’s approach to the referral, it seems that Moreno Ocampo understood that if he made the decision to pursue an investigation quickly, it would help to ensure that the Court had a demonstrated relevance.

These examples reveal that prosecutors understood indictments to produce myths within a community broader than simply the representatives of states who were funding their institutions. Among a different population, indictments were understood to produce different myths for very much a different purpose. Within the public at large, they could symbolise power, authority, legitimacy, and—most importantly—relevance. The issuance of an indictment can be seen as both a magnet and a plea for attention: the act is a boast of power and authority; but it is also a cry for legitimacy and relevance. In the circumstances described above, indictments could therefore be seen as an expression of internal self-doubt masked by external confidence. They demonstrate the existential fear of a tribunal slipping into the backwaters of international relations and international criminal law retreating to the shadows of the previous decades, and how prosecutors have adopted the role of guardians over their court and the field at large.

219 *Annex to Decision Assigning the Situation in the Libyan Arab Jamahiriya to Pre-Trial Chamber I* (ICC, Office of the Prosecutor, ICC-01/11-1-Anx, 2 March 2011).

220 Interview with P24.

221 Interview with P24.

5.2 Avoiding accusations of bias

Probably the most controversial matter that has possibly influenced how prosecutors have selected situations and cases is the desire to avoid accusations of bias or partiality between groups. Prosecutors have both suggested that this consideration has and has not affected the choices prosecutors made.

Some prosecutors have been conscious of wanting to avoid accusations of bias or favouritism when exercising their discretion to select situations and cases. At the ICTR, for example, Hassan Jallow recognised the 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.²²²

Yet when it comes to national or military groups, the situation is more controversial. The ICTY had arguably the worst reputation when it came to perceived bias and inequality. The institution as a whole was the subject of heavy criticism for its so-called 'anti-Serb bias' which affected its ability to achieve social change.²²³ A 2011 study conducted by Ipsos for the OSCE and the Belgrade Centre for Human Rights found that 40% of the sampled 1,407 respondents²²⁴ believed that the primary purpose of war crimes trials before the ICTY was to "put the blame for war sufferings on Serbs".²²⁵

222 Hassan Jallow, 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 *Journal of International Criminal Justice* 145, 153.

223 See, for a review of public perception towards the ICTY, Marko Milanović, 'The Impact of the ICTY on the Former Yugoslavia: An anticipatory postmortem' (2016) 110(2) *American Journal of International Law* 233.

224 The sample was based on the following:

Target population: citizens of Serbia of the age of 16 and up. The population was defined based on the data from the 2002 census, and vital statistics.

Type of sample: three-phase, stratified, random representative sample. The sample was expanded with three groups of particular interest (citizens aged from 16 - 23, Albanians and Bosniaks/Muslims) in order to enable a reliable assessment of results for these population groups and their comparison with the average of the overall population of Serbia.

OSCE and the Belgrade Centre for Human Rights, *Attitudes towards war crimes issues, ICTY and the national judiciary* (OSCE, 1st ed, 2011) <<https://www.osce.org/serbia/90422>>, 2

225 OSCE and the Belgrade Centre for Human Rights, *Attitudes towards war crimes issues, ICTY and the national judiciary* (OSCE, 1st ed, 2011) <<https://www.osce.org/serbia/90422>>, 2

73% of respondents believed that the ICTY had a “different attitude towards individuals indicted for war crimes depending on their ethnicity”.²²⁶ Another study found that 56% of Serbian respondents believed that the ICTY was biased.²²⁷ The ICTR cannot escape the criticism of bias either. Sara Kendall and Sarah Nouwen, while dissecting the notion of ‘legacy’ at a time when staff of the *ad hoc* tribunals were feverishly trying to document their achievements on websites, in books, speeches, and videos before their courts were consigned to the history books, bitinglly observed that “RPF impunity also forms part of the Tribunal’s legacy”.²²⁸ The ICC is also regularly subject to bias critiques (from the 2003 referral of the Situation in Uganda²²⁹ to the critique that it is a tool of Western neocolonialism²³⁰).

For its part, the ICTY Appeals Chamber rejected the idea that charging decisions could be used to demonstrate parity between groups. In the *Čelebići* Appeal, the judges were asked by Esad Landžo to confirm that he had been the target of a selective prosecution “simply because he was the only person the Prosecutor’s office could find to ‘represent’ the Bosnian Muslims”.²³¹ In rejecting this ground of appeal, the judges noted that suc-

org/serbia/90422>, 16. This was the most prominent response. The equal-second responses were “[t]o show that war crimes can not go unpunished, thus spreading the idea of peace and tolerance among people” (17%) and “[t]o meet the demand of international community” (17%). The target sampled population “citizens of Serbia of the age of 16 and up”

- 226 OSCE and the Belgrade Centre for Human Rights, *Attitudes towards war crimes issues, ICTY and the national judiciary* (OSCE, 1st ed, 2011) <<https://www.osce.org/serbia/90422>>, 22.
- 227 The study (available only in BCS) is available at Srećko Mihailović, ‘Obaveštenost građana Srbije o ratovima ’90-ih godina, ratnim zločinima i sudnjima optuženima za ratne zločine’ (Demostat, August 2017) <http://www.hlc-rdc.org/wp-content/uploads/2017/12/Istrazivanje_javnog_mnjenja_Sudjenja_za_ratne_zlocine_Demostat.pdf>. It was summarised in English by Milica Kostić, ‘Public Opinion Survey in Serbia Sheds Light on ICTY Legacy’ on *EJIL: Talk!* (22 January 2018) <<https://www.ejiltalk.org/public-opinion-survey-in-serbia-sheds-light-on-icty-legacy/>>.
- 228 Sara Kendall and Sarah Nouwen, ‘Speaking of Legacy: Toward an ethos of modesty at the International Criminal Tribunal for Rwanda’ (2016) 110(2) *American Journal of International Law* 212, 221.
- 229 See Cale Davis, ‘Political Considerations in Prosecutorial Discretion at the International Criminal Court’ (2015) 15(1) *International Criminal Law Review* 170, 176.
- 230 See Geoffrey Lugano, ‘Counter-Shaming the International Criminal Court’s Intervention as Neocolonial: Lessons from Kenya’ (2017) 11(1) *International Journal of Transitional Justice* 9.
- 231 *Prosecutor v Zejnil Delalić et al (Brief of Appellant, Esad Landžo, on Appeal Against*

cess would require “evidence from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with [the principle of equality in article 21 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*]”.²³² In addition, they observed, the Prosecutor was free to allocate resources towards those persons whom they believed “committed exceptionally brutal offences” and the prosecution of Landžo was consistent with their stated policy “to ‘focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences’”.²³³ Yet whether the ‘inconsistent’ factor needs to be the primary or merely *a* motivation in the exercise of the charging discretion is unclear.

For the most part, ICTY prosecutors appear to have agreed that they should be blind to national, racial, religious, or ethnic differences when selecting situations and cases. One prosecutor “never accepted the idea that ... there should be a sort of equal count of number of people you charge” in order to demonstrate even-handedness.²³⁴ Another noted that it was important to treat like cases alike, and this did not mean “that if we were going to prosecute a Serb we had to prosecute a Croat and prosecute a Muslim at the same time”.²³⁵

There is, however, belief among some prosecutors that Carla Del Ponte did indeed try to demonstrate to the Serbs that her and her staff were also interested in other groups. “Carla wanted a good representation, because of her concern about too many Serbs and not enough Bosniaks”, noted one prosecutor.²³⁶ Another believed that “if Arbour had been there... for a longer period of time, I don’t think that we would have prosecuted as many Muslim cases”, observing that they believed Del Ponte’s approach was to aim for more or less an equal number of prosecutions across the different ethnic groups.²³⁷ The prosecutor pointed to meetings where “Del Ponte would certainly emphasise that we wanted to have more Muslim cases”, adding further that “she certainly was inclined to direct people to prepare to prosecute a number of those cases, including some which weren’t ter-

Conviction and Sentence) (ICTY, Appeals Chamber, IT-96-21-A, 2 July 1999), 17.

232 *Prosecutor v Zejnil Delalić et al (Appeals Judgment)* (ICTY, Appeals Chamber, IT-96-21-A, 20 February 2001), [611].

233 *Prosecutor v Zejnil Delalić et al (Appeals Judgment)* (ICTY, Appeals Chamber, IT-96-21-A, 20 February 2001), [614].

234 Interview with P7.

235 Interview with P13.

236 Interview with P29.

237 Interview with P13.

ribly strong”.²³⁸ In a similar vein, another prosecutor believed that Del Ponte dissolved the ICTY OTP’s indictment review process—under which draft indictments being submitted to a collective of prosecutors in the Office for evidential scrutiny, prior to the indictment being sent to the Chief Prosecutor or Deputy Prosecutor for approval²³⁹—to “give this image of even-handed justice”, noting that “sometimes you have the evidence against Group A, and you have zero evidence against Group B, and... [s]he somehow thought ‘well, we’ll still bring the case’”.²⁴⁰

The prosecution of Ramush Haradinaj is arguably an example of Del Ponte’s desire for ‘even-handed justice’; a choice of case that has been controversial regarding the motivations behind his indictment and the evidence used to justify it. Andrew Cayley QC, who at the time was working at the ICTY OTP, recalled in an interview with *The Guardian* that he felt “under increasing pressure to come up with something... almost as if I was questioning a predetermined outcome”.²⁴¹ Cayley wrote to Del Ponte expressing the view that Haradinaj should not be indicted.²⁴² When he was nevertheless indicted—and without peer review—Geoffrey Nice QC and Mark Harmon wrote a memo to Del Ponte expressing their opinion that the indictment should not have been signed without the evidence having been subjected to peer scrutiny (yet quietly accepting that it was entirely within her power to have avoided the process).²⁴³ Another prosecutor’s re-

238 Interview with P13.

239 Interview with P10.

240 Interview with P26. The indictment review process was implemented in September or October 1994, in a large part due to Deputy Prosecutor Graham Blewitt and Senior Trial Attorney Mark Harmon. There are, however, differing views on the fate of the process. According to one prosecutor, “pretty soon [after the ICTY OTP commenced work] the practice fell off, when we got too busy” (Interview with P6), according to another, “it remained in place until the last indictment was issued in 2004” (Email from P4 to Cale Davis, 3 October 2018). P26 believed that Del Ponte dissolved the process in 2000 for the reasons expressed above, nevertheless noting that “it was one of those things that were never properly explained”.

241 Andrew Cayley, interviewed in Ed Vulliamy, ‘Freed Kosovo war chief pledges: “I will lead my people once more”’, *The Observer* (Online), 2 December 2012 <<https://www.theguardian.com/world/2012/dec/02/ramush-haradinaj-kosovo-acquitted>>.

242 Andrew Cayley, interviewed in Ed Vulliamy, ‘Freed Kosovo war chief pledges: “I will lead my people once more”’, *The Observer* (Online), 2 December 2012 <<https://www.theguardian.com/world/2012/dec/02/ramush-haradinaj-kosovo-acquitted>>.

243 Geoffrey Nice, *Justice for All and How to Achieve It* (Scala, 1st ed, 2017), 306; Ed Vulliamy, ‘Freed Kosovo war chief pledges: “I will lead my people once more”’, *The Observer* (Online), 2 December 2012 <<https://www.theguardian.com/world/2012/dec/02/ramush-haradinaj-kosovo-acquitted>>. This is likely a reference to the

mark that *Haradinaj* “was a politically motivated case we couldn’t prove, and it was not a case that should have been indicted” supports the claim that Del Ponte had indicted him in the hope of shedding the accusations of bias that had been plaguing the institution.²⁴⁴ One prosecutor went so far as to claim that Del Ponte desired “to have the scalp of a senior Kosovo politician”, and remarked that “the only reason she would have [indicted Haradinaj]” was “[b]ecause the Serbs wanted it”.²⁴⁵

Indictments, then, can produce two entirely different messages: they can either project a prosecutor’s independence and impartiality, or their ‘politicisation’ and bias. This is entirely consistent with the operation of myth: the message produced depends on the observer. More importantly, however, the recollections recounted above demonstrate that prosecutors have been conscious that indictments do produce these myths and are therefore aware of the power of indictments to send messages about their own legitimacy and credibility. This again demonstrates that the selection of situations and cases is informed by prosecutors’ own anxieties about how they are seen and the ongoing respect that they will be afforded. They are choices deeply connected with the production of symbolic capital in relation to those actors whom the prosecutor believes poses a threat to their legitimacy and credibility.

5.3 Getting a tribunal working

In the early days of courts, case selection decisions were influenced by prosecutors wanting to get their respective tribunals working. This is evident in two respects. First, prosecutors have been responsive to the concerns of judges about the speed at which prosecutions were moving. After sitting out the better part of eight months in late 1993 and 1994 at an institution without a prosecutor, Richard Goldstone described that the judges “were beside themselves with frustration and even anger”.²⁴⁶ When he was appointed, he observed that a ‘complex’ and ‘sensitive’ relationship existed between the prosecutors and the judges, and noted that “[t]he judges were obviously eager to be involved with judicial work”, and that “[w]hen it was

indictment review process.

²⁴⁴ Interview with P29.

²⁴⁵ Interview with P11.

²⁴⁶ Richard Goldstone, ‘The International Criminal Tribunals for the Former Yugoslavia and Rwanda’ in David Crane, Leila Sadat, and Michael Scharf (eds), *The Founders* (Cambridge University Press, 1st ed, 2018) 55, 58.

not forthcoming, there was a huge potential for frustration”.²⁴⁷ One judge, he recalled, was “embarrassed” because “he couldn’t go to his club in his home town because his friends laughed at him” as he was a judge on a UN salary without any cases.²⁴⁸ The lack of work was a deeply personal matter of professional pride. “[F]rom time to time”, another prosecutor said, “the judges would ask where were we at with our first indictment, and our first trial, and when we were not able to give them a time frame that encouraged them, then they became a little bit frustrated and were putting pressure on the Prosecutor and the Prosecutor’s Office to work faster to bring cases before the Court”.²⁴⁹ Additionally, this prosecutor reflected, the judges “were impatient to be seen to be doing something”.²⁵⁰ Gabrielle Kirk-McDonald, one of the first judges at the fledgling court, is on the record having noted that “I was terribly frustrated because... I came to do justice... and although I enjoy drafting rules... I didn’t expect that to be my life’s work”.²⁵¹

This pressure was felt by the prosecutors. “The judges were on our back, and we were feeling the frustration and the pressure”, remarked one prosecutor.²⁵² The frustration and the pressure manifested in several ways. ICTY judges would meet in plenary with Goldstone and Blewitt, and express the view that prosecutors “should work as quickly as possible”.²⁵³ President Cassese would also speak directly with Goldstone and Blewitt, and directly express the judges’ collective frustration.²⁵⁴ Finally, as one prosecutor candidly stated, Cassese “and a couple of other judges at different times thought the Tribunal would never really get off the ground and that they were wasting their time, and they were ready to either resign as a judge or just to give up the process as being unachievable”.²⁵⁵

As a result of the judges pressuring the Prosecutor for trial work, prosecutors “chose to bring some lower-level prosecutions, primarily to get the judges off our backs as the prosecutors and to give them some work to

247 Richard Goldstone, ‘A View from the Prosecution’ (2004) 2(2) *Journal of International Criminal Justice* 380, 381.

248 Richard Goldstone in *Against All Odds* (Sense TV, 2003) <<https://www.sensecentar.org/node/1984>>, 00:08:29.

249 Interview with P4.

250 Interview with P4.

251 Gabrielle Kirk-McDonald in *Against All Odds* (Sense TV, 2003) <<https://www.sensecentar.org/node/1984>>, 00:08:09.

252 Interview with P4.

253 Interview with P4.

254 Interview with P4.

255 Interview with P4.

do”.²⁵⁶ Another prosecutor (who was not working at the ICTY in 1994, but reflecting on the early days of the Tribunal) believed that the judges’ collective desire to be “relevant” led to the early prosecution of a “number of lower-level and mid-level individuals”.²⁵⁷ This was confirmed by a prosecutor who was involved in the Tribunal’s first cases, who noted that “it was pressures like that that led us to get the deferral of [Duško] Tadić from Germany and to run that case”, before adding that when prosecutors started filing indictments, the pressure “disappeared completely”.²⁵⁸

Interestingly, however, ICTY prosecutors were not alone in feeling that judges were getting impatient with the speed at which they were moving. At the ICC, one prosecutor who worked in the Office in the early days of the Court’s existence described that judges were “furious because they [did not] have a case”.²⁵⁹ Moreno Ocampo noted that judges wanted to be involved in cases as soon as possible.²⁶⁰ Kersten has written that ICC judges were pressuring Moreno Ocampo to commence a case, and quoted one anonymous OTP staff member who said a judge told Moreno Ocampo to “just give us a [Duško] Tadić”.²⁶¹ Another prosecutor reflected that the limited scope of the *Lubanga* indictment (which infamously did not include allegations of sexual violence) was, in part, due to “the external pressure, judges sitting there, waiting for cases”.²⁶²

The second way that this consideration has operated is that it has informed the complexity of cases that prosecutors have brought. Two ICTY prosecutors described that by selecting smaller cases in the early days of the ICTY, they were able to ensure that important procedural law was clarified and that the Tribunal would not be thrown flailing into the deep end of complex trials before its organs could learn to cope with simpler ones. It was observed that holding early trials for lower-ranked perpetrators (such as Duško Tadić) “would get the machinery of the Tribunal work-

256 Interview with P4. Emphasis added.

257 Interview with P5.

258 Interview with P4. It should be noted that this prosecutor also bluntly denied that the “frustrations expressed by the judges influenced what we were doing in the Prosecutor’s Office”. Instead, they argued, the pressures were just a factor that existed and they “didn’t alter what we were doing or the way we were doing it”.

259 Interview with Pt.

260 Luis Moreno Ocampo, ‘The International Criminal Court’ in David Crane, Leila Sadat, and Michael Scharf (eds), *The Founders* (Cambridge University Press, 1st ed, 2018) 94, 114.

261 Mark Kersten, *Justice in Conflict* (Oxford University Press, 1st ed, 2016), 171.

262 Interview with P5.

ing” and “iron-out any flaws in the procedures and the *Rules of Evidence and Procedure*”.²⁶³ This “would have been far more difficult”, remarked one prosecutor, “if that had been Karadžić or Milošević”.²⁶⁴ Simply put, the selection of situations and cases was informed by a fundamentally pragmatic interest in ensuring that the ICTY was able to function effectively and efficiently prior to proceeding to more complex matters. Simple cases allowed for the machinery of justice to be set in motion without the risk of over-torquing the engine. This evidences that prosecutors had a clear sense of guardianship over their institution (and, arguably, international criminal law more broadly given the potential for the ICTY to mark the emergence of modern international criminal law).

Incidentally, it is interesting to contrast the approach to case selection of the ICTY with that of the Kosovo Specialist Prosecutor’s Office to highlight that the ability to start small to put the metaphorical wheels of justice into motion is best seen as a luxury position that not all prosecutors enjoy—the opportunity to do so can be suddenly stripped away from them. Matthew Cross noted in late 2019 that the work of the Specialist Prosecutor’s Office was likely going to “enjoy a tense relationship with the government of Kosovo”.²⁶⁵ That became clearly apparent when the first indictment was made public in June 2020. Instead of starting small and working their way up, prosecutors instead went straight to the top and indicted Kosovo’s President, Hashim Thaçi, and national opposition leader Kadri Veseli. In a press statement that accompanied the unsealing of the indictment, prosecutors explained that it was necessary to publicise the charges because the indictees were believed to have engaged in “repeated efforts” to “obstruct and undermine the work of the KSC”.²⁶⁶ These same concerns justified the Pre-Trial Judge sealing the indictment when he issued it.²⁶⁷ In these circumstances,

263 Interview with P4. See also Sarah Nouwen and Michael Becker, ‘Tadić v Prosecutor: International Criminal Tribunal for the Former Yugoslavia, 1995’ (March 2017) *University of Cambridge Legal Studies Research Paper Series 17/2017* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946821>, 2.

264 Interview with P10.

265 Matthew Cross, ‘Strategising International Prosecutions: How might the work of the Kosovo Specialist Prosecutor’s Office come to be judged?’ (2020) 20(1) *International Criminal Law Review* 43, 47.

266 Kosovo Specialist Prosecutor’s Office, ‘Press Statement’ (Press Statement, 24 June 2020) <<https://www.scp-ks.org/en/press-statement>>.

267 *Prosecutor v Hashim Thaçi et al (Public Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi)* (Kosovo Specialist Chambers, Pre-Trial Judge, KSC-BC-2020-06, 26

the decision to indict at that moment may have been influenced by a desire to neutralise the threat to the workings of the tribunal that the indictees were posing. The lesson from this situation may well be that if the opportunity does present itself for prosecutors to start small, there may be benefits to acting upon this before circumstances rob of them of the chance and force a court into complex, highly political, and difficult proceedings before testing it on simpler ones.

5.4 Previous representations

In the mid-1950s, Ernst Kantorowicz highlighted the fiction that the King of England is treated as having two bodies. On the one hand, they are a person of flesh and blood. But on the other, they never die, existing in perpetuity as a body politic evidenced by the cry of ‘The King is dead, long live the King’.²⁶⁸ Kantorowicz was concerned with understanding how “regimes without a monopoly of violence preserve themselves” through ‘dynastic continuity’, by producing the ‘mystic fiction’ that the King has god-like properties.²⁶⁹ The analogy is somewhat strained and departs significantly from Kantorowicz’s original argument, but something similar can be said about Chief Prosecutors. They are at once their physical selves, but at the same time have a more permanent and stable identity. They, just like Kantorowicz’s king, have ecclesiastical attributes: they represent a utopian ideal. They exist in perpetuity. They are something to be feared.

This continuity explains the feeling of professional integrity felt by one SCSL prosecutor to not renege on a previous representation made by another prosecutor regarding the selection of a particular case. The post-2004 decision not to prosecute Yeaten, as discussed on page 70, appears to have been affected by Desmond de Silva QC’s representation to the United Kingdom that, in the words of another prosecutor, “we’re not going to do Yeaten”.²⁷⁰ The symbolic capital possessed by ‘the Prosecutor’ is vested in both the person and the role. The post-2004 decision to not pursue Yeaten’s case appears to have been informed by the belief that the respect and integrity afforded to both bodies would have been harmed by reversing the

October 2020), [515].

268 See Ernst Kantorowicz, *The King’s Two Bodies: A study in mediaeval political theology* (Princeton University Press, 3rd ed, 2016).

269 See Ernst Kantorowicz, *The King’s Two Bodies: A study in mediaeval political theology* (Princeton University Press, 3rd ed, 2016), xix.

270 Interview with P9.

decision, which would not have served the interests of either.

5.5 Closing the tribunal

Finally, prosecutors at the ICTY, ICTR, and SCSL have had their decision-making affected by the need to close their respective tribunals down. The ICTY and the ICTR were always intended to be temporary even if this was not expressly stated in their statutes,²⁷¹ and pressure progressively mounted on both Del Ponte and ICTR Prosecutor Hassan Jallow to get on with the job of wrapping things up sooner rather than later. By mid-2000, Del Ponte had recognised that the prosecutorial policy of her office needed to be aimed towards expediting trials.²⁷² In December that year, the UN Security Council representatives commenced a concerted effort to bring the ICTY's work to an end, by requesting the UN Secretary-General submit a report regarding possible end dates for the tribunal.²⁷³ No meaningful suggestion was forthcoming. The Secretary-General noted that he was not in a position to make any recommendation on the basis that the situation in the former Yugoslavia still constituted a threat to international peace and security and the tribunal had thus not met its mandate.²⁷⁴ Yet the pressure to complete the operations of both tribunals remained. In November 2001, Judge Navanethem Pillay of the ICTR told the Security Council that the Prosecutor would need to "drastically [revise] her investigative programme" in order for the tribunal to complete its work by 2007.²⁷⁵ Del Ponte subsequently noted:

I know that the Council is particularly keen to have an understanding of what my future prosecution policy will be and

271 Dominic Raab, 'Evaluating the ICTY and its Completion Strategy: Efforts to achieve accountability for war crimes and their tribunals' (2005) 3(1) *Journal of International Criminal Justice* 82, 84.

272 *Letter dated 14 June 2000 from the Secretary-General addressed to the President of the Security Council (Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda)*, UNSCOR, UN Doc S/2000/597 (17 June 2000), [172].

273 SC Res 1329 (2000), UN SCOR, UN Doc S/Res/1329 (2000) (5 December 2000), [6].

274 *Report of the Secretary-General Pursuant to Paragraph 6 of Security Council Resolution 1329 (2000)*, UN Doc S/2001/154 (21 February 2001), [10]-[16].

275 *Provisional verbatim record of the 4429th meeting*, UN SCOR, UN Doc S/PV.4429 (27 November 2001), 8 (Judge Pillay).

how much work the Tribunals will have to do before they can complete their respective mandates.²⁷⁶

Del Ponte informed the Security Council that her staff had begun considering an ‘exit strategy’ as to the work that would need to be done to allow the Tribunals to complete their mandates.²⁷⁷

On 4 March 2002, President Pillay informed the UN Secretary-General that she had spoken to Del Ponte about her investigative programme and urged her to revise it out of the concern held by UN Security Council representatives over the ongoing operations of the Tribunal, resulting in the number of suspects being reduced from 136 to 111.²⁷⁸ In June that year, ICTY staff noted in their first Completion Strategy that the Tribunal was operating at full capacity but they were “successfully seeing through all the reforms necessary to complete investigations by 2004 and the first instance trials by 2008”.²⁷⁹ They stated that in order to do this, the prosecution staff must focus on the highest-ranking political and military leaders and refer “intermediary-level accused” to national courts.²⁸⁰ The decision to focus on senior leaders placed Del Ponte in a difficult position, as it required a shift in prosecutorial policy.²⁸¹ Prior to this point, ICTY prosecutors had not exclusively targeted senior leaders, but the ICTY Completion Strategy “placed a significant additional pressure” on her that had not been placed on her predecessors to investigate and prosecute all remaining offences committed by senior leaders.²⁸²

276 *Provisional verbatim record of the 4429th meeting*, UN SCOR, UN Doc S/PV.4429 (27 November 2001), 9 (Ms Del Ponte).

277 *Provisional verbatim record of the 4429th meeting*, UN SCOR, UN Doc S/PV.4429 (27 November 2001), 9 (Ms Del Ponte).

278 *Identical letters dated 4 March 2002 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council (Letter dated 6 February 2002 from the President of the International Tribunal for Rwanda addressed to the Secretary-General*, UN Doc S/2002/241 (8 March 2002), 3.

279 *Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council (Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, UN Doc S/2002/678 (19 June 2002), [1].

280 *Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council (Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, UN Doc S/2002/678 (19 June 2002), [83].

281 Dominic Raab, ‘Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals’ (2005) 3(1) *Journal of International Criminal Justice* 82, 90.

282 Dominic Raab, ‘Evaluating the ICTY and its Completion Strategy: Efforts to

In 2003, the Security Council representatives recalled and reaffirmed “in the strongest terms” their desire for the ICTY and the ICTR to “complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010”.²⁸³ In doing so, they requested with respect to the ICTY that Del Ponte focus her efforts on “the most senior leaders”; transfer “cases involving those who may not bear this level of responsibility to competent national jurisdictions”; and strengthen the capacity of national jurisdictions.²⁸⁴ With respect to the ICTR, they requested the Tribunal to “transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions”.²⁸⁵ Del Ponte recognised that the Security Council representatives had given her “clear guidance” regarding the time frame of her investigations.²⁸⁶

In March 2004, the Security Council representatives again stressed the importance of the ICTY and the ICTR completing their work by 2010 and called on them, “in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003)”.²⁸⁷ The representatives also obliged the Presidents and the Prosecutor to submit a report every six months “explaining what measures have been taken to implement the Completion Strategy”.²⁸⁸

When Jallow’s appointment as ICTR Prosecutor was extended on 14 September 2007, the Security Council representatives recalled that the Tribunal needed to complete its work by 2010.²⁸⁹ It did the same in appointing Serge Brammertz as ICTY Prosecutor on 28 November 2007.²⁹⁰ If these prosecutors were under any doubt about the strategies they were to employ, these letters of appointment dispelled them.

The pressure to wind up operations was also felt by SCSL prosecutors.

Achieve Accountability for War Crimes and their Tribunals’ (2005) 3(1) *Journal of International Criminal Justice* 82, 90.

283 SC Res 1503 (2003), UN SCOR, UN Doc S/Res/1503 (2003) (4 September 2003).

284 SC Res 1503 (2003), UN SCOR, UN Doc S/Res/1503 (2003) (4 September 2003).

285 SC Res 1503 (2003), UN SCOR, UN Doc S/Res/1503 (2003) (4 September 2003).

286 *Provisional verbatim record of the 4838th meeting*, UN SCOR, UN Doc S/PV.4838 (9 October 2003), 9 (Ms Del Ponte).

287 SC Res 1534 (2004), UN SCOR, UN Doc S/Res/1534 (2004) (26 March 2004), [3], [5].

288 SC Res 1534 (2004), UN SCOR, UN Doc S/Res/1534 (2004) (26 March 2004), [6].

289 SC Res 1774 (2007), UN SCOR, UN Doc S/Res/1774 (2007) (14 September 2007).

290 SC Res 1786 (2007), UN SCOR, UN Doc S/Res/1786 (2007) (28 November 2007).

The Court was expected to operate for a minimum of three years and be terminated “by agreement of the Parties upon completion of the judicial activities of the Special Court”.²⁹¹ Just under three years after the Court began its operations in January 2002, SCSL principals appointed a ‘Completion Strategy Coordinator’ to produce “a strategy which will steer the Court’s operation as it nears completion of its mandate”.²⁹² The resulting Completion Strategy was submitted to the UN Security Council in May 2005. Court staff recognised that the international community had aimed for the work of the Court to be completed in three years.²⁹³ Yet it was not until 2 October 2012 that residual functions were transferred to the Residual Special Court for Sierra Leone.²⁹⁴

The Prosecutor’s decision not to indict Yeaten (described on page 70) was evidently caused by the Prosecutor’s desire to bring the Court to a close. As described by one prosecutor, “we were expected to get everything done at that point by the end of ’09”, and that (in culmination with the other factors marking the Yeaten case) this meant that it was not possible to join a trial of Yeaten to the trial of Charles Taylor.²⁹⁵ The 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”.²⁹⁶ The prospect of joining a Yeaten trial with the Taylor trial was, in their words, “really a ship that had sailed”.²⁹⁷

Bowing to pressure to shut a tribunal arises from a sense of responsibil-

291 Kofi Annan, *Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council*, UN Doc S/2001/40 (12 January 2001), [12]; *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, opened for signature 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002), art 23.

292 Special Court for Sierra Leone, ‘Second Annual Report of the President of the Special Court for Sierra Leone for the period 1 January 2004 - 17 January 2005’ (Special Court for Sierra Leone, 2005), 23.

293 *Identical letters dated 26 May 2005 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council (Special Court for Sierra Leone Completion Strategy, 18 May 2005)*, UN Doc A/49/816 (27 May 2005), [37].

294 *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone*, opened for signature 29 July 2010, 2871 UNTS 333 (entered into force 2 October 2012).

295 Interview with P9.

296 Interview with P9.

297 Interview with P9. Nevertheless, the prosecutor held out hope that a domestic prosecution might yield some justice and stop Yeaten “from going back into active circulation” (which, incidentally, never occurred).

ity. Prosecutors have a shared responsibility with other executive officeholders working in other organs of a Tribunal to ensure that they work together to achieve a common goal. Yet underlying the desire to pursue this common goal could well be an element of individual self-preservation. Prosecutors are not appointed for life, and serve (and served) largely on limited terms at the pleasure of their appointers. If they were not doing what they were expected to be doing, they would need to find subsequent employment and be marked by the stain that, when entrusted with a high office, they were incapable of fulfilling the tasks that they were assigned. By working to close a court, prosecutors have therefore demonstrated that they not only have a responsibility to their institution, but also a responsibility to themselves.

6 Conclusion

This chapter has demonstrated that the selection of situations and cases has been understood to fulfil a variety of functional, normative, and strategic aims. It has also demonstrated that the way that prosecutors select situations and cases appears to have been informed by three different role identities that prosecutors have adopted.

The first of these is the role of the *norm performer*, under which prosecutors have tried to affirm, project, and internalise norms through their decisions. Two types of norms, in particular, appear to stand out. On the one hand, the thematic windows have revealed that prosecutors have concerned themselves with performing procedural norms that relate to the functioning of judicial mechanisms. This has been evidenced with the attention given to the desirability of efficiency and competency, seen through prosecutors considering the prospects of a successful investigation, the likelihood of the defendant being arrested, trial management, existential threats, and the need to close tribunals down. It also includes the norm of prosecutorial impartiality, shown by the debate surrounding whether prosecutors should demonstrate this evidentially or demographically. On the other hand, prosecutors have tried to express moral norms. This is seen through concerns about an actual or potential defendant's wellbeing, and most clearly by the desire to engage in norm expression with regard to particular classes of offences.

The second role identity is that of the *builder*, under which prosecutors have been concerned with the recording of history. Even though discovering 'the' truth or writing 'the' historical record are unrealisable goals

(as demonstrated in subsection 4.1), some prosecutors have nevertheless attempted them. This role identity arguably explains the desire to build an historical record through the selection of situations, as well as decisions to engage in representational charging. The role of the builder is also demonstrated by prosecutors' attempts at developing their own symbolic capital (and to a lesser extent, that of their respective courts), which has been a concern evident in most of the thematic windows described in this chapter. Finally, the role of the builder has also been ever so slightly evidenced with regard to prosecutors engaging in institutional transformation, by the single example of prosecutors at the ICTY attempting to avoid proceedings that looked like *in absentia* trials becoming substitutes for real trials when they could not lay their hands on a defendant and get them into the dock.

Finally, prosecutors have acted as *guardians*. They have, most clearly, acted as guardians over their respective courts when they understood them to be facing existential crises that threatened their financial viability, their functional viability, or their reputation. But they have also acted as guardians over people. They have protected actual or potential defendants from the burden of legal proceedings when there have been substantial doubts about their wellbeing. They have sought to provide victims with vindication, validation, and redress. And they have sought to protect themselves from reputational damage caused by failing to do what is expected of them in terms of responding to funders' concerns.

The presence of these three roles demonstrate that when international prosecutors select situations for investigation and cases to pursue, they are informed by more than a mere desire to 'bring justice to victims and defendants to justice'. Reality is more complicated. Prosecutors are people, and the choices they make cannot be detached from the circumstances in which they find themselves or the goals that they wish to achieve.

Chapter 4

Selecting Charges

‘Guys we need to move this case. What evidence do we have? We have evidence against killings?’

‘No.’

‘Rapes?’

‘No.’

‘What you have?’

‘Child soldiers.’

‘Okay, we move with child soldiers’.

INTERVIEW WITH PI

1 Introduction

The selection of charges concerns how prosecutors decide to legally characterise a potential defendant’s allegedly criminal conduct and the decision to include charges in an indictment. It is therefore distinct from the discretion to select situations (which concerns selecting allegedly criminal conduct for investigation or prosecution prior to the identification of an accused) and the selection of cases (identifying individuals who allegedly engaged in that conduct). How prosecutors legally characterise conduct and whether they decide to include charges in the indictment will naturally affect the conduct of the trial and the leading of evidence. But the selection of charges may also have other effects. It might recognise harm, lead to the development of new jurisprudence, or establish an historical record. These decisions may also draw public attention towards particular types of alleged criminality, and lead to the emergence of new norms regarding what is appropriate behaviour.

This chapter focuses on what has informed charge selection. It begins, in section 2, by providing context to these decisions by outlining the legal framework in which they are made. It then goes on to explore seven considerations that have informed prosecutorial decision-making, by drawing upon interviews with current and former senior prosecutors. Section 3 describes the functional considerations: the likelihood of a potential defendant's arrest; increasing the prospects of a guilty verdict; and the likely sentence. Section 4 then explains the desire to use the charging discretion to advance the law, which is the single normative consideration. Finally, section 5 outlines three strategic factors: judicial criticisms; public expectations; and the need to close tribunals.

This chapter concludes by arguing that the selection of charges evidences that prosecutors have adopted three different role identities when making these choices: they have been norm performers, builders, and guardians.

2 The Legal Framework

The legal framework governing the selection of charges is arguably the most comprehensive of all the legal frameworks relating to the choices that this thesis explores. The reason for this is that the various statutes, court decisions, and the ICC's *Elements of Crimes* detail, in most cases quite well, exactly what prosecutors need to prove if they want a defendant to be found guilty. If prosecutors do have the necessary evidence, they can charge that crime; if they do not, they should not for risk of exposing themselves to allegations of malicious prosecution or the inevitable tsunami of criticism about wasting resources prosecuting hopeless cases or failing to properly investigate the crimes they charged.

This framework, however, does not always provide prosecutors with an answer about what to charge, because it leaves two problems unanswered. The first is that the legal framework might not provide *any* crime that directly fits the impugned conduct. The second is that the evidence prosecutors have of alleged conduct might fulfil the elements of more than one crime. Sexual violence, for example, can be (and has been) charged as torture, persecution, and genocide.¹

1 Michelle Jarvis and Najwa Nabti, 'Policies and Institutional Strategies for Successful Sexual Violence Prosecutions' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press,

When confronted with the first problem, prosecutors are arguably afforded some minimal guidance by the principle of legality, otherwise known as *nullum crimen sine lege*. In international criminal justice, the principle of legality is actually a collection of three more specific rules detailing the limits on what people can be held criminally responsible for.² First, conduct needs to be criminalised at the time it is committed in order for criminal liability to arise.³ This prohibition on retroactivity has “obsessed international criminal justice since its earliest days” because courts have historically been established as a response to, rather than in anticipation of, conduct that offends public morality.⁴ The most famous invocation of this principle was arguably before the International Military Tribunal at Nuremberg, where all defence counsel jointly argued that it was “repugnant to a principle of international jurisprudence” that the defendants were being tried under a “penal law enacted after the crime”.⁵ This argument was given short shrift by the judges, who concluded that the defendants must have known at the time that they were engaging in their impugned conduct that it was wrongful.⁶ Second, the principle of legality posits that crimes cannot be applied by analogy to novel conduct.⁷ In principle, this rule bars the creation of new crimes by judges exercising ‘judicial creativity’ and establishes that, “in case of ambiguity, the definition is to be interpreted in favour of the person being investigated, prosecuted, or convicted”.⁸ Third, any prohibition that does exist needs to be clearly and precisely defined, so that everyone can know exactly what conduct is prohibited and punishable.⁹

1st ed, 2016) 73, 91.

- 2 See the summary compiled by Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Springer, 1st ed, 2017), 20; Claus Kreß, ‘Nulla poena nullum crimen sine lege’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2010).
- 3 *Nullum crimen sine lege praevia*.
- 4 William Schabas, *Unimaginable Atrocities: Justice, politics, and rights at the war crimes tribunals* (Oxford University Press, 1st ed, 2012), 47-48.
- 5 *Trial of the Major War Criminals (Motion adopted by all defence counsel)* (19 November 1945) I Blue Series 168, 168.
- 6 *Trial of the Major War Criminals (Judgment)* (1 October 1946) I Blue Series 171, 219.
- 7 *Nullum crimen sine lege stricta*.
- 8 Susan Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’ in Antonio Cassese, Paola Gaeta, and John Jones (eds), *The Rome Statute of the International Criminal Court: A commentary* (Oxford University Press, 1st ed, 2002) 733, 752.
- 9 *Nullum crimen sine lege certa*. Thomas Rauter notes that the additional requirement that the law be written down (*nullum crimen sine lege scripta*) does not apply in

Despite *nullum crimen sine lege* being a “basic principle of justice”,¹⁰ it hardly has any practical relevance. It has been successfully invoked in only a few rare instances to challenge the charges brought by prosecutors. In *Prosecutor v Mitar Vasiljević*, the Appeals Chamber acquitted the defendant on the charge of ‘violence to life and person’ on the basis that there was no “clear indication in the practice of states as to what the definition of the offence... may be under customary law”.¹¹ This is despite the fact another Trial Chamber had, two years previously, convicted Tihomir Blaškić for the same offence.¹² Similarly, the Trial Chamber dismissed the charge of forcible transfer as an ‘other inhumane act’ in *Prosecutor v Milomir Stakić* in part because the Prosecution’s examples of deportation might have, in that case, amounted “to an infringement of the principle of *nullum crime sine lege certa*”¹³—although this finding was overturned on appeal.¹⁴

On the whole, however, international criminal judges have “gradually watered down their understanding of the principle of legality”.¹⁵ Challenges to charges based on *nullum crimen sine lege* have been “fairly consistently unsuccessful”.¹⁶ In the face of challenges brought by defendants, the principle posed no problem for prosecutors in *Prosecutor v Zlatko Aleksovski*,¹⁷ *Prosecutor v Milan Milutinović, Nikola Šainović, and Dragoljub Ojdanić*,¹⁸

the context of international criminal justice and that, if it did, “international criminal law, as we know it today, would not exist”: Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Springer, 1st ed, 2017), 47.

10 William Schabas, *The International Criminal Court: A commentary on the Rome Statute* (Oxford University Press, 2nd ed, 2016), 539.

11 *Prosecutor v Mitar Vasiljević (Judgment)* (ICTY, Appeals Chamber, IT-98-32-T, 29 November 2002), [203].

12 *Prosecutor v Tihomir Blaškić (Judgment)* (ICTY, Trial Chamber, IT-95-14-T, 3 March 2000, [182] and 268. See also Beth van Schaack, ‘Crimen Sine Lege: Judicial lawmaking at the intersection of law and morals’ (2008) 97(1) *Georgetown Law Journal* 119, 139-141.

13 *Prosecutor v Milomir Stakić (Judgment)* (ICTY, Trial Chamber, IT-97-24-T, 31 July 2003), [723].

14 *Prosecutor v Milomir Stakić (Judgment)* (ICTY, Appeals Chamber, IT-97-24-A, 22 March 2006), [315]-[317].

15 Jean d’Aspremont, ‘The Two Cultures of International Criminal Law’ in Kevin Heller et al (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 1st ed, 2020) 400, 409.

16 William Schabas, *The UN International Criminal Tribunals* (Cambridge University Press, 1st ed, 2006), 65.

17 *Prosecutor v Zlatko Aleksovski (Appeals judgment)* (ICTY, Appeals Chamber, IT-95-14/1-A, 24 March 2000), [127].

18 *Prosecutor v Milan Milutinović, Nikola Šainović, and Dragoljub Ojdanić (Decision on*

Prosecutor v Zejnil Delalić et al,¹⁹ *Prosecutor v Dario Kordić and Mario Čerkez*,²⁰ *Prosecutor v Enver Hadžihanović, Mehmed Alagić, and Amir Kubura*,²¹ nor in the contempt prosecution of Anto Nobile.²²

With this in mind, the principle of *nullum crimen sine lege* does not provide much useful guidance to prosecutors. It will rarely prevent them from seeking a verdict on a charge that *may* violate the rule because practice has demonstrated that challenges based on it are largely unsuccessful. The other, more fundamental, reason is that the principle does not prevent prosecutors actually *charging* a defendant: it merely bars them from being held criminally responsible. Further, the crime against humanity of ‘other inhumane acts’ was specifically designed as a “residual category” of offences without a closed list of illegal conduct so as not to “create opportunities for evasion of the letter of the prohibition”.²³ Prosecutors therefore have an avenue to advance the argument that novel courses of conduct are nevertheless criminal under this prohibition. The guidance the principle *does* provide is more that it imposes a standard of reasonableness: when prosecutors are laying novel charges, they should be able to advance reasonable arguments to support the proposition that the charge does not violate the principle of legality. In this sense, the principle of legality deters prosecutors from laying charges that stray too far from what they, and more importantly the judges, would consider reasonable interpretations of existing crimes.

The principle of fair labelling may also afford prosecutors some minimal guidance when they are confronted with both the first and the second problems. Fair labelling as an identifiable concept is relatively new and is often regarded as having its roots in Andrew Ashworth’s 1981 chapter ‘The Elasticity of Mens Rea’. Ashworth argued that the characterisation of conduct “ought fairly to represent the offender’s wrongdoing”.²⁴ Fair labelling

Dragoljub Ojdanić’s motion challenging jurisdiction - joint criminal enterprise (ICTY, Appeals Chamber, IT-99-37-AR72, 21 May 2003), [43].

19 *Prosecutor v Zejnil Delalić et al (Appeals Judgment)* (ICTY, Appeals Chamber, IT-96-21-A, 20 February 2001), [180], [576].

20 *Prosecutor v Dario Kordić and Mario Čerkez (Judgment)* (ICTY, Appeals Chamber, IT-95-14/2-A, 17 December 2004), [117].

21 *Prosecutor v Enver Hadžihanović, Mehmed Alagić, and Amir Kubura (Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility)* (ICTY, Appeals Chamber, IT-01-47-AR72, 16 July 2003), [33]-[36].

22 *Prosecutor v Zlatko Aleksovski (Judgment on appeal by Anto Nobile against finding of contempt)* (ICTY, Appeals Chamber, IT-95-14/1-AR77, 30 May 2001), [127].

23 *Prosecutor v Zoran Kupreskić et al (Judgment)* (ICTY, Trial Chamber, IT-95-16-T, 14 January 2000), [563].

24 Andrew Ashworth, ‘The Elasticity of Mens Rea’ in Colin Tapper (ed), *Crime, Proof*

purports to ensure that society can understand the morality of an offender's conduct and appropriately distinguish between the moral gravity of different criminal acts.²⁵ If prosecutors want international criminal tribunals to fulfil their mandates, they may think it is important that the charges they select are fair labels for the situations and cases they are pursuing. Talita De Souza Dias argued that fair labelling provides for condign retribution by leading "to a greater public opprobrium of [international] crimes".²⁶ But it may also have other communicative roles, such as stigmatising conduct, deterring potential future perpetrators, recognising harm, and leaving an important historical record.²⁷ It is a principle that guides both the selection of charges and the selection of modes of liability.²⁸

This principle, however, finds no basis in statutes. Prosecutors are under no formal obligation to allege against a defendant the most specific crime they can. In the veritable mountain of policy documentation produced by ICC prosecutors, there is only one reference to the principle. The ICC Prosecutor's *Policy Paper on Sexual and Gender-Based Crimes* states that prosecutors will, "in principle", "bring charges for sexual and gender-based crimes explicitly as crimes *per se*".²⁹

Of course, none of this is to say that prosecutors do not feel obliged to label conduct fairly. Moreover, there are several notable examples of where prosecutors have advanced novel charges where they presumably felt that the existing legal framework did not provide for a 'fair' label to be attached to the allegedly criminal conduct. In *Prosecutor v Paul Bisengimana*, ICTR prosecutors advanced the charge of "the inhumane acts of violent rape to

and Punishment: Essays in memory of Sir Rupert Cross (Butterworths, 1st ed, 1981) 45, 53.

- 25 Hilmi Mohammad Ahmad Zawati, *Symbolic Judgments or Judging Symbols: Fair labelling and the dilemma of prosecuting gender-based crimes under the statutes of the international criminal tribunals* (PhD thesis, McGill University, 2010), 42.
- 26 Talita De Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18(5) *International Criminal Law Review* 788, 805.
- 27 Talita De Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18(5) *International Criminal Law Review* 788, 805-806.
- 28 Douglas Guilfoyle, 'Responsibility for Collective Atrocities: Fair labelling and approaches to commission in international criminal law' (2011) 64(1) *Current Legal Problems* 255, 268; *Prosecutor v Duško Tadić (Judgment)* (ICTY, Appeals Chamber, IT-94-I-A, 15 July 1999), [192].
- 29 Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (International Criminal Court Office of the Prosecutor, June 2014), [72].

deliberately cause a foetus to abort”—though this charge, and eleven others, were later withdrawn and Bisengimana pleaded guilty to only two charges.³⁰ ICTY prosecutors charged Stanislav Galić with “unlawfully inflicting terror upon civilians”, despite there being no direct reference to this charge in the ICTY *Statute*.³¹ ICTY prosecutors also charged Dragoljub Kunarac with sexual enslavement in a move that pushed the boundaries of how enslavement was traditionally understood.

The two problems the legal framework poses are therefore marginally overcome by the principles of legality and fair labelling. On the one hand, the principle of legality arguably helps prosecutors when they have no appropriate charge by, first, ensuring that they argue the novel conduct is criminal by reasonable reference to past decisions; and second, by giving them the confidence that challenges based on *nullum crimen sine lege* have historically been unsuccessful. On the other hand, when prosecutors are confronted with numerous possible charges, they are essentially free to charge them all and ensure that the conduct is fairly labelled. Put simply, neither principle provides much firm guidance as to what prosecutors should do to overcome the two problems, except for affirming that the legal framework does not provide any guidance and they are free to charge whatever they believe is reasonable in light of prior decisions and the facts of the case. For these reasons, prosecutorial decision-making with regard to the selection of charges has been informed by several other factors, and these are discussed in the following sections.

3 Functional Considerations

3.1 Likelihood of arrest

The first factor that prosecutors have been informed by when deciding how to characterise conduct or include it in the indictment is—just like with decisions regarding situation and case selection—the likelihood of a potential defendant’s arrest. This appears to have operated when prosecutors were effectively forced into laying charges that they could prove when the opportunity to arrest a potential defendant arose, instead of sitting on the file and taking the time to further investigate or decide whether their al-

30 *Prosecutor v Paul Bisengimana (Indictment)* (ICTR, Trial Chamber, ICTR-00-60, 1 July 2000), 42. Emphasis added.

31 Laura Paredi, ‘The War Crime of Terror: An analysis of international jurisprudence’ (ICD Brief 11, International Crimes Database, June 2015), 2.

leged conduct could be classified in any other way. In the ICTY Prosecutor's *Kosovo* indictment,³² for example, Slobodan Milošević was indicted "rapidly" because "arrest became a consideration".³³ Prosecutors were worried that Milošević would come to an agreement to end the war in Kosovo, that would see him "leave the country and get protected somewhere where he would be forever outside our reach".³⁴ Louise Arbour publicly stated that she was "in a hurry" to indict him because she feared that Milošević would "negotiate a deal for his departure".³⁵ The need to ensure that Milošević was arrested before he fled meant that he was ultimately not charged with genocide, with a prosecutor noting "if the arrest possibility had not been a consideration, we might have waited and indicted a higher level of responsibility".³⁶

Similarly, the charges laid by Luis Moreno Ocampo at the ICC against Thomas Lubanga Dyilo were also affected by potential for the window in which Lubanga could be arrested closing. On 23 June 2004, Moreno Ocampo announced that the ICC OTP staff would commence the Office's first investigation into the Democratic Republic of the Congo.³⁷ Within the *Situation in the Democratic Republic of the Congo*, Lubanga attracted the investigative focus of prosecutors in relation to "lootings, killings, and a number of other crimes".³⁸ He was not originally under investigation for the offences relating to the conscription and use of child soldiers that he would ultimately be convicted on years later.³⁹

At the time of the investigations, Lubanga was being detained by the DRC authorities in Kinshasa on unrelated matters. This made him "an easy pick" for the first prosecution.⁴⁰ Nevertheless, prosecutors were becoming increasingly concerned that a local judge would order his release prior to

32 *Prosecutor v Slobodan Milošević et al (Indictment)* (ICTY, Office of the Prosecutor, IT-99-37, 22 May 1999).

33 Interview with P7.

34 Interview with P7.

35 Marlise Simons, 'Proud but Concerned, Tribunal Prosecutor Leaves', *New York Times* (online), 15 September 1999 <<https://www.nytimes.com/1999/09/15/world/proud-but-concerned-tribunal-prosecutor-leaves.html>>.

36 Interview with P7.

37 ICC Office of the Prosecutor, 'The Office of the Prosecutor of the International Criminal Court opens its first investigation' (Press Statement, ICC-OTP-20040623-59, 23 June 2004).

38 Interview with P5.

39 Interview with P5.

40 Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 1st ed, 2018), 349.

prosecutors concluding their investigations.⁴¹ With the knowledge that it would become more difficult to obtain custody of Lubanga should he be released from detention, Moreno Ocampo believed he needed to charge him quickly and obtain a warrant for his arrest. However, as he remarked in a 2009 interview, prosecutors were “not ready to prove the connection between Lubanga and some of the killings and some of the rapes”.⁴²

One prosecutor—with specific knowledge of the circumstances under which the decision to proceed was made and the decision itself—recounted using an illustrative dialogue between Moreno Ocampo and his staff how Moreno Ocampo approached the problem. The dialogue emphasises not only the urgency of the situation, but also that the decision to proceed sooner rather than later was an executive one. After ‘running’ to his staff, Moreno Ocampo began:

‘Guys we need to move this case. What evidence do we have?
We have evidence against killings?’

‘No.’

‘Rapes?’

‘No.’

‘What you have?’

‘Child soldiers.’

‘Okay, we move with child soldiers’.⁴³

The “majority” of prosecutors involved in this decision-making process, however, considered the investigation should be prolonged by a further six months to investigate other potential charges.⁴⁴ Nevertheless, Moreno Ocampo made the decision to seek Lubanga’s transfer to the ICC’s custody on the alleged child soldier offences, and broaden the indictment at a later stage.⁴⁵ This was never done.⁴⁶ It is apparent, therefore, that the likeli-

41 Paul Seils, ‘The Selection and Prioritisation of Cases by the Office of the Prosecutor of the International Criminal Court’ in Morten Bergsmo (ed), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl Academic ePublisher, 2nd ed, 2010) 69, 74.

42 Luis Moreno Ocampo in *The Reckoning* (Directed by Pamela Yates, Skylight Pictures, 2009), 00:38:50.

43 Interview with Pt.

44 Interview with P5.

45 Interview with P5.

46 See, with respect to the argument that Lubanga should have been later charged

hood of Lubanga entering the custody of the ICC had a direct effect on the charges that were laid against him.

The most obvious reason why the likelihood of a potential defendant's arrest affects the exercise of the charging discretion is a fundamentally pragmatic one: arrests allow prosecutors to get on with the business of conducting trials. Though why is this important? The underlying concern appears to be the assumption that having people in custody and running trials is an important source of a prosecutor's—and indeed a court's—symbolic capital. The concept of symbolic capital was introduced previously (on page 67), but in short it can be summarised as a source of power produced through those actions which develop an actor's integrity, honour, and respect among those with the capacity to “perceive, know, and recognise” these traits by responding to “socially constituted ‘collective expectations’ and beliefs”.⁴⁷ The prioritisation of arrests over mere indictments arguably demonstrate that arrests are understood to be a greater contributor to the development of symbolic capital than that which comes from simply filing charges. Arrests might be seen to vindicate the suffering of victims by allowing them to see that their alleged malefactor has, at least temporarily, been deprived of their liberty. Serge Brammertz, upon the arrest of Radovan Karadžić, was quoted in an OTP press release as saying that “[t]his is a very important day for the victims who have waited for this arrest for over a decade”.⁴⁸ They might be understood to strip a defendant of their power and, in doing so, give it to the Prosecutor in the form of perceived integrity, wisdom, and fair-mindedness. Or, they could confirm the moral outrage felt in response to a defendant's conduct by demonstrating that it is shared by the Prosecutor, reaffirming to a Court's benefactors that the institution is functioning as intended and providing value-for-money. Central to all these possibilities is the idea that the physical act of detaining someone is a simple and very clear manifestation of a power imbalance in favour of whoever is doing the

with rape and sexual enslavement, *Prosecutor v Thomas Lubanga Dyilo (Judgment pursuant to Article 74 of the Statute)* (ICC, Trial Chamber, ICC-01/04-01/06, 14 March 2012), [629]: “Not only did the prosecution fail to apply to include rape and sexual enslavement at the relevant procedural stages, in essence it opposed this step. It submitted that it would cause unfairness to the accused if he was tried and convicted on this basis”.

47 Pierre Bourdieu, *Practical Reason: On the theory of action* (Stanford University Press, 1st ed, 1998), 102. See also Pierre Bourdieu, *The Logic of Practice* (Richard Nice, Cambridge University Press, 1st ed, 1990) [trans of: *Le sens pratique*], 119–120.

48 ICTY OTP, ‘Statement of the Office of the Prosecutor on the Arrest of Radovan Karadžić’ (Press Statement, OTP/1274e, 21 July 2008).

detaining. Arrests thus contribute to the symbolic capital of the prosecutor and the court.

3.2 Increasing the prospects of a guilty verdict

Several prosecutors spoke about how the selection of charges was influenced by a desire to increase the prospects of a defendant being found guilty for something at trial. One prosecutor described this desire in the context of wanting to ensure that a defendant was eventually punished for their alleged crimes. Using the indictment against Stanislav Galić as an example, they described how they were keen to see the defendant punished for his conduct, especially in light of his malicious intent. Galić was the commander of the Sarajevo Romanija Corps ('SRK') from September 1992 during the siege of Sarajevo, whose members had engaged in a campaign of sniping civilians going about their daily lives. In one incident, a lady was killed in front of her family while sitting at the dining table in their apartment by two bullets fired through the window; in another, a man was shot in the back while picking lettuce in his vegetable patch.⁴⁹ These sorts of attacks went on for several years. In the Prosecution's Final Trial Brief, a prosecutor recalled how the Senior Trial Attorney stressed that Galić's crimes were not "committed in the heat of battle, or with little time to reflect on their consequences" but instead "were continuing crimes, in which his *mens rea* was refreshed on a daily basis".⁵⁰ This, the prosecutor remarked, reflected the idea that prosecutors were "out to get him".⁵¹ The alleged maliciousness of Galić, the prosecutor said, "warranted using everything in our armoury to get him for the killing and [serious] wounding of civilians" and that "on that basis alone, it was appropriate to use all relevant crimes in the *Statute* that applied to what he'd done".⁵²

This account is a good example of the prosecutor as a norm performer. Prosecutors can select charges to increase the prospects of punishment for acts that offend their sense of morality. Durkheim's assessment that the principle purpose of punishment is "to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour"⁵³ is also

49 *Prosecutor v Stanislav Galić (Judgment and opinion)* (ICTY, Trial Chamber, IT-98-29-T, 5 December 2003), [277]-[284]; [547]-[551].

50 *Prosecutor v Stanislav Galić (Prosecution's final trial brief)* (ICTY, Trial Chamber, IT-98-29-T, 28 April 2003), [644].

51 Interview with P19.

52 Interview with P19.

53 Émile Durkheim, *The Division of Labour in Society* (W D Halls, Free Press, 2nd ed,

relevant for understanding how the selection of charges occurs. Charge selection, too, involves the sustainment of the common consciousness through the labelling of acts as potentially criminal. The act of charging is an act of stigmatisation.⁵⁴ This sustainment is arguably amplified by the prosecutor choosing to select multiple charges as applicable to the one act as it demonstrates that the act has triggered significant outrage to warrant ‘throwing the book’ at the alleged perpetrator.

Other prosecutors, however, described that in their experience charges were selected to increase the prospects of a guilty verdict primarily because of the prosecution’s doubts about their own case. One recalled that “[i]f you’re confident in your case, you don’t feel like you need to charge everything just in case something goes wrong. Which I feel like sometimes, nobody in particular, ... some prosecutors do”.⁵⁵ Another reflected that in the early days of the ICTY, “[w]e were grossly overcharging our accused”.⁵⁶ At one point, the prosecutor recalled that they had a conversation with a “very prominent member of the OTP” where they asked them “why are you charging sixty counts in this indictment for essentially a camp guard?”, to which the other prosecutor responded, “because we don’t know what we are going to be able to prove”.⁵⁷ “[T]hat’s good”, the prosecutor recalls saying, “that’s really good. So if you get four counts conviction and the other fifty-six acquittals, that’s a win?” What expectations are you putting in the hearts and minds of the community when you bring sixty counts?”.⁵⁸

There are two roles to be observed here. The first, and perhaps the most obvious, stems from the link between the charges filed and the victims’ perceived expectations. Both the desirability and undesirability of charging ‘sixty counts’ can be explained by prosecutors adopting the role of guardians over the victims—it is simply that they had different views on what charging strategy was in the victims’ best interests. On the one hand, what might be regarded as ‘gross overcharging’ may well increase the prospects of the defendant being found guilty for *something* and possibly provide the victims with some validation, vindication, or redress. On the other hand, it also might raise their expectations and lead to disenchantment if or when the

2014) [trans of: *De la division du travail social*], 83.

54 See Frédéric Mégret, ‘Practices of Stigmatisation’ (2013) 76(3) *Law and Contemporary Problems* 287, 300.

55 Interview with P20.

56 Interview with P29.

57 Interview with P29.

58 Interview with P29.

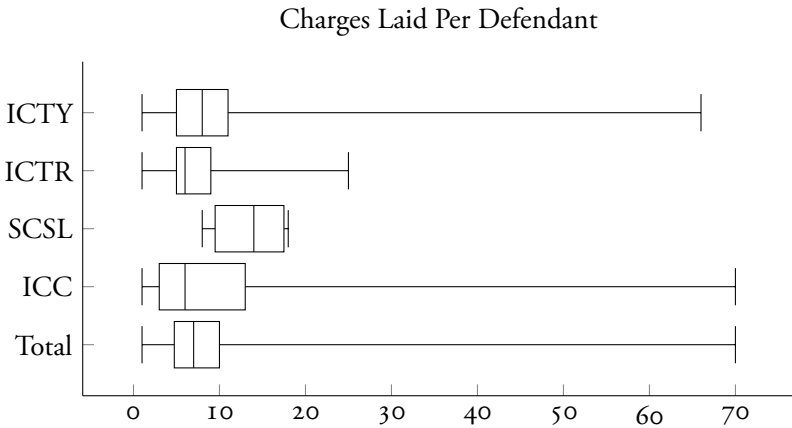


Figure 4.1: The number of charges alleged against individual defendants is generally between 5 and 10. Data from Cale Davis, *International Criminal Law Charging Document Database* (DOI 10.17026/dans-zcc-zdhp, 2021) version 6.

defendant is acquitted. This latter point highlights that a guilty verdict on a specific count does not have an independent and isolated symbolic power. Instead, the symbolic power of a guilty verdict is contextual upon the number of other charges that the prosecutor was *not* able to obtain guilty verdicts for. This clash of opinions seems attributable to prosecutors not actually knowing what victims wanted in the first place.

Decisions about the number of charges to allege against a potential defendant also reveal that prosecutors act in the role of norm performers. Bearing in mind that there are inherent difficulties in making comparisons between courts and between cases (each defendant is accused of different crimes and each brief of evidence is unique), charging practices both *within* and *across* the four primary international criminal courts have to some degree crystallised around what is an appropriate number of charges to allege against individual defendants. As shown in figure 4.1, this is generally between 5 and 10. This is arguably demonstrative of a procedural norm concerning the appropriate size for international prosecutions. The second message, however, is derived from the exceptions to this norm. Figure 4.1

shows that there are some notable instances where the number of charges has far exceeded the standard range: 66 charges were filed against Slobodan Milošević; and 70 were filed against Dominic Ongwen. These decisions demonstrate that the number of charges also sends messages about the role of perpetrators within conflicts and their relative criminality. Specifically, they are an act of moral messaging regarding what conduct is worthy of punishment. Liana Minkova argued that the Prosecutor's decision to charge Ongwen with 70 charges portrayed him "as one of the most notorious and ferocious perpetrators of crimes in Northern Uganda", though this decision "appeared to carry [a] disproportionate degree of stigmatisation compared to other LRA commanders".⁵⁹ An awareness of this messaging capacity is consistent with the prosecutor's suggestion mentioned above that the 'sixty counts' they referred to were disproportionate to the defendant's alleged conduct. The perceived stigmatising effect of the number of charges is contingent upon practice settling around what is considered to be a 'normal' number of charges. Some prosecutors have therefore arguably been conscious that they are performing both procedural and moral norms when making decisions regarding the number of charges to allege against individual accused.

3.3 The likely sentence

A concern related to the desire to increase the prospects of a defendant being found guilty, though unique to from it, is an awareness of the likely sentence the defendant will receive in the event that they are found guilty. One prosecutor questioned whether it was worth their while to prosecute additional charges if the defendant was going to nevertheless get a "fair sentence".⁶⁰ They explained that they were "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", and wondered aloud whether "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".⁶¹ 'Necessary', they explained, referred to justice, process, and the victims.

59 Liana Minkova, 'Expressing What? The stigmatisation of the defendant and the ICC's institutional interests in the Ongwen case' (2021) 34(1) *Leiden Journal of International Law* 223, 226, 238.

60 Interview with P20.

61 Interview with P20.

This concern appears to be underpinned by the prosecutor adopting several roles. The first stems from their concern with the fairness of the sentence. When this concern is viewed through the lens of expressive punishment, the prosecutor is revealed as a performer of moral norms. Expressivist theories of punishment “view punishment as a communicative gesture that is meant to affirm legal and societal norms and to convey messages of punishment to offenders and victims”.⁶² Antony Duff argued that punishment communicates censure by calling upon offenders “as member of the normative community... to recognise that they have done wrong”.⁶³ Mirjan Damaška has also argued international criminal courts have a role in “strengthening a sense of accountability for international crime by exposure and stigmatisation of these extreme forms of inhumanity”.⁶⁴ In this light, Harmen van der Wilt has argued that sentences delivered by international courts “should imbue the general public with core values”.⁶⁵ Mark Drumbl, too, has argued that sentencing in international courts can signal “the absolute immutability of core values” and “thereby impede the early indoctrination phases in which average citizens become assimilated into the machinery of mass violence”.⁶⁶ The fact that the prosecutor was thinking about sentencing *before* the charges were even selected shows that they had an awareness that the communicative potential of international criminal justice is contingent upon them laying charges that allow this potential to be fulfilled. In other words, they saw themselves as performers of moral norms that is manifested in the ultimate sentencing, which challenges the idea that it is the judges who have a monopoly on triggering the expressive capacity of criminal punishment.

The second is that they acted as a guardian of the victims’ interests. The prosecutor appears to have adopted the idea that it is not necessary to

62 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 324.

63 Antony Duff, *Punishment, Communication, and Community* (Oxford University Press, 1st ed, 2003), 82.

64 Mirjan Damaška, ‘What’s the Point of International Criminal Justice?’ (2008) 83(1) *Chicago-Kent Law Review* 329, 345.

65 Harmen van der Wilt, ‘Why International Criminal Lawyers Should Read Mirjan Damaška’ in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press, 1st ed, 2010) 44, 54, as cited in Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 340.

66 Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 1st ed, 2007), 174.

charge a defendant with all the crimes prosecutors believe were committed if the defendant nevertheless receives the necessary fair sentence the interests of the victims requires. On this account, the interests of the victims are best served through the sentence and not through the fair labelling or trial of allegedly criminal—though comparatively less-severe—conduct. When they turned their attention to whether it was ‘necessary’ for the victims to charge the ‘kitchen sink’, they were therefore acting in a guardianship role.

4 Normative Considerations

4.1 Advancing the law

As foreshadowed in the discussion of *nullum crimen sine lege* in section 2, some prosecutors have been motivated by a desire to advance the law when making decisions about which charges to include in an indictment. International criminal law is in a continuous state of development, and historically, judges have been given most of the credit for the way that ‘the law’ has developed and its occasional transmogrifications.⁶⁷ Joe Powderly called judicial creativity the “lifeblood of international criminal law” through which judges have sculpted “the relatively featureless granite of existing law in order to give it form, effect, and reason”.⁶⁸ Yet even though judges might write (or at least put their signatures on) the decisions in which ‘the law’ is found, they certainly have no monopoly on the creation of law within the context of legal proceedings. Their capacity to develop the law is largely (though not wholly) constrained by the questions they are asked to decide and the arguments put before them in submissions and filings. Both prosecution and defence counsel play a role here, and both deserve significant credit for

67 Tamàs Hoffman called Antonio Cassese “the gentle humaniser of humanitarian law”, noting that he “opportunistically” used his position as an Appeals Chamber judge in *Tadić* to “extend the regulatory framework of international armed conflicts to non-international armed conflicts”: Tamàs Hoffman, ‘The Gentle Humaniser of Humanitarian Law: Antonio Cassese and the creation of the customary law of non-international armed conflict’ in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser Press, 1st ed, 2010) 58, 58. Cassese has also been attributed with inventing a crime of transnational terrorism: Ben Saul, ‘Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism’ (2011) 24(3) *Leiden Journal of International Law* 677.

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

the way they push judges into deciding one way or the other. With respect to prosecutors specifically, there is clear evidence that some have been motivated by a desire to advance the law and that this motivation has affected their selection of charges.

The historical context in which international prosecutors exercise or exercised the charging discretion sheds some light on why some prosecutors have been motivated by this consideration. One ICTY prosecutor correctly observed that “[a]part from Nuremberg, ... and Tokyo for that matter, there had been no real attempt to develop the international criminal law” prior to the creation of the ICTY in 1993.⁶⁹ They observed that before that happened, international criminal law had been primarily an academic exercise with little means through which it could be judicially enforced.⁷⁰ This meant that when the ICTY and the ICTR became operational in the early '90s, prosecutors were confronted with a situation in which they could now make the ‘real attempt’ at padding out the body of law that had been largely neglected since the late 1940s.

Given the lack of jurisprudence, some prosecutors enthusiastically jumped at the opportunity to start work on building a body of law. 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”.⁷¹ Another reflected that the undeveloped state of international humanitarian law meant that its development “needed to be pursued”.⁷² This desire to advance the law had practical consequences for how the charging discretion was exercised. An ICTY prosecutor reflected, for example, that Deputy Prosecutor Graham 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”.⁷³

Prosecutors related the idea of using their charging discretion to advance the law to two unique issues. The first was that the charging discretion could be used to expand the recognised class of victims in international criminal law, by increasing the amount of recognised acts that constitute criminal behaviour. ICTY prosecutors were arguably the most prolific in this respect, notably with regard to the development of the law surrounding

69 Interview with P4.

70 Interview with P4.

71 Interview with P9.

72 Interview with P4.

73 Interview with P4.

sexual violence in armed conflict. Patricia Sellers and Nancy Patterson, for example, led the way with these developments by notably seeking permission from the Prosecutor and the Deputy Prosecutor to charge rape as torture.⁷⁴ They were by no means alone in wanting to prove the criminality of sexual assault, and the work of prosecutors in getting these charges to be accepted as crimes is one of the lasting and laudable legacies of the Tribunal.⁷⁵ “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”.⁷⁶ It was the “dearth” of jurisprudence regarding this category of crime that allowed prosecutors to be creative in the formulation of these charges, which saw sexual violence be charged as “cruel treatment, torture, persecution, enslavement, and genocide”.⁷⁷ These charges led to the “rapid development of sexual violence jurisprudence”.⁷⁸ The focus on developing the law through the forward-thinking charging of sexual violence left a positive legacy for ICC prosecutors, who themselves have made a policy decision to focus on charging sexual and gender-based violence as crimes *per se*.⁷⁹

It has not only been sexual and gender-based violence that has been the subject of innovative charging practices by international prosecutors. ICC prosecutors have also adopted charging practices with regard to crimes against children with the explicit intention of, in the words of one prosecutor, using their decisions to “do what we can to protect the most vulnera-

74 Interview with P4. See, specifically, *Prosecutor v Dragan Gagović et al (Indictment)* (ICTY, Trial Chamber, IT-96-23-I, 18 June 1996) (commonly known as the ‘Foča indictment’).

75 Interview with P29. The ICTY’s website even contains a special page to highlight the Tribunal’s achievements with regard to crimes of sexual violence: ICTY, *Crimes of Sexual Violence* <<https://www.icty.org/en/features/crimes-sexual-violence>>.

76 Interview with P4.

77 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, 1st ed, 2016) 33, 58.

78 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, 1st ed, 2016) 33, 58.

79 Office of the Prosecutor, ‘Policy Paper on Sexual and Gender-Based Crimes’ (International Criminal Court Office of the Prosecutor, June 2014), [72]. This was also discussed in the context of the principle of ‘fair labelling’ in section 2.

ble populations”.⁸⁰ The charges laid against Bosco Ntaganda, they pointed out, were an attempt to prove that it was a crime for a member of an armed group (in the case, the *Forces Patriotiques pour la Libération du Congo*) to commit war crimes (specifically rape and sexual slavery) against 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”.⁸¹ The decision to press this point ultimately led to Appeals Chamber judges stating that “there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law”.⁸² While the Appeals Chamber’s judges have been criticised for going too far in claiming that it is irrelevant whether the victims of sexual violence were *hors de combat*,⁸³ the judgment has also been held by Patricia Sellers as yielding a “steadily durable paved road of redress” and “[illuminating] the extent of protection afforded to children”.⁸⁴ Yvonne McDermott wrote that the Trial Chamber judges’ decision (which the Appeals Chamber judges agreed with) was “clearly founded in a desire to offer the greatest level of protection to victims of sexual violence in armed conflict, regardless of their status”.⁸⁵

There are other examples of where innovative charging practices have advanced the law and expanded the recognised classes of victims in international criminal justice. The decision by ICTY prosecutors to charge

80 Interview with P14.

81 Interview with P14.

82 *Prosecutor v Bosco Ntaganda (Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of counts 6 and 9”)* (ICC, Appeals Chamber, ICC-01/04-02/06 OA5, 15 June 2017), [65]. See also Wairagala Wakabi, ‘Appeals Chamber Affirms ICC Can Try Ntaganda Over Rape of Child Soldiers’ on *International Justice Monitor* (25 June 2017) <<https://www.ijmonitor.org/2017/06/appeals-chamber-affirms-icc-can-try-ntaganda-over-rape-of-child-soldiers/>>.

83 See Kevin Heller, ‘ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL’ on *Opinio Juris* (15 June 2017) <<http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>>.

84 Patricia Sellers, ‘Ntaganda: Re-alignment of a paradigm’ in Fausto Pocar (ed), *The Additional Protocols 40 Years Later: New conflicts, new actors, new perspectives* (Franco Angeli, 1st ed, 2018), 134-135.

85 Yvonne McDermott, ‘ICC extends War Crimes of Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator’ on *IntLawGrrls* (5 January 2017) <<https://ilg2.org/2017/01/05/icc-extends-war-crimes-of-rape-and-sexual-slavery-to-victims-from-same-armed-forces-as-perpetrator/>>.

Stanislav Galić with unlawfully inflicting terror upon civilians was motivated by the idea 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.⁸⁶ This “discretionary additional charge” was selected because, according to one prosecutor, “we thought it was important to nail [the infliction of terror upon civilians as] an express crime”, and added that they saw this as a “a responsible exercise of our power”.⁸⁷ Daniela Kravetz wrote that the recognition of terrorising the civilian population as an express crime would “transcend the sphere of competence of the ICTY” and affect the work of other tribunals, both international and domestic, in prosecuting acts of terror against civilians.⁸⁸ For their part, SCSL prosecutors alleged in *Prosecutor v Alex Tamba Brima and Santigie Borbor Kanu* that forced marriage constituted an ‘other inhuman act’ despite the fact that this was “a crime not known to international criminal law” at the time.⁸⁹ While the Trial Chamber judges rejected this charge on the basis that it was not distinct from the existing charge of sexual slavery,⁹⁰ it was ultimately upheld by the Appeals Chamber judges as a unique crime.⁹¹ The decision to charge the crime of forced marriage arguably contributed to a greater awareness of the gender dimensions of conflict and will help to ensure the successful prosecution of this conduct in the future.⁹²

In these instances, prosecutors were clearly acting builders of the law. Further, the desire to use the selection of charges to advance the law and expand the authority of international courts over new classes of victims evidences a strong paternal undercurrent.⁹³ By expanding the categories

86 Interview with P19.

87 Interview with P19.

88 Daniela Kravetz, ‘The Protection of Civilians in War: The ICTY’s Galić case’ (2004) 17(3) *Leiden Journal of International Law* 521, 535-536.

89 Charles Chernor Jalloh, *The Legal Legacy of the Special Court for Sierra Leone* (Cambridge University Press, 1st ed, 2020), 163. The charge of forced marriage was added after the initial indictment was signed: *Prosecutor v Alex Tamba Brima and Santigie Borbor Kanu (Request for leave to amend the indictment)* (SCSL, Trial Chamber, SCSL-04-16-PT, 6 May 2004).

90 *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu (Judgment)* (SCSL, Trial Chamber, SCSL-04-16-T, 20 June 2007), [713].

91 *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu (Judgment)* (SCSL, Appeals Chamber, SCSL-04-16-A, 22 February 2008), [203].

92 Charles Chernor Jalloh, *The Legal Legacy of the Special Court for Sierra Leone* (Cambridge University Press, 1st ed, 2020), 186.

93 ‘Paternal’ has historically been used to refer to traits possessed by fathers; in contrast to ‘maternal’, which refers to those traits possessed by mothers. The use here is

of crimes, prosecutors have claimed the right for prosecutions to be used as a remedy for suffering that was not previously recognised as harm inflicted contrary to international criminal law. To expand the law to new classes of crimes is to claim the power of a guardian or protector over those who previously fell beyond the scope of prosecutorial authority.

The decisions to expand the categories of crimes through the selection of charges also suggests that prosecutors have tried to achieve something other than the 'protection' of victims. These choices may also be underpinned by a desire to develop the relevance of their tribunal and, by extension, enhance the value of international criminal law. By increasing a tribunal's sphere of influence, prosecutorial charging practices can give international criminal justice institutions new purposes and work and ensured that they are seen as actively responding and adapting to situations on the ground. The expansion of harm categories to embrace new victims has arguably also contributed to the idea that international criminal law is a practical and indispensable tool for redressing an ever-increasing range of harms. Charging practices have made a valuable contribution to increasing the protection of vulnerable populations by establishing clear guidance on what conduct is considered criminal. They also serve to construct and reconstruct the perception that one of international criminal justice's strengths is its capacity to craft public morality. The creeping expansion of international criminal justice's jurisdictional reach has served to contribute to norms around morally repugnant conduct and enforced the prohibition on sexual and gender-based crimes and crimes against children. The advancement of the law has therefore served both external and internal ends: first, by drawing people into international criminal law's orbit; and by doing so, increasing the relevance of the Prosecutor, the Tribunal, and international criminal justice as a field.

The second issue that prosecutors related to in the context of their power to lay charges that advance the law is the idea that this power is not unlimited. Prosecutors spoke of constraints. For example, despite the clear path that ICTY prosecutors had before them to push forward novel charges and arguments, the broader international community had enforced upon prosecutors at the highest level of the Office that the Tribunal should not be allowed to fail. One prosecutor reflected that prior to Graham Blewitt travelling to The Hague to take up the role of Deputy Prosecutor, he travelled to

gender neutral: paternal relates to those traits possessed by guardians, regardless of their gender.

the United Nations in New York and met with high-profile NGOs, members of the 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 making it clear the ICTY needed to succeed.⁹⁴ The emergence of the ICTY also occurred at a time when there was increasing discussion about whether it would be possible to create a ‘permanent’ international criminal court. The work of the Ad-Hoc Committee (tasked with examining the International Law Commission’s draft statute for an international criminal court) was underway. One prosecutor noted that if the ICTY judges were able to produce good jurisprudence (no doubt ensured by prosecutors providing them with well-reasoned arguments about the scope of the law) and the ICTY was regarded as a success, “then the creation of a permanent court had more chance of ... being achieved than if we failed”.⁹⁵ Other prosecutors, too, recalled that the ICTY was something of an experiment whose successful function could assist the creation of a permanent court. One recalled that their general objective was to ensure “the survival of the enterprise and hopefully even its spread into something more universal, more permanent”.⁹⁶ While another argued that the potential for an international criminal court generally had no effect on the functioning of the Office or on the decisions prosecutors made,⁹⁷ the feeling that the ICTY’s early work represented a critical juncture in the development of the international criminal justice field appears to have formed part of the prosecutorial *zeitgeist* in the early and mid ’90s (at the closing of the ICTY in December 2017, the then-Dutch Foreign Minister Halbe Zijlstra illustrated this feeling of scepticism by telling the audience that “in the early years few people believed this would work” and that “[t]he first employees were advised against buying property in the Netherlands” because “[t]he Tribunal wouldn’t last very long”).⁹⁸ While prosecutors may never have consciously engaged with whether their selection of charges would help or hinder the institutional success of the ICTY or the creation of the ICC, these issues nevertheless formed part of the historical

94 Interview with P4.

95 Interview with P4.

96 Interview with P4.

97 Interview with P15.

98 Halbe Zijlstra, ‘Speech by Minister Zijlstra (Foreign Affairs) at the closing of the International Criminal Tribunal for the Former Yugoslavia (ICTY)’ (Speech delivered at the ICTY Closing Ceremony, The Hague, 21 December 2017).

context in which the charging discretion was exercised and may therefore have subtly dissuaded prosecutors from making decisions that could hinder the realisation of this vision of international criminal law's institutional success.

Another constraint was that any development of the law needed to respect prior judgments: prosecutors should not stray too far from what they, and the judges, would consider reasonable interpretations of the law. 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".⁹⁹ Further, any argument that was advanced to develop the law in new directions needed to 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".¹⁰⁰ Another prosecutor explained 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".¹⁰¹ 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".¹⁰² One prosecutor observed that they "had the responsibility of making sure that the judgments that came out of the trial chambers, but more particularly out of the Appeals Chamber, would withstand international scrutiny" and saw it as a "major responsibility to put up good, sound legal arguments".¹⁰³ Prosecutors played a role in acting as guardians of the law's integrity by ensuring that international criminal law developed as a coherent, consistent, and reasoned body of judicial decisions.

Finally, the rights of the potential defendant appear also to have acted as a constraint on moves to advance the law. An ICC prosecutor described that they were constrained by the 'spirit' that animated the provisions in

99 Interview with P4.

100 Interview with P4.

101 Interview with P13.

102 Interview with P13.

103 Interview with P4.

the *Rome Statute* in all decisions that they made. They were conscious that they should only advance arguments “that will look to be fair in the light of day”.¹⁰⁴ 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”.¹⁰⁵ While the prosecutor was not discussing the charging discretion specifically, there seems no reason why this philosophy would not have extended to informing what charges they alleged against a potential defendant. While this view clearly evidences at least some guardianship over potential defendants, the deeper message is that the prosecutor was aware of their role in legitimising the criminal justice system by expressing the importance of fairness and reasonableness in court procedures. By casting themselves as respectful of defendants’ rights, the prosecutor positioned themselves in opposition to the immorality of those who would become accused of serious crimes. They constructed the image of their Court as somewhere where even those accused of serious crimes, in a forum which has the potential to expand its jurisdictional reach at the expense of a defendant’s liberty, are entitled to procedural fairness. While creative charging practices are therefore constrained superficially by a defendant’s rights, this respect may well have been motivated by an underlying desire for institutional legitimacy that the prosecutor plays a key role in constructing.

5 Strategic Considerations

5.1 Judicial criticisms

Prosecutors have not been ‘tone-deaf’ to signals they receive from the bench about their selection of charges and there have been situations where prosecutors have decided not to pursue charges on the basis of criticisms and hints that they have received from judges. It is worth remembering here that courtrooms are interactional spaces. James Eisenstein and Herbert Jacob observed that “[c]ourts are not an occasional assemblage of strangers who resolve a particular conflict and then dissolve, never to work together again. Courts are permanent organisations”.¹⁰⁶ Lawyers and judges need to

¹⁰⁴ Interview with P24.

¹⁰⁵ Interview with P24.

¹⁰⁶ James Eisenstein and Herbert Jacob, *Felony Justice: An organisational analysis of criminal courts* (Little, Brown and Company, 1st ed, 1977), 20, quoted in David

work together, often for long periods of time, and sometimes across different courts.¹⁰⁷ Within the courtroom environment, social dynamics manifest in different ways, such as by affecting the assessment of evidence. Laurie Levenson observed that while courts are sometimes seen as “a controlled laboratory in which the science of the law is performed”, “this sanitised venue for trials is a fantasy”.¹⁰⁸ In her summary of the voluminous work done (particularly in the US) on the relationship between jurors’ assessments of evidence and the appearance of defendants, she noted that a defendant’s courtroom demeanour “can have potentially serious ramifications on the outcome of a case”.¹⁰⁹ How lawyers behave in court can also affect jury verdicts. Victor Gold observed in 1987 that something of a cottage industry had sprung up in the US to teach trial lawyers about ‘psychological courtroom techniques’ to sway jurors’ opinions by controlling everything from a witness’s dress to unspoken premises during questioning.¹¹⁰ Though international criminal judges—as generally, but bizarrely not always, trained judges or lawyers¹¹¹—might be more immune to these social influences than lay jurors, it would be naïve to think that they account for nothing. On the other side of the coin, social dynamics also affect lawyers’ experiences in court. In a professional publication produced by the American Bar Association, one practitioner offered his readers tips on how lawyers could overcome perceived instances of judicial bias against ‘out of town’ advocates.¹¹² In some jurisdictions, it is alarmingly common to hear stories of judges bullying counsel or making snide or unsettling remarks about their

Neubauer, ‘The Dynamics of Courthouse Justice: A critical review of the literature’ (1979) 5(1) *Justice System Journal* 70, 71.

107 Elena Baylis, ‘Tribunal-Hopping with the Post-Conflict Justice Junkies’ (2008) 10 *Oregon Review of International Law* 361.

108 Laurie Levenson, ‘Courtroom Demeanour: The theatre of the courtroom’ (2008) 92(3) *Minnesota Law Review* 573, 574.

109 Laurie Levenson, ‘Courtroom Demeanour: The theatre of the courtroom’ (2008) 92(3) *Minnesota Law Review* 573, 597. Levenson’s main argument was that because demeanour can play such an important role in determining the outcome of a case, rules were needed to ensure that the effect of demeanour was consistently addressed in a principled way.

110 Victor Gold, ‘Covert Advocacy: Reflections on the use of psychological persuasion techniques in the courtroom’ (1987) 65(3) *North Carolina Law Review* 481.

111 Joseph Powderly, *Judges and the Making of International Criminal Law* (Brill, 1st ed, 2020), 79, 89–108.

112 Stan Perry, ‘Overcoming Judicial Bias’ (2009) 35(4) *Litigation* 28.

appearance.¹¹³

The point here is not that international criminal law judges are biased or bullies, but merely that lawyers generally are not aloof to the social dynamics of the courtroom environment and these dynamics pervade all aspects of legal proceedings. It should not come as a surprise, then, that social dynamics between judges and prosecutors appear to have informed how prosecutors have decided charges. One prosecutor described, for example, that some judges would “subtly push” prosecutors towards withdrawing charges if they felt they were not the right ones.¹¹⁴ The procedures before the ICTY, ICTR, SCSL, and ICC all provided and provide for opportunities for judges to engage with the prosecution prior to the confirmation of the indictment or the issuance of a warrant or summons. Technically, the indictment review process at the ICTY, ICTR, and SCSL only provided judges with the opportunity to accept or reject the indictment or adjourn the process for prosecutors to seek more evidence;¹¹⁵ and at the ICC the Pre-Trial Chamber can issue a warrant or summons upon the presentation of evidence by the Prosecutor. Yet there is, of course, always the opportunity for the Prosecutor to simply withdraw the proposed charge from the judges’ consideration. At the ICTR, for example, one prosecutor described that the charge of genocide was excluded from some indictments because the rostered judges suggested that genocide “was not necessary because the facts or the crimes, the violence, was prosecuted”.¹¹⁶ At the ICC, one prosecutor recalled 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”, and questioned whether this would be an appropriate use of judicial resources if their goal was to “get a fair sentence, get justice for the victims, and tell the story”.¹¹⁷

ICTY prosecutors similarly experienced criticism from judges regarding the number of charges they were filing, which led to some of them proactively altering their indictments to avoid inevitable criticisms. Prior to his arrest, for example, Radovan Karadžić was facing 11 charges including one of complicity in genocide and one of wilful killing. After his arrest, the

113 In one particularly egregious instance, this author once heard a male judge comment that female counsel had ‘very nice teeth, your parents must have loved you very much’. Another person confirmed this recollection.

114 Interview with P20.

115 This is governed by Rule 47 of the various *Rules of Procedure and Evidence*.

116 Interview with P27.

117 Interview with P20.

indictment was amended to exclude these two charges and include an additional count of genocide and a count of attacking civilians. One prosecutor reflected that these changes were made primarily to ensure a manageable trial, but then added that “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”.¹¹⁸ When Alan Tieger for the Prosecution explained that the amended indictment would ensure “the most heightened specificity” and allow the most efficient presentation of the case “in light of both the evolving jurisprudence, evolving procedures, and the adjudicated facts”,¹¹⁹ this appears to be attributable to both prosecutors’ and the judges’ desires’ to have an efficiently-presented, representative, and manageable case.

Judicial criticisms have therefore affected the charging discretion in two different ways. On the one hand, they have forced prosecutors to reconcile differences between the objectives of international criminal trials held by themselves and the judiciary. While prosecutors may wish to charge conduct in every way they can (for any number of reasons), they have also curbed their expectations for what a trial can achieve when confronted by judges who prioritise expediency and efficiency over comprehensiveness. On the other hand, prosecutors have also been confronted with something much more human: a realisation that courtrooms are spaces in which they need to interact with judges on a daily basis, and often for a long time. The maintenance of good social relations is a key contributor towards quality of life, happiness, and intrinsic value.¹²⁰ More importantly, perhaps, is that these sorts of concessions are arguably a means of a prosecutor accumulating their own symbolic capital through increasing a judge’s sense of the prosecutor’s credibility and reasonableness.¹²¹ Whether this accumulated symbolic capital ever affords a prosecutor any advantage is debatable, how-

118 Interview with P5.

119 *Prosecutor v Radovan Karadžić (Transcript of 29 August 2008)* (ICTY, Trial Chamber, IT-95-5/18-I, 29 August 2008), 37-38. See also the Prosecution’s argument as to why it was desirable to amend the indictment: *Prosecutor v Radovan Karadžić (Motion to amend the first amended indictment)* (ICTY, Trial Chamber, IT-95-5/18-PT, 22 September 2008), [1]-[4].

120 Serge-Christophe Kolm, ‘The Logic of Good Social Relations’ in Benedetto Gui and Robert Sugden (eds), *Economics and Social Interaction: Accounting for interpersonal relations* (Cambridge University Press, 1st ed, 2005) 174, 174.

121 The notion of symbolic capital was introduced in this chapter on page 118, and substantively on page 67. See Pierre Bourdieu, *Practical Reason: On the theory of action* (Stanford University Press, 1st ed, 1998), 102.

ever one could reasonably speculate that it makes a prosecutor's life in the courtroom easier than if judges believed they were unreasonable. Nevertheless, both of these situations evidence prosecutors protecting their own interests by maintaining good relations with the judiciary and accumulating symbolic capital, demonstrating that self-interest is a factor affecting the selection of charges.

5.2 Public expectations

With the exception of the ICC, all other international criminal tribunals were established as reactions to prior or ongoing mass atrocity situations. Their mandates reflect the historical context of their creation. One practical ramification of this is that how prosecutors understand the public's expectations of a tribunal and pre-existing beliefs about the criminality of the conduct that they have witnessed may influence the charges that a prosecutor lays. For example, one ICTY prosecutor reflected that it "might well have been better if [genocide] hadn't been included [in the *ICTY Statute*]", because its inclusion made it "very hard for Del Ponte, Louise Arbour before her, and then us as the individual prosecutors not to say well, does the evidence arguably meet that standard? Because the public has said there is to be an inquiry into genocide, crimes against humanity, [and] war crimes".¹²²

The after-the-fact creation of tribunals means that they cannot be divorced from their historical context. Their creation reflects the belief that crimes *did* occur and creates expectations about what crimes *should* be prosecuted. These expectations are the invisible part of a tribunal's mandate. When prosecutors select charges in line with these expectations, they arguably try to contribute to the tribunal's perceived integrity by validating public opinions and beliefs about what occurred and meeting the expectations about what charges should be laid. But, as reflected in the above prosecutor's reflection on the inclusion of genocide in the *ICTY Statute*, a court's integrity is more complex. On the one hand, the prosecutor can build the court's integrity by charging the crimes the public believes occurred; but on the other hand, they can build the court's integrity by impartially and independently assessing the evidence before them—a process which may well result in them not charging crimes the public otherwise wants. In both cases, the prosecutor is forced to confront the question of how their selection of charges contributes to two very different conceptions

122. Interview with P11.

of integrity, reflecting their embrace of their role as the court's guardian.

5.3 Closing the tribunal

As discussed in chapter 3, section 5.5, the need to close the ICTY, ICTR, and SCSL had a significant impact upon how prosecutors selected situations and cases. This same need may also have affected the selection of charges at the ICTR. In a speech at the Asser Institute in 2006, the ICTR's final prosecutor, Hassan Jallow, recalled that the need to close the tribunal prompted prosecutors to start filing from early-2004 onwards what he termed "lean and mean indictments" with fewer counts.¹²³ This example neatly shows how charge selections can be affected by financial constraints. Taking into account this pressure is predominately an act of self-preservation aimed at mitigating the criticism the prosecutor would inevitably receive—particularly from the UN Secretary-General, Security Council and General Assembly representatives, and members of the ACABQ—if their charge selections continued to act as a drain on the public purse.

6 Conclusion

The seven thematic windows in this chapter have shown that the selection of charges has been used by prosecutors as an opportunity to pursue functional, normative, and strategic goals. Moreover, the features that have informed how prosecutors exercise their discretion reflect the existence of three different role identities that appear to have motivated their decisions.

The role of prosecutors as *norm performers* is evidenced in two respects. First, they have performed moral norms. This was evidenced by the decision to maximise the prospect of Galić being found guilty by charging him with everything prosecutors could; but also by prosecutors considering the expressive potential of the likely sentence for a defendant prior to charges being selected. In these two instances, prosecutors have sought to reaffirm existing standards of morality by relying on the expressive capacity of international criminal procedure. Second, they have performed procedural norms. This can be seen by prosecutorial practice crystallising around what appears to be an 'appropriate' number of charges in international criminal indictments, while leaving open the prospect of charging a number

¹²³ Hassan Jallow, 'The ICTR and the Challenge of Completion' (Paper delivered at the TMC Asser Institute, The Hague, 4 October 2006), 2.

of allegations that significantly exceeds that range in cases of exceptional criminality. It was also demonstrated by prosecutors exercising restraint in advancing the law out of an apparent concern for procedural fairness to the defendant, so the court's procedures would not be seen as oppressive or punitive.

Prosecutors have also acted as *builders*. They have done this with respect to the law, by using their selection of charges to increase the number of recognised crimes. Perhaps more unexpectedly, prosecutors also appear to have acted as builders of institutional and personal power and authority. Laying charges that increase the prospects of a conviction being obtained and laying charges to increase the likelihood of arrest suggest an attention to the symbolic power that is attached to convictions and arrests for both courts and prosecutors. Further, charging decisions targeted towards advancing the law also serve to increase a court's, a prosecutor's, and international criminal justice's sphere of influence and cement their relevance in international relations and transitional justice.

Finally, prosecutors have adopted the role of *guardians*. Charge selection decisions evidence that they have, first, acted as guardians over people. They have acted as guardians over victims by considering what is in their best interests when deciding to prioritise the expressive potential of the likely sentence on a fewer number of charges over charging 'the kitchen sink'. They have also acted as guardians over victims by seeking to use their charge selection decisions to expand the category of people who can claim to be victims of international crimes. Further, they have acted as guardians over themselves. By taking into account judicial criticisms and the need to close the tribunal, prosecutors have demonstrated that they are apparently conscious of the risks posed to their own wellbeing and reputation. Second, prosecutors have acted as guardians over the law by respecting its integrity and not seeking to expand it too quickly with creative charging decisions. Finally, they have acted as guardians over their respective courts when they considered what the public was expecting from their institution in terms of the charges that would be prosecuted before it.

The selection of charges is therefore informed by more complex considerations than the mere strength of the evidence or a desire to advance the law. Instead, the role identities highlighted here demonstrate that charging decisions are informed by desires to perform, to build, and to protect. This chapter has displayed that the selection of charges—like all other discretionary choices—can only be properly understood when positioned in the context of these roles at the risk of otherwise neglecting the complex

array of forces that inform how prosecutors reach reasoned decisions about appropriate courses of action to pursue.

Chapter 5

Negotiating Outcomes

I wouldn't try to get a guilty plea if I didn't think I could prove it.

INTERVIEW WITH P28

Where we had sufficient evidence to prosecute someone to conviction, we never went for a plea bargain.

INTERVIEW WITH P22

1 Introduction

Negotiating outcomes with a defendant is one of the most controversial things that international prosecutors can do. The reason is that the discursive space created by the concept of negotiated outcomes—typically called ‘plea negotiations’, though this name is misleading—is a microcosm of international criminal law’s macro debates. In it, accountability is pitted against pragmatism; expense against value; comprehensive accounts of the truth against distorted portrayals of reality; and criminal justice against transitional justice. Despite this, there is a conspicuous lack of public, primary information about what informs prosecutors when they are negotiating outcomes. This is remarkable in light of the close relationship between this choice and the choice to select charges. With some minor exceptions,¹

1 Such as a hypothetical agreement under which the prosecution agrees only to a sentencing range.

both relate to what is alleged against a defendant.

Through interviews with current and former international prosecutors, this chapter illustrates—for the first time—what has informed prosecutors when they negotiated outcomes in international criminal justice. It begins, in section 2, by describing the legal framework which governs these decisions. It then turns to exploring eight factors which appear to have informed prosecutorial decision-making. These eight ‘thematic windows’ are discussed across three sections. Section 3 addresses the functional considerations of the strength of the evidence; efficiency gains; the alleged conduct of the accused; and the risks posed to victims and witnesses. Section 4 moves on to two normative considerations: establishing the ‘truth’ and norm expression. Section 5 then explores the strategic considerations of the prosecutor’s social capital and their legal background.

Finally, this chapter concludes by reflecting on what these thematic windows reveal about how prosecutors have adopted the roles of norm performers, builders, and guardians.

2 The Legal Framework

The legal framework governing negotiated outcomes depends on the type of negotiated outcome. Negotiated outcomes take two forms. The first (and arguably the most well-known) is the plea agreement, in which prosecutors offer actual or potential defendants concessions in return for pleading guilty by attempting to reduce the severity of the proceedings.

Guilty pleas themselves are relatively rare occurrences in international criminal justice. Only 10% of defendants, or 30 out of 298, have pleaded guilty. This has regularly been contrasted with US practice, where authors have noted the overwhelming majority of criminal matters (in the realm of 90%) are disposed of with pleas.² Table 5.1 contains a summary of all *guilty pleas* that have occurred at the ICTY, ICTR, SCSL, and ICC.

As shown in Figure 5.1, the first formal plea agreements (starting with Erdemović on his return to the Trial Chamber, Kambanda, and Serushago) were concluded in 1998. Erdemović’s guilty plea predated his later plea

2 See, for example, Nancy Combs, ‘Copping a Plea to Genocide: The plea bargaining of international crimes’ (2002) 151(1) *University of Pennsylvania Law Review* 1, 9, citing *Brady v United States*, 397 US 742 (1970), 752 for the proposition that 90% of criminal cases resolve in pleas. In federal cases, the number is around 97%: Fair Trials, ‘At a glance – A visual breakdown of plea bargaining’ on *Fair Trials* (11 February 2016) <<https://www.fairtrials.org/node/850>>.

Defendant	First Charges	Final Charges	Plea To	% Change
ICTY				
Biljana Plavšić	9	1	1	-89%
Damir Došen	10	7	1	-90%
Darko Mrđa	3	2	2	-33%
Dragan Kolundžija	13	5	1	-92%
Dragan Nikolić	64	4	4	-94%
Dragan Obrenović	5	5	1	-80%
Dragan Zelenović	13	14	7	-46%
Dražen Erdemović	1	-	1	0%
Duško Sikirica	16	7	1	-94%
Goran Jelisić	56	32	31	-45%
Ivica Rajić	3	12	4	+33%
Milan Babić	5	-	1	-80%
Milan Simić	3	7	2	-33%
Miodrag Jokić	16	6	6	-63%
Miroslav Bralo	21	8	6	-71%
Miroslav Deronjić	6	1	1	-83%
Momir Nikolić	6	6	1	-83%
Predrag Banović	31	5	1	-97%
Ranko Češić	27	12	12	-56%
Stevan Todorović	15	27	1	-93%
Equating to 20 of 165 defendants, or 12%				
ICTR				
Georges Ruggiu	2	6	2	0%
Jean Kambanda	6	-	6	0%
Joseph Nzabirinda	4	1	1	-75%
Joseph Serugendo	4	-	2	-50%
Juvenal Rugambarara	9	1	1	-89%
Michel Bagaragaza	2	1	1	-50%
Omar Serushago	5	5	4	-20%
Paul Bisengimana	11	-	2	-82%
Vincent Rutaganira	7	7	1	-86%
Equating to 9 of 85 defendants, or 9%				
SCSL				
-	-	-	-	-
Equating to 0 of 11 defendants, or 0%				
ICC				
Ahmad Al Faqi Al-Mahdi	1	-	1	0%
Equating to 1 of 37 defendants, or 3%				
Guilty pleas were entered by 30 out of 298 defendants, or 10%				
The average reduction in charges from the first charging document is 58%				

Table 5.1: Defendants who have pleaded guilty to core international crimes. In the calculation of the ‘First Charges’ column and the ‘Final Charges’ column, alternative charges have been excluded. Charges framed as *possible* alternatives (ie ‘Count 1 *and/or* Count 2’) have been included. Thanks go to Barbora Holá for her assistance in providing the list of ICTR defendants who pleaded guilty.

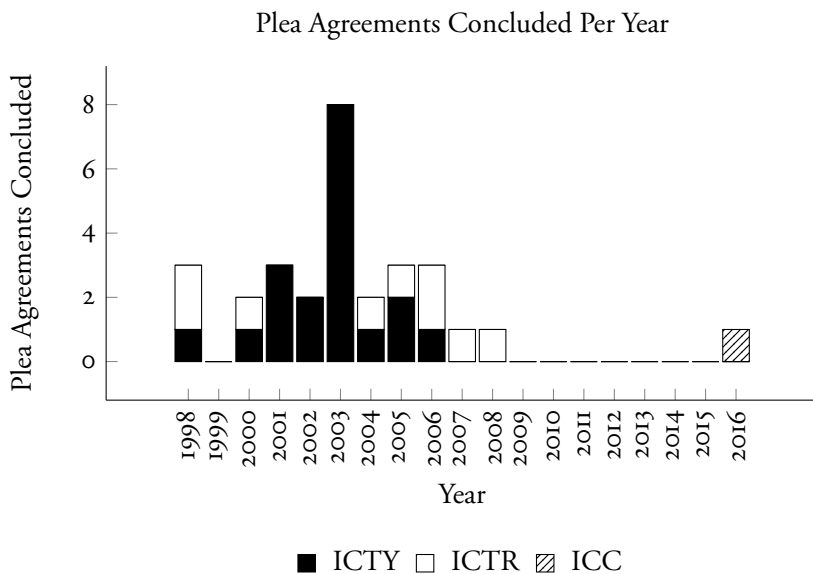


Figure 5.1: The number of plea agreements concluded each year, by court. This figure includes those plea agreements that are confidential and thus not publicly available.

agreement by over one and a half years.³ ICTY, ICTR, and ICC prosecutors have concluded only 29 formal plea agreements, 13 of which are public.⁴ Formal plea agreements were concluded with each defendant who pleaded guilty (as shown in Table 5.1), with the single exception of Goran Jelisić. Jelisić, a guard at the Luka camp in Brčko, was a particularly sadistic character who (among other things) took pleasure out of randomly executing detainees by systematically beating them before shooting them in the back of the neck. He also used to declare that he needed to kill twenty to thirty people before he could drink his coffee each morning, and referred to himself as ‘Serbian Adolf’ (including at his first appearance before the trial chamber judges).⁵ He was apparently under the mistaken belief that he would receive a discount for his cooperation in pleading guilty, and—consistent with there being no agreement in place—got none when prosecutors held no punches in recommending a life sentence.⁶

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- 3 While Combs argues that Erdemović’s 1998 plea agreement cannot be considered the outcome of plea bargaining, and lists *Todorović* as the first ICTY case in which a plea agreement was reached, this disregards the fact that the outcome of the case was the result of negotiation. The Prosecution *did* undertake to submit that Erdemović had provided them with substantial assistance, withdraw the alternative count, and recommend a maximum head sentence of 7 years in return for Erdemović providing information and testifying as a prosecution witness in other trials. See Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative approach for bridging truth and justice* (PhD thesis, Leiden University, 2005), 218; *Prosecutor v Dražen Erdemović (Annexure A to the joint motion for consideration of plea agreement between Dražen Erdemović and the Office of the Prosecutor)* (ICTY, Trial Chamber, IT-96-22-PTbis, 8 January 1998).
- 4 The plea agreements that are *not* public are those for Miroslav Bralo, Ranko Češić, Miodrag Jokić, Darko Mrđa, Dragan Nikolić, Milan Simić, Stevan Todorović, Michel Bagaragaza, Paul Bisengimana, Jean Kambanda, Joseph Nzabirinda, Juvénal Rugambarara, Georges Ruggiu, Vincent Rutaganira, Joseph Serugendo, and Omar Serushago. Applications to access these documents have been unsuccessful. They have, therefore, not been analysed for this chapter. No plea agreements were concluded at the SCSL.
- 5 *Prosecutor v Goran Jelisić (Judgment)* (ICTY, Trial Chamber, IT-95-10-T, 14 December 1999), [38], [102]-[103].
- 6 Nancy Combs, ‘Copping a Plea to Genocide: The plea bargaining of international crimes’ (2002) 151(1) *University of Pennsylvania Law Review* 1, 117. As Geoffrey Nice QC remarked during his sentencing hearing,

Every human instinct, we respectfully suggest—whether in the bereaved, in such victims this man has survived, or indeed even in the hearts and minds of lawyers and judges—will be that this man should receive the maximum possible sentence and should never again breathe the air of free society... The sentence on the

The limited practice of prosecutors concluding plea agreements has been attributed to several factors. The limited number of plea agreements at the ICTY was initially due to prosecutors wanting trials to run due to a lack of defendants, though it later became attributable to lenient sentences attracting “highly critical publicity” and a subsequent swing towards sentences *greater* than that recommended by prosecutors.⁷ Defendants preferred to take their chances at trial. The departure of Chief of Prosecutions Michael Johnson—“a strong supporter of plea bargaining”—in early 2004 may also have contributed to the practice’s decline.⁸ Over at the ICTR, various other reasons contributed to accused not wanting to plead guilty. These included that “they truly [did] not believe that they [were] guilty of the crimes for which they [had] been charged”; prison dynamics militated against defendants entering pleas in return for cooperation with prosecutors in their prosecutions against more senior detainees; defence counsel may have had financial incentives to run trials or similarly believed in their client’s innocence; and the limited life expectancy of defendants may have enhanced the attraction of staying out of gaol for longer (albeit remaining in the UN Detention Centre).⁹ The lack of a “credible and predictable policy” at the ICC may historically have also deterred defendants from pleading guilty.¹⁰

Plea agreements see prosecutors grant an actual or potential defendant

defendant, in our submission, should reflect the magnitude of the horrifying crimes that occurred and the suffering that was caused by him. He cries out effectively for mercy. He showed none. World opinion, it might be safe to conclude, would not want him to be shown any, and it is our submission that this Chamber should show him none and should impose on him the maximum sentence of life imprisonment.

Prosecutor v Goran Jelisić (Transcript of 11 November 1999) (ICTY, Trial Chamber, IT-95-10, 11 November 1999).

- 7 Nancy Combs, ‘Procuring Guilty Pleas for International Crimes: The limited influence of sentence discounts’ (2006) 59 *Vanderbilt Law Review* 69, 84, 87, 98. See also James Meernik, ‘What Kind of Bargain is a Plea?’ (2014) 14(1) *International Criminal Law Review* 200, 216.
- 8 Nancy Combs, ‘Procuring Guilty Pleas for International Crimes: The limited influence of sentence discounts’ (2006) 59 *Vanderbilt Law Review* 69, 99.
- 9 Nancy Combs, ‘Procuring Guilty Pleas for International Crimes: The limited influence of sentence discounts’ (2006) 59 *Vanderbilt Law Review* 69, 118, 120–122.
- 10 Alex Whiting, ‘Encouraging the Acceptance of Guilty Pleas at the ICC’ on *Post-Conflict Justice* (11 February 2015) <<http://postconflictjustice.com/encouraging-the-acceptance-of-guilty-pleas-at-the-icc/>>.

two core concessions that can be made separately or together.¹¹ The first concession that prosecutors can make to mitigate the severity of the outcome of the proceedings is through recommending a sentencing chamber impose a penalty within a particular range. This is commonly called ‘sentence bargaining’. Of the 13 public negotiated outcomes, 12 contained a sentence bargain. *Plavsić* was the only case where prosecutors did not agree to a sentencing range, and did so expressly.¹²

The prevalence of sentence bargaining is in spite of two factors that would otherwise suggest its limited attraction for defendants considering whether it would be in their interests to enter a guilty plea. It goes without saying that the value to a defendant of a sentence bargain is ultimately found in the prosecution’s ability to make a recommendation that has an effect on the sentencing chamber’s disposition. But in all courts where negotiated outcomes were utilised, any agreement between prosecutors and defence lawyers (and defendants) with respect to sentence (or, for that matter, anything) was and is considered non-binding.¹³ In this light, there have been two cases where the first instance sentencing chamber imposed a sentence *higher* than that agreed between the parties: *Babić*, where prosecutors suggested 11 years and he was given 13,¹⁴ and *Momir Nikolić*, where the suggestion of 15 to 20 years was ignored in favour of a term of imprisonment of 27 years.¹⁵ In other words, in 17% of cases where prosecutors agreed to a sentencing range, this was ignored by the first instance sentencing chamber.

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- 11 See, for a brief discussion on the two types of plea agreements, Gideon Boas et al, *International Criminal Law Practitioner Library* (Cambridge University Press, 1st ed, 2011) vol 3, 221.
- 12 *Prosecutor v Biljana Plavsić (Plea Agreement)* (ICTY, Trial Chamber, IT-00-39&40-PT, 30 September 2002), [7].
- 13 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 62ter; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 62bis; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 65(5).
- 14 *Prosecutor v Milan Babić (Joint motion for consideration of plea agreement between Milan Babić and the Office of the Prosecutor pursuant to rule 62ter)* (ICTY, Trial Chamber, IT-03-72-I, 12 January 2004), [4](b); *Prosecutor v Milan Babić (Sentencing judgment)* (ICTY, Trial Chamber, IT-03-72-S, 29 June 2004), [102].
- 15 *Prosecutor v Momir Nikolić (Joint motion for consideration of amended plea agreement between Momir Nikolić and the Office of the Prosecutor)* (ICTY, Trial Chamber, IT-02-60-PT, 7 May 2003), [4](a); *Prosecutor v Momir Nikolić (Sentencing judgment)* (ICTY, Trial Chamber, IT-02-60/01-S, 2 December 2003), [183]. The case was appealed and Nikolić was resentenced to 20 years: *Prosecutor v Momir Nikolić (Judgment on sentencing appeal)* (ICTY, Appeals Chamber, IT-02-60/01-A, 8 March 2006), 48.

The second significant factor that would suggest sentence bargains would have been used less than they have is that guilty pleas appear to have little to no impact on the sentence the defendant ultimately receives. In his 2014 study, James Meernik found little evidence that pleading guilty provides a defendant with any substantial decrease in the ultimate sentencing disposition, and “even some indication that pleaders may be worse off”.¹⁶ Yet sentences are still negotiated.

The second concession that prosecutors can make to reduce the severity of the outcome of the proceeding is to reduce the number of charges the defendant is facing by withdrawing, or moving to withdraw, particular charges. This method, commonly known as ‘charge bargaining’, is as prevalent as sentence bargaining and is evidenced in 11 of the 13 publicly available plea agreements (additionally, in *Deronjić*, the need for a charge bargain to be formally contained in the agreement was obviated by prosecutors filing a reduced indictment on the same day). The only other case where a charge bargain was not contained in a plea agreement was *Al Mahdi*, where the defendant’s arrest warrant for a single charge was issued while he was in custody in Niger,¹⁷ meaning that there was very little for the parties to negotiate over in terms of the charges he was facing.

The legal framework governing charge bargains depends on the stage of proceedings the charge bargain is concluded in. At the ICTY, ICTR, and SCSL, it was entirely within a prosecutor’s power to withdraw a charge prior to its confirmation, however they required the leave of the confirming judge if the indictment had been confirmed but not yet allocated to a trial chamber or the trial chamber if the case had been allocated.¹⁸ At the ICC, prosecutors can withdraw charges after providing notice to the Pre-Trial Chamber judges before the Confirmation of Charges hearing; and after the

16 James Meernik, ‘What Kind of Bargain is a Plea?’ (2014) 14(1) *International Criminal Law Review* 200, 216.

17 Milena Sterio, ‘Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi case’ (2017) 49(1) *Case Western Reserve Journal of International Law* 63, 66; citing Mark Kersten, ‘Why the Timbuktu Case is a Breakthrough for International Criminal Court’, *The Globe and Mail* (Online), 25 August 2016 <<https://www.theglobeandmail.com/opinion/timbuktu-case-a-breakthrough-for-international-criminal-court/article31540221/>>.

18 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 51; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 51; Special Court for Sierra Leone, *Rules of Procedure and Evidence* (31 May 2012), r 51.

commencement of trial with the leave of the Trial Chamber judges.¹⁹ At no court where plea agreements were utilised was or is an agreement relating to charges binding upon the judges.²⁰

In October 2020, the ICC Prosecutor released her *Guidelines for Agreements Regarding Admission of Guilt*.²¹ This document outlines eight factors that prosecutors *should* consider when concluding a plea agreement. At their core, these guidelines emphasise the importance of ensuring the charges represent the gravity of the offending and the defendant's criminality, the wellbeing of the victims and witnesses, and the desirability of the defendant's cooperation with other investigations and prosecutions. Importantly, the *Guidelines* also stress that prosecutors should exercise "particular caution" before agreeing to withdraw or amend charges concerning sexual and gender-based violence, crimes against or affecting children, attacks against protected objects, and attacks against humanitarian or peacekeeping personnel.²² They also stress that the ability of plea agreements to lead to greater efficiency may never be considered "the dominant factor" when prosecutors are deciding whether to conclude one with a defendant.²³

Returning to the two forms of negotiated outcomes, the second form negotiated outcomes can take is the grant of immunity. This process, referred to by one prosecutor as 'dancing with the devil',²⁴ also allows prosecutors to make two concessions. The first concession is granting the actual or potential defendant immunity from prosecution. There are no statistics that reveal the actual *prevalence* of this form of immunity, although Nancy Combs observed in 2005 that "rumours abound... that insider witnesses are informally granted immunity".²⁵ Despite there being no information on

19 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 61(4) and (9).

20 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 62ter(b); International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 62bis(b); *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 65(5).

21 Office of the Prosecutor, 'Guidelines for Agreements Regarding Admission of Guilt' (International Criminal Court Office of the Prosecutor, October 2020).

22 Office of the Prosecutor, 'Guidelines for Agreements Regarding Admission of Guilt' (International Criminal Court Office of the Prosecutor, October 2020), 5-6.

23 Office of the Prosecutor, 'Guidelines for Agreements Regarding Admission of Guilt' (International Criminal Court Office of the Prosecutor, October 2020), 7.

24 Interview with P2.

25 Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative approach for bridging truth and justice* (PhD thesis, Leiden University, 2005), 217

how widespread the practice is or was (the charges may not be formalised in a charging document that is *subsequently* negotiated, so there may not be a paper trail), there are some known cases where immunity has been offered. In 2004, ICTR Prosecutor Hassan Jallow undertook (among other things) “[n]ot to prosecute [Michel Bagaragaza] before [the] ICTR” in exchange for his statements that allowed prosecutors “to make significant progress in the different ongoing cases”.²⁶ The agreement also specified that the Prosecutor would refer the file to national authorities outside of Africa.²⁷ Ultimately, no national authority could be found and Bagaragaza was dealt with by the ICTR.²⁸ Immunity from prosecution was also granted to seven individuals by SCSL prosecutors,²⁹ who were able to provide information that took prosecutors “all the way to Charles Taylor very quickly”.³⁰ It is not known who these individuals are, or were.

The second concession is the offering of ‘use immunity’. Under a grant of use immunity, prosecutors undertake not to use any information obtained from a witness in a prosecution against them (therefore necessitating the prosecution proving, through the standard means, any charges against the accused). It is conceptually related to the privilege against self-incrimination; yet whereas the privilege allows a witness *not* to answer questions that may incriminate themselves, use immunity gives an individual the comfort to speak openly without fear that they are ‘putting the noose around their own neck’.³¹ There is similarly no information regarding the prevalence of this type of immunity, but it is known that Captain Dragan Vasiljković was offered—but refused—use immunity in the trial of Slobodan Milošević.³²

(footnote 80r).

- 26 *Prosecutor v Protais Zigiranyirazo (Agreement between the Prosecutor of the ICTR and Michel Bagaragaza)* (ICTR, Trial Chamber, ICTR-01-73, 28 November 2006), 1-2. Incidentally, the prosecutors also offered “[t]o change the face of the witness, if it is so required, through cosmetic surgery” in what is perhaps one of the more extreme known undertakings extended by a prosecutor (at 3).
- 27 *Prosecutor v Protais Zigiranyirazo (Agreement between the Prosecutor of the ICTR and Michel Bagaragaza)* (ICTR, Trial Chamber, ICTR-01-73, 28 November 2006), 2.
- 28 *Prosecutor v Michel Bagaragaza (Sentencing Judgment)* (ICTR, Trial Chamber, ICTR-05-86-T, 17 November 2009), [2]-[7].
- 29 Interview with P2.
- 30 Interview with S30.
- 31 Similar provisions exist in domestic legislation. See, for example, *Evidence (National Uniform Legislation) Act 2011* (NT), s 128(7) and its counterparts in other jurisdictions.
- 32 *Prosecutor v Slobodan Milošević (Transcript of 19 February 2003)* (ICTY, Trial Chamber,

There is no legal framework governing the conclusion of either type of immunity.

What emerges from the above is that while practice has developed four different concessions prosecutors can offer to actual or potential defendants when concluding negotiated outcomes, they are free to consider whatever they like when deciding whether they should be offered.³³ The following eight sections reveal what some of the factors are that prosecutors have considered when deciding whether to conclude negotiated outcomes with defendants.

3 Functional Considerations

3.1 The strength of the evidence

Prosecutors have expressed vastly different views on what impact the strength of the evidence has on the decision to conclude plea negotiations, as demonstrated in the epigraph at the beginning of this chapter. One prosecutor used plea negotiations only if the evidence they had did not establish *prima facie* case. In their view, plea negotiations were a means to dispose of weak files that they would not be able to prove in court. “The reason is that when we opted for the solution of the plea bargain, we had come to the realisation that the evidence that was available to the Prosecutor... was insufficient to obtain a conviction for the crimes that were charged”, they admitted.³⁴ “Where we had sufficient evidence to prosecute someone to conviction, we never went for a plea bargain. No, we never did that... It was for the weak cases that we did go for the plea bargain”.³⁵

This account is strongly connected with the notion of symbolic capital.³⁶ Plea negotiations were a means for prosecutors to both increase the likelihood of a conviction being entered whilst reducing the prospect of an acquittal at trial. Convictions and acquittals are important sources of symbolic capital—they highlight a prosecutor’s legal prowess, their power, their

IT-02-54-T, 19 February 2003), 16444.

33 Even the ICC Prosecutor’s *Guidelines for Agreements Regarding Admission of Guilt*, the only and therefore most comprehensive official document to date on the subject, is phrased in non-mandatory terms: prosecutors *should* consider the eight factors it contains, but there is no requirement that they *must*.

34 Interview with P22.

35 Interview with P22.

36 The concept of symbolic capital is introduced in chapter 3 on page 67.

capabilities, and their effectiveness. For plea negotiations to be used in the circumstances described by this prosecutor arguably demonstrates that they had a degree of anxiety about what the effect on their symbolic capital would be if the defendant was acquitted. Plea negotiations were a useful method to secure convictions in circumstances where time and resource-intensive trial proceedings would likely result in the embarrassing spectacle of an acquittal. Plea negotiations provided the prosecutor with an easy means of protecting their own interests and those of their Office.

On the other side of the coin, another prosecutor used plea negotiations only if they had a *prima facie* case upon which they believed a defendant could be convicted. “[I]f I felt that I didn’t have a case, I wouldn’t get into a plea negotiation”, they remarked.³⁷ “If I felt that we didn’t have a case, I didn’t think it was then appropriate to try and negotiate a guilty plea”, they repeated, as if to reinforce the point.³⁸ “... Either I can prove it, or I can’t. I wouldn’t try to get a guilty plea if I didn’t think I could prove it”.³⁹ While this may have resulted in provable charges being withdrawn, the prosecutor was of the opinion that any distortion of reality could be appropriately addressed in sentencing. “In all of these files where I accepted guilty pleas, I would say basically we will take a position on sentencing that reflects the degree of culpability that we see in this case, as compared to the involvement of others”, they explained.⁴⁰

In contrast to the first account, this latter account places no emphasis on the capacity of convictions to produce symbolic capital. Instead, it is evidence that the prosecutor has adopted the role of an institution builder by demonstrating an institutional power struggle between prosecutors and judges for the right to determine the outcomes of proceedings. By claiming the power to recommend sentences and withdraw charges, prosecutors can reshape the ways international courts respond to allegations of criminal conduct. They create a second layer of arbitration which is more flexible in terms of possible outcomes than the limited powers of judges to merely assess guilt and punish.

37 Interview with P28.

38 Interview with P28.

39 Interview with P28.

40 Interview with P28.

3.2 Efficiency gains

Perhaps unsurprisingly, prosecutors have been drawn to the economic efficiencies negotiated outcomes afford them. In the 22 public prosecution sentencing briefs for defendants who have pleaded guilty under a negotiated outcome,⁴¹ ICTY, ICTR, and ICC prosecutors have (with only four exceptions) emphasised that a guilty plea has saved time, effort, or resources that would otherwise have been spent running a trial against the accused. The fact that a plea has saved resources is the most common argument that prosecutors have employed as to why the plea should count as a mitigating factor, and is argued in 82% of their public sentencing briefs. In two cases where prosecutors did *not* emphasise this point—*Simić* and *Todorović*—the defendant’s pleas were entered after the commencement of the trial (in *Banović* and *Jelisić*—the remaining two cases—there is no obvious explanation for the absence of the submission). There is no doubt that the economic advantages pleas bring are seen as significant motivators for concluding negotiated outcomes.

The economic value of negotiated agreements is also reflected in the agreements themselves. In 54% of the plea agreements that are publicly available, the defence undertook not to appeal the awarded sentence if it was within the recommended range. 38% contained the agreement not to appeal the conviction, and 31% the agreement not to withdraw the guilty plea.

Plea negotiations also mean that resources can be spent elsewhere. “Trials at the [ICTY] were complex and time consuming”, explained one prosecutor, adding that “I took the view that prosecuting every charge on an indictment would consume unnecessary time and would dissipate out limited human and material resources, particularly if an indictee was willing to plead guilty and cooperate”.⁴² One former ICC and ICTY prosecutor recalled that they turned their mind to “the risks that [the trial] won’t be successful or the evidence will fall apart” in deciding whether to attempt a negotiated outcome.⁴³ A similar view was expressed by an ICTR prosecutor who explained that ICTR prosecutors concluded negotiated outcomes when the evidence on file was incapable of obtaining a conviction.⁴⁴ The

41 The sentencing briefs that are apparently *not* public are those for Milan Babić, Georges Ruggiu, Jean Kambanda, Joseph Serugendo, Michel Bagaragaza, and Omar Serushago.

42 Interview with P6.

43 Interview with P24.

44 Interview with P22.

use of resources can also be seen through the lens of missed opportunities. One prosecutor, for instance, described that they needed to assess “[w]hat are the opportunity costs in terms of other cases and other prosecutions you might bring[?]”.⁴⁵

In this sense, international criminal courts could be conceptualised as managed investment funds. They are designed to provide valuable returns on the investment of significant amounts of money. Prosecutors are the fund managers, and convictions are the currency. Plea agreements not only provide convictions, but also allow prosecutors the opportunity to obtain more of them. Convictions are a visible and easily understood (albeit incredibly simplistic) metric of a court’s success. They are an important source of symbolic capital, allowing prosecutors to demonstrate to state representatives that they are competent, efficient, and capable.

Beyond the saving of time, effort, and resources that would otherwise have been spent running a trial against *the accused*, prosecutors have also emphasised that guilty pleas may encourage *other* potential defendants to accept responsibility and/or plead guilty. This may similarly provide economic benefits to prosecutors, albeit with regard to other files. According to Dragan Kolundžija’s defence, for instance, his guilty plea may have induced the pleas of his co-accused.⁴⁶ Prosecutors made comparable arguments in *Jokić*, *Bisengimana*, and *Rugambarara*, arguing more broadly that the guilty pleas of those defendants may encourage other participants in the alleged crimes to accept responsibility for their own conduct, although it is not clear whether they were referring to live files that would have granted them direct economic benefits.⁴⁷

Of course, negotiated outcomes are a two-way street. They require the agreement of both parties. The economic advantages they bring to prosecutors are largely dependent on the defence’s willingness to grant them. Recognising this, one prosecutor was attuned to the importance of reaching fair agreements that appropriately balanced the interests of both parties

45 Interview with P24.

46 See the summary of the Defence’s submissions in *Prosecutor v Duško Sikirica, Damir Došen, and Dragan Kolundžija (Sentencing Judgment)* (ICTY, Trial Chamber, IT-95-8-S, 13 November 2001), [213].

47 *Prosecutor v Miodrag Jokić (Prosecution’s brief on the sentencing of Miodrag Jokić)* (ICTY, Trial Chamber, IT-01-42/1-S, 14 November 2003), [50]; *Prosecutor v Paul Bisengimana (Mémoire de Procureur relatif à la sentence)* (ICTR, Trial Chamber, ICTR-00-60-T, 16 January 2006), [58]; *Prosecutor v Paul Bisengimana (The Prosecutor’s sentencing brief)* (ICTR, Trial Chamber, ICTR-00-59-T, 12 September 2007), [55].

so as to attract the pleas of other defendants. The finalisation of one plea negotiation, they recalled, saw other people “coming forward and wanting to negotiate guilty pleas”.⁴⁸ “I got calls after the fact from Defence counsel on cases that weren’t even my own”, they continued.⁴⁹ “They’re saying, ‘well, we trust you’, and... they wanted to surrender their accused into custody if I would take the case. Of course”, they added, “I couldn’t do that. But it was an indication that word among Defence counsel spread that... there are certain people you can come to and they’ll negotiate in good faith”.⁵⁰ The prosecutor concluded by reflecting that they were “very pleased to have exercised prosecutorial discretion in that fashion with those kinds of results”.⁵¹

Plea agreements therefore have an important communicative effect: they are not concluded simply to abbreviate the proceedings the prosecution has commenced against the defendant. Plea agreements are an advertisement for prosecutors and an act of marketing; the criminal law equivalent of a ‘Sold’ sign plastered over a ‘For Sale’ placard. They advertise to defence counsel that prosecutors are ready and willing to offer meaningful concessions in return for a defendant’s cooperation. In this sense, they are a source of valuable symbolic capital and allow a prosecutor to demonstrate to defence counsel and defendants that they are reasonable, fair, and can be relied upon to maintain agreements. Plea agreements can provide benefits to prosecutors beyond the case that they are negotiating.

3.3 The alleged conduct of the accused

Initially, prosecutors were hesitant to conclude negotiated outcomes because of the gravity of the conduct they were alleging against people. “When the ICTY was first established”, argued Combs, “plea bargaining was understandably considered a distasteful and unnecessary procedural device”.⁵² The gravity of the crimes that fell within the jurisdiction of the ICTY was such that plea negotiations were viewed as “particularly unseemly”.⁵³ Immunities, too, were considered undesirable for international crimes. For-

48 Interview with P28.

49 Interview with P28.

50 Interview with P28.

51 Interview with P28.

52 Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative approach for bridging truth and justice* (PhD thesis, Leiden University, 2005), 216.

53 Nancy Combs, ‘Copping a Plea to Genocide: The plea bargaining of international crimes’ (2002) 151(1) *University of Pennsylvania Law Review* 1, 7.

mer ICTY President Antonio Cassese's well-known opinion on a proposed amendment to the *Rules of Procedure and Evidence* which would have allowed ICTY prosecutors to grant defendants immunity summarises the general view:

The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be.⁵⁴

At least in the early days of the ICTY and the ICTR, prosecutors adopted a similar perspective. “[M]y attitude was that crimes of that level shouldn’t be subject to plea bargaining”, remarked one former senior ICTY and ICTR prosecutor, who continued, “... I don’t think you can tell somebody, well, we won’t charge you with genocide; if you plead guilty, we’ll charge you with crimes against humanity”.⁵⁵ Richard Goldstone was certainly of this opinion. He believed that plea negotiations were not suitable in the context of international criminal law, and this view was so strong that one of the first rules—if not the first rule—he issued to his staff, in the words of one prosecutor, “was that there was to be no plea bargaining”.⁵⁶ This position obviously changed with the arrival of Louise Arbour, under whose leadership ICTY and ICTR prosecutors concluded their first three plea agreements.⁵⁷ More recently, when confronted with the proposition that negotiated outcomes might be unsuitable in the context of international criminal justice, one prosecutor responded “[w]ell, *chacun à son goût*”.⁵⁸ In light of the practice of concluding plea agreements, opinions seem to have changed.

A negotiated outcome necessarily involves granting the defendant concessions and casting them as a beneficiary. Therefore, some prosecutors have considered “the nature of the participation of the person with whom you

54 Antonio Cassese, quoted in Michael Scharf, *Balkan Justice: The story behind the first international war crimes trial since Nuremberg* (Carolina Academic Press, 1st ed, 1997) 67, itself quoted in Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative approach for bridging truth and justice* (PhD thesis, Leiden University, 2005), 217.

55 Interview with P10.

56 Interview with P10.

57 With Dražen Erdemović, Jean Kambanda, and Omar Serushago.

58 Interview with P6.

want to negotiate the plea”.⁵⁹ In other words, they asked “whether or not to accept *x* as the person who would be the beneficiary of the bargain”.⁶⁰ Prosecutors have illustrated the implementation of this idea in two ways. The first concerns a prosecutor’s assessment of the *character* of the accused person, including consideration of mitigating factors that might normally be relevant to sentencing. One prosecutor recalled the situation of one defendant indicted on a whole raft of offences including wilful killing, murder, outrages upon personal dignity, persecution, cruel treatment, and others. Nevertheless, they described that witnesses “had said very positive things” about the defendant, describing his efforts to bring them food and afford them “certain favours”.⁶¹ Witnesses described that “he actually tried to help us”, paraphrased the prosecutor.⁶² “Well”, they concluded, “I thought that was relevant”.⁶³ Moreover, the prosecutor continued, “[h]e was not a bad guy at all. But he got caught up in the situation”.⁶⁴ The second way that prosecutors have assessed whether a defendant should be the beneficiary of a bargain concerns the defendant’s mode of participation. “Sometimes”, recalled one prosecutor, “[individuals] were simply facilitators and not direct perpetrators”.⁶⁵ “That helped us”, they continued.⁶⁶

The relevance of the accused’s conduct to the conclusion of a negotiated outcome is principally attributable to prosecutors adopting the role of institution builders regarding who within the international criminal justice machinery should assess and punish allegations of criminality. On the one hand, treating as irrelevant the accused’s specific conduct is a clear message that the prosecutor alleges conduct and the judge assesses the allegations and punishes them. The prosecutor has no role in assessing the moral culpability of the defendant or determining the severity of the procedure. Under this approach, prosecutors emphasise the *idea* of the alleged crime rather than the *conduct* through which it was allegedly committed. Prosecutors do this by treating procedure *as* punishment by not making concessions in the defendant’s favour. The defendant is punished by confronting allegations of all their conduct and not benefiting from any compromises with

59 Interview with P22.

60 Interview with P22.

61 Interview with P28.

62 Interview with P28.

63 Interview with P28.

64 Interview with P28.

65 Interview with P22.

66 Interview with P22.

regard to sentence. All crimes are treated as equally severe without lessening the burden of trials in light of the defendant's actual conduct. Victims may see defendants face the full force of accusations against them, perhaps giving them the satisfaction that regardless of the judicial outcome, the alleged perpetrator suffered through being confronted with the gravity of their allegations.

On the other hand, the act of considering the accused's conduct as relevant to whether a negotiated outcome should be concluded fulfils different purposes. It establishes that prosecutors have a role in assessing the severity of the outcome facing a defendant by breaking down the role division between prosecutors and judges. It emphasises that the accused's *conduct* is more important than the *idea* of the crime to bringing about desirable normative change. While less-severe procedures may not fulfil the same punitive, preventative, or restorative functions than those in which prosecutors refuse to concede any charges or possible sentences, they do emphasise the importance of individual morality and allow prosecutors to both reward and highlight laudable (or less-severe) conduct while condemning that which is morally repugnant.

3.4 The risks to victims and witnesses

Finally, prosecutors have considered the risks that running a trial will pose to victims and witnesses when assessing whether to negotiate outcomes with defendants. One prosecutor described that they needed to assess "what are the risks that... victims or witnesses will be traumatised or jeopardised or put in danger" by running the trial.⁶⁷ The power of a guilty plea to save victims and witnesses from having to give evidence or the accompanying prospect of retraumatisation is the third most noted benefit that prosecutors have argued pleas result in, following from resource savings and establishing the 'truth'. In 68% of all public sentencing briefs, prosecutors have argued that this should be considered by the judges as a mitigating factor. The ICC Prosecutor's *Guidelines for Agreements Regarding Admission of Guilt* also highlight that plea negotiations can avoid victims and witnesses going through the possibly "traumatic experience" of a trial.⁶⁸ It is therefore evident that prosecutors feel a sense of responsibility to victims and witnesses not to retraumatise them through the process of giving evidence

67 Interview with P24.

68 Office of the Prosecutor, 'Guidelines for Agreements Regarding Admission of Guilt' (International Criminal Court Office of the Prosecutor, October 2020), 7.

and have adopted a guardianship role over them.

On the other hand, one prosecutor expressed the view that plea negotiations can harm victims. In their words, plea negotiations were “demeaning of the victims” because the gravity of the crimes alleged against defendants would be diluted should they be negotiated.⁶⁹ This view instead emphasises the importance of prosecutors conveying the gravity of the *notion* of the crime, as opposed to the conduct of the defendant. Plea negotiations would not fulfil the prosecutor’s role in communicating the severity of the crimes that they were entrusted to prosecute, and represent an abandonment of the victims and their interests.

4 Normative Considerations

4.1 Establishing the ‘truth’

A desire to establish the truth appears to have been motivated by prosecutors acting as builders of history, and guardians over their respective courts and their own self-interest. While plea negotiations may mean that prosecutors “get less than the complete conviction”,⁷⁰ they have also been seen as useful tools to uncover evidence and advance investigations. In 62% of public plea agreements, the defendants agreed to testify in other proceedings when requested by prosecutors; and in 54% they agreed to provide prosecutors with information that might advance or bring about investigations or prosecutions. A defendant’s evidential value has therefore been an important consideration in assessing whether to attempt a plea negotiation. One prosecutor, for example, described looking at whether an accused would be cooperative and was “in a position to provide useful information”.⁷¹ Another prosecutor explained that they thought it was “very important” to look at “the difficulty of obtaining evidence otherwise”.⁷² Plea agreements can, for example, act as “incredibly useful tool[s] in prosecuting complex criminal investigations” that allow prosecutors “to penetrate the organisation and get cooperation”.⁷³

Prosecutors have considered that granting immunity from prosecution is useful for the same reason. Immunities have helped prosecutors deter-

69 Interview with P10.

70 Interview with P24.

71 Interview with P24.

72 Interview with P22.

73 Interview with P24.

mine who is most responsible for the alleged offences, and through what structures. For example, if a person was capable of “listing all the individuals involved, all the command structures, information and evidence, if they could support a crime base event prosecution”, they were in the SCSL prosecutors’ sights.⁷⁴ Immunity would be granted to those who “provided specific, credible information to include the admission of their own wrongdoing, that we could verify”.⁷⁵ Given that SCSL prosecutors were acting in a very unique situation—tasked with prosecuting the heads of the warring factions—identifying who these valuable individuals were was a comparatively easy task. As one former SCSL prosecutor reflected, “I knew exactly who these people were, why they would help me, what kind of cases they would assist in, etcetera etcetera”.⁷⁶ This tactic—which the same prosecutor referred to as “dancing with the devil”⁷⁷—proved effective in facilitating the collection of evidence that took SCSL prosecutors “all the way to Charles Taylor”.⁷⁸ In total, SCSL prosecutors informally awarded 7 individuals immunity from prosecution with one prosecutor recalling that prosecutors “chose not to indict them in return for cooperation or information”.⁷⁹ In one senior SCSL OTP staff member’s view, the power to offer immunity or a reduced sentence “were the two key things that I think really spurred [the investigations] along very quickly”, and offering negotiated outcomes “turned out to be a very wise choice”.⁸⁰

One of the drivers behind the need to negotiate with people of evidential value has been a feeling of frustration that the evidence on file was insufficient to prosecute those deemed most responsible. For example, despite ICTR prosecutors having confirmed indictments against senior accused, cases were falling apart. With the passage of time, one prosecutor recollected, “we had this strange phenomenon: [the] [t]ampering of witnesses. Witnesses, over time, got frustrated. They got discouraged. They lost confidence in the Tribunal. So that even the witnesses that we had obtained sort of credible statements from... started backtracking”.⁸¹ To make matters

74 Interview with S30.

75 Interview with S30.

76 Interview with P2.

77 Interview with P2.

78 Interview with S30.

79 Email from P2 to Cale Davis, 8 August 2019; Interview with P2.

80 Interview with S30. It should be noted that in *none* of the core cases that proceeded to sentence did prosecutors argue that there were mitigating circumstances, so in practice, immunity from prosecution was the concession that was ultimately granted.

81 Interview with P22.

worse for prosecutors, this was occurring while accused were in pre-trial detention.⁸² “[T]he Prosecutor had his back on the wall”, they reflected, and “[t]he only practical tool we had that would have allowed us even to proceed with those we had in custody was to plea bargain”.⁸³ If prosecutors wanted to mitigate the haemorrhaging of evidence from files, plea negotiations were a good solution. Georges Ruggiu—the Belgian public servant-turned-radio broadcaster charged with inciting genocide against Tutsis and Hutus opposed to the government—was encouraged by prosecutors to assist them with their investigations and testify in other proceedings. “[H]ad we not taken the practical step of encouraging [Georges] Ruggiu to help us, we probably would have lost the case against Ferdinand Nahimana and Jean Bosco Barayagwiza”, the prosecutor reflected. “[H]e helped us with evidence that was relevant to the prosecution of... Hassan Ngeze, and the rest”.⁸⁴

There is significant evidence that plea negotiations have proven evidentially useful at the ICTY, too. Perhaps the most famous example was Milan Babić. “I thought... [it] was incredibly important to get his evidence”, reflected one prosecutor who was involved in reaching a negotiated outcome with him.⁸⁵ Prosecutors were not exactly sure *what* evidence Babić was going to provide, but “it turned out it was against Slobodan Milošević”.⁸⁶ Babić would go on to be a key witness in the Milošević trial. Dražen Erdemović, too, testified in multiple Srebrenica trials, identifying his co-perpetrators. According to one prosecutor, he also “identified a crime scene that we were completely ignorant about” at the Pilica Cultural Dom.⁸⁷ The prosecutor continued:

We had no idea that this crime had occurred. There were no survivors. And so, based on Mr Erdemović’s information, investigators went to the cultural dom. The doors were locked. We cut the chains on the doors with a bolt cutter. There was clearly evidence that a massacre had taken place. Blood and tissue on the walls. You know. Gunpowder residues, etcetera. Under the stage, there were, there was drippings of blood that were stalactites, you know, coagulated. So, I mean, that’s the

82 Interview with P22.

83 Interview with P22.

84 Interview with P22.

85 Interview with P24.

86 Interview with P24.

87 Interview with P6.

benefit of plea bargaining. And in an *ad hoc* tribunal where, as I say, limited resources, limited time, you advance the ball considerably by having reliable and verifiable insider information.⁸⁸

Erdemović also provided prosecutors with information about other unknown incidents, including the killings at the Pilica collective farm, the killing of an unidentified male in Srebrenica, and a killing in Vlasenica on 13 July 1996.⁸⁹ Similarly useful information revealing previously unknown crimes was also provided by other defendants, including Miroslav Deronjić and Joseph Serugendo.⁹⁰

However, one former ICTY prosecutor expressed doubt about the evidential utility of plea negotiations. “I’m afraid I don’t think [plea negotiations] had a huge evidential value”, they remarked.⁹¹ They correctly observed that the value of a plea negotiation is largely dependent on whether other defendants are willing to accept the evidence of someone who has pleaded guilty. “[A]t the beginning”, they recalled, “every single basic crime was contested by the Defence. I mean, really. Every single crime. Didn’t happen, you know, they’re all lying”.⁹² While the parties were able to agree facts, this rarely happened. Plea negotiations therefore offered little advantage to the prosecution, when whatever evidence was obtained by virtue of a plea would nevertheless be contested in subsequent prosecutions that sought to rely on it. Nevertheless, the value of plea agreements increased over time.⁹³

Other prosecutors have been hesitant to rely on negotiated outcomes out of concern over the veracity of evidence that would be forthcoming. “I think it’s very dangerous to rely on evidence that is obtained in that sort of manner”, noted one prosecutor, observing that “it’s like [they’re] a gaol house snitch”.⁹⁴ The risk of the individual manufacturing evidence for their own benefit was too great. “[T]hey could give false evidence, if they thought it would assist themselves”, the prosecutor explained, adding

88 Interview with P6.

89 *Prosecutor v Dražen Erdemović (Sentencing Judgment)* (ICTY, Trial Chamber, IT-96-22-Tbis, 5 March 1998), 17.

90 *Prosecutor v Miroslav Deronjić (Sentencing Judgment)* (ICTY, Trial Chamber, IT-02-61-S, 30 March 2004), [255]; *Prosecutor v Joseph Serugendo (Judgment and Sentence)* (ICTR, Trial Chamber, ICTR-05-84-I, 12 June 2006), [61].

91 Interview with P23.

92 Interview with P23.

93 Interview with P23.

94 Interview with P28.

that “...I have not engaged in that kind of behaviour at the ICTY” and “I would not feel comfortable doing that”.⁹⁵ Using negotiated outcomes for this purpose, they went on, was not “in keeping with how I view the role of the Prosecutor. It’s not to get a conviction at all costs. It’s to see that justice is done in a fair way”.⁹⁶

It should be noted that it is not a *sine qua non* of a prosecutor concluding a negotiated outcome that the individual be of *any* evidential value in terms of their capacity to provide prosecutors with previously-unknown evidence or testify in other cases. Some defendants have pleaded guilty to a reduced indictment and failed, or were not in a position, to provide any substantial information. Prosecutors noted with respect to Predrag Banović, for example, that “there has been some cooperation but by no means substantial cooperation” with prosecutors, apparently in part due to his low rank within the police.⁹⁷ No evidential assistance appears to have been provided by Duško Sikirica, Damir Došen, or Dragan Kolundžija, either;⁹⁸ and, indeed, no cooperation clause was included in their respective plea agreements.⁹⁹ At the ICTR, Juvénal Rugambarara similarly appeared not to provide prosecutors with any useful information,¹⁰⁰ and Paul Bisengimana expressly—according to the *Defence* (for some unknown reason)—“did not cooperate with the Prosecutor”.¹⁰¹

95 Interview with P28.

96 Interview with P28.

97 *Prosecutor v Predrag Banović (Transcript of 3 September 2003)* (ICTY, Trial Chamber, IT-02-65/1, 3 September 2003), 116; *Prosecutor v Predrag Banović (Sentencing Judgment)* (ICTY, Trial Chamber, IT-02-65/1-S, 28 October 2003), [60].

98 No reference to cooperation is made in the sentencing remarks: *Prosecutor v Duško Sikirica, Damir Došen, and Dragan Kolundžija (Sentencing Judgment)* (ICTY, Trial Chamber, IT-95-8-S, 13 November 2001).

99 *Prosecutor v Duško Sikirica (Joint submission of the Prosecution and the Accused Duško Sikirica concerning a plea agreement and admitted facts)* (ICTY, Trial Chamber, IT-95-8-T, 6 September 2001); *Prosecutor v Damir Došen (Joint submission of the Prosecution and the Accused Damir Došen concerning a plea agreement and admitted facts)* (ICTY, Trial Chamber, IT-95-8-T, 6 September 2001); *Prosecutor v Dragan Kolundžija (Joint submission of the Prosecution and the Accused Dragan Kolundžija of a plea agreement)* (ICTY, Trial Chamber, IT-95-8-T, 30 August 2001).

100 *Prosecutor v Juvénal Rugambarara (Sentencing Judgment)* (ICTR, Trial Chamber, ICTR-00-59-T, 16 November 2007).

101 *Prosecutor v Paul Bisengimana (Judgment and Sentence)* (ICTR, Trial Chamber, ICTR-00-60-T, 13 April 2006), [127]. Defence counsel bluntly submitted that “[a]s far as Paul Bisengimana is concerned, he did not cooperate with the Prosecutor”: *Prosecutor v Paul Bisengimana (Transcript of 19 January 2006)* (ICTR, Trial Chamber, ICTR-00-60-T, 19 January 2006), 34.

Prosecutors have, however, believed that guilty pleas—regardless of whether the defendant has some evidential significance—do in any event have benefits beyond advancing their investigations and obtaining guilty verdicts. In 77% of their public sentencing briefs for defendants who have pleaded guilty,¹⁰² prosecutors have argued that the plea would contribute to establishing the truth. This belief has been widely held by judges.¹⁰³ The argument that guilty pleas are beneficial because they establish ‘the truth’ did not appear in the first two sentencing briefs (with respect to Erdemović; and Sikirica, Došen, and Kolundžija), but gained traction afterwards and appeared in all sentencing submissions from 2002 onwards. Only the argument that guilty pleas save resources has been relied on by prosecutors more in support of their value.¹⁰⁴

Guilty pleas have also been seen to contribute to reconciliation. Prosecutors made this claim in 68% of their public sentencing briefs for defendants who pleaded guilty. As one prosecutor explained, a defendant’s guilty plea means “they admit to committing the crimes and then there’s no longer any dispute about that”.¹⁰⁵ “It seemed to me”, argued another prosecutor, “that if we got a guilty plea, in other words an acknowledgement by the accused that they had done something wrong... that the inhabitants of the community where he would ultimately return to would recognise the fact that he had admitted his guilt and that would be sort of a reconciliation process for everybody”.¹⁰⁶ The prosecutor continued, “[a]nd it turns out that’s exactly what happened. Once there was an acknowledgement of guilt”, they explained, “and you know, being sorry for what they had done—and they were caught up of course as military people and were having to follow orders, etcetera—it made a difference. So I think it was a very positive thing. And I have no regrets about having done that”.¹⁰⁷ Similarly, a former ICTR prosecutor recalled asking themselves “what is the benefit of putting to rest the issue of guilt and having the defendant say publicly that ‘I’m responsible and I’m guilty’, and will it be perceived as a genuine guilty plea, as genuinely taking responsibility?”.¹⁰⁸ “At the end of

102 See footnote 41 for the sentencing briefs that remain under seal.

103 Janine Clark, ‘Plea Bargaining at the ICTY: Guilty pleas and reconciliation’ (2009) 20(2) *European Journal of International Law* 415, 423.

104 As discussed on Page 153.

105 Interview with P24.

106 Interview with P28.

107 Interview with P28.

108 Interview with P24.

the day”, remarked another prosecutor, “everybody wanted closure. Everybody wanted closure. And I would dare say, by benefit of hindsight, that it is that closure that has helped Rwanda to be what it is today. Because of what good would it be to send all the people to gaol and then continue to have a fractured society?”¹⁰⁹ Judges adopted a similar perspective. In 72% of sentencing remarks for defendants who have pleaded guilty (23 out of 29 remarks), trial chamber judges have recalled the link between guilty pleas and reconciliation.¹¹⁰

The claim that guilty pleas contribute to reconciliation is, however, problematic. In all sentencing remarks that claimed a defendant’s guilty plea may contribute to reconciliation (with one exception), the citations given by judges to support this proposition do no such thing. All citations are simply references to other cases that similarly refer to other cases. In some cases, there is no citation at all. The single exception to this is the sentence for Miroslav Bralo, where all the judges relied on was a single, context-specific, one-page witness statement provided by Mehmed Ahmic (the President of the Ahmici Municipality Council) appended to the Defence’s sentencing brief where the Ahmic claimed

If five or six or seven years ago there were people like Miroslav Bralo who would say they had done this and this, and that and that happened, it would now be much better for people to live at peace with one another here, and move from the hard positions against each other.¹¹¹

To date, this single sentence is the *only* evidence that has *ever* been relied on by judges for the proposition that a plea may help reconciliation. This supports Janine Clark’s argument that “[m]any of the discussions on this topic... are merely theoretical and not empirically grounded”¹¹²

The belief that plea negotiations can contribute to reconciliation by

109 Interview with P22.

110 The number 29—and not 30 (ie, the number of defendants who have pleaded guilty)—is due to there being three defendants who were dealt with in a single sentencing judgment (Duško Sikirica; Damir Došen; and Dragan Kolundžija), and that Dražen Erdemović was sentenced twice by the Trial Chamber (the initial sentence, and resentence).

111 *Prosecutor v Miroslav Bralo (Sentencing Brief on Behalf of Miroslav Bralo)* (ICTY, Trial Chamber, IT-95-17-S, 25 November 2005), annex B13 (‘Witness Statement of Mehmed Ahmic’), [4].

112 Janine Clark, ‘Plea Bargaining at the ICTY: Guilty pleas and reconciliation’ (2009) 20(2) *European Journal of International Law* 415, 421.

virtue of the defendant pleading guilty is a myth.¹¹³ It is a message that prosecutors (and judges) take from the act of a guilty plea without an awareness that it is merely their own background (as opposed to any actual evidence) that disposes them to understand guilty pleas as reconciliatory acts. Perhaps attributable to a desire to repair societies damaged through bloody conflicts; perhaps because of its prominence in discourse, the myth of reconciliation has arguably motivated prosecutors to conclude plea negotiations. The myth of reconciliation has appropriated the act of guilty pleas and cemented its claim to them. With every unsupported claim that this relationship exists, the myth has gained power.

Guilty pleas have also been understood as beneficial because they prevent the writing of revisionist history. This claim is made in 55% of prosecutors' public sentencing briefs for defendants who pleaded guilty. They have been seen to act as confirmation to victims that the other people recognised that the crimes occurred. "[T]o get a plea, particularly from a high-level perpetrator, was... exceedingly important for those who were the victims of the crimes", expressed one prosecutor.¹¹⁴ This, they explained, was because victims "could see that the argument that 'we didn't commit crimes, we were merely reacting to the crimes that were being committed by others, or we were acting in self-defence'... wasn't going anywhere".¹¹⁵ Plea negotiations may therefore also be motivated by a desire on the part of prosecutors to author history by establishing an uncontested record of a defendant's conduct.

Prosecutors have, therefore, been apparently informed by their role as builders of history when conducting plea negotiations as evidenced by their desire to establish 'the truth'. However, underpinning this consideration also appears to be a sense that the need to be conscious of their own, or their respective institutions', self-interest. This is because plea negotiations have been directly tied to the provision of efficiency benefits. By using plea negotiations to advance investigations and achieve convictions, prosecutors have been able to promote the production of tangible judicial products that serve as signs that their institution is functioning and relevant.

113 This specific understanding of myth (as the manner through which meaning is created through the appropriation of other meanings) is introduced in chapter 3, page 79.

114 Interview with P23.

115 Interview with P23.

4.2 Norm expression

There is a single example of a case where a prosecutors expressed the belief that a guilty plea was capable of contributing to normative development. The *Jokić* case concerned the JNA's shelling of Dubrovnik in the early hours of the morning on 6 December 1991. The Prosecution's sentencing brief, filed by Susan Somers, linked Jokić's guilty plea to three positive effects that do not feature in any of the other submissions that had been filed or have subsequently been filed for cases that resolved in guilty pleas. The first is that Jokić's plea was said to send a message to the world more broadly that the shelling was illegal.¹¹⁶ The second was that the plea showed the shelling was "utterly senseless and unjustifiable by any standard".¹¹⁷ Finally, it was hoped the plea would encourage discussion about the attack, as it "breaks the code of silence which has hovered over and surrounded this shameful event, which was witnessed by the world as it unfolded".¹¹⁸

All of these ideas are innovative and unique in the publicly available sentencing briefs for defendants who have pleaded guilty, and appear to be underpinned by the role of the prosecutor as a performer of moral norms. They did not appear before *Jokić*, and they have not appeared subsequently. These expressed benefits of pleas mark a radical departure from the narrow view that guilty pleas help to establish the truth, promoting the idea that guilty pleas have a broader expressive capacity with the potential to bring about legal and social-normative change and promote open discussion about the events that occurred. Jokić's plea of guilty was seen to mythologise unquestionable moral opprobrium, a myth that may not necessarily have emerged had he maintained his innocence and been found guilty instead by judges. The plea negotiation may, therefore, have been motivated by a conscious engagement with the role of the prosecutor as an agent of normative change. It is arguably evidence of a belief that guilty pleas have a communicative power that should be promoted by prosecutors engaging in plea negotiations.

116 *Prosecutor v Miodrag Jokić (Prosecution's brief on the sentencing of Miodrag Jokić)* (ICTY, Trial Chamber, IT-01-42/1-S, 14 November 2003), [49].

117 *Prosecutor v Miodrag Jokić (Prosecution's brief on the sentencing of Miodrag Jokić)* (ICTY, Trial Chamber, IT-01-42/1-S, 14 November 2003), [49].

118 *Prosecutor v Miodrag Jokić (Prosecution's brief on the sentencing of Miodrag Jokić)* (ICTY, Trial Chamber, IT-01-42/1-S, 14 November 2003), [50].

5 Strategic Considerations

5.1 The prosecutor's social capital

If the motivation to engage in plea negotiations is not properly explained, prosecutors run the risk of harming their own credibility. An example of where this occurred was in the prosecution of Omar Serushago at the ICTR. Serushago was charged with five counts, one of which was a charge of rape as a crime against humanity. At his first appearance, he pleaded guilty to every charge *except* this rape charge. As Serushago had voluntarily surrendered to the Court, Combs observed that prosecutors and defence had apparently not consulted with each other regarding what charges he would be pleading guilty to prior to the issuing of the indictment.¹¹⁹ When defence counsel threatened to continue with the trial on this count alone, prosecutors withdrew it.¹²⁰ Reflecting on the agreement to withdraw this charge, one ICTR prosecutor recalled that “that decision to withdraw the charge, we lived with it in an unpleasant way for a hell of a long time... most people could not understand why that was done”.¹²¹

It is evident then that plea negotiations have been seen to post a risk to a prosecutor's social capital, and prosecutors may well be motivated by a desire to protect it from being harmed by their decisions. If the decision to withdraw a charge (particularly one that has historically been under-prosecuted though widespread) is not properly explained or understood by office outsiders, a prosecutor's reputation may be tarnished. The lesson from *Serushago* therefore appears to be that prosecutors subsequently became aware that they also needed to be conscious of how plea negotiations would be perceived by others.

5.2 The prosecutor's legal background

Finally, different legal cultures had an impact on the willingness of prosecutors to engage in plea negotiations. One prosecutor recalled that Goldstone's background as a lawyer in South Africa was a part of his decision to prevent his staff from engaging in plea negotiations, as, according to them, “certainly in South Africa there's never been such a thing as a plea

119 Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative justice approach* (Stanford University Press, 1st ed, 2007), 94.

120 Nancy Combs, *Guilty Pleas in International Criminal Law: Constructing a restorative justice approach* (Stanford University Press, 1st ed, 2007), 94.

121 Interview with P22.

bargain”.¹²² A former ICC prosecutor reflected that in the event that a defendant was not willing to confess their guilt, “you go to trial”, and not enter into plea negotiations.¹²³ Relevant, too, is that according to one prosecutor what “a lot of Prosecutors and judges don’t like who are not from a culture that has plea agreements” is the perception that the prosecutor is bargaining with a defendant.¹²⁴ The defendant—perhaps seen as malicious, fiendish, manipulative—should not be elevated to the status of an equal bargaining power to the prosecutor with all the authority of states parties behind them to prevent and punish exactly what the defendant has been accused of. Therefore, while international criminal courts are, at least on paper, a mix of different legal traditions, it is impossible to completely remove the influence of a prosecutor’s prior domestic experiences on the way that they work.

The fact that the prosecutors grappled with whether it would be appropriate to engage in plea negotiations for prosecutions before international criminal courts arguably demonstrates that they assumed the role of performers of both moral and procedural norms. They were conscious that the potential for plea negotiations existed, and in some cases sought to make sure they were not conducted. In doing so, they attempted to affirm both the severity of international crimes and also that trials are the appropriate procedural response to them.

6 Conclusion

The eight thematic windows discussed in this chapter have illustrated what has informed prosecutors when they are assessing whether to conclude negotiated outcomes with defendants. This chapter has demonstrated that these decisions are informed not only by functional concerns regarding evidence and efficiency, but also normative and strategic considerations.

These considerations appear to have been informed by prosecutors assuming three different role identities. First, they have acted as *norm performers*. Prosecutors have adopted the role of performers of moral norms, evidenced by the conscious engagement with the communicative potential of guilty pleas to send messages about the moral opprobrium of specific crimes and the more general condemnation of international crimes through the

122 Interview with P10.

123 Interview with P1.

124 Interview with P24.

refusal to offer alleged perpetrators concessions in the form of negotiated outcomes. Prosecutors have also appear to have been informed by their role as performers of procedural norms. Their decisions have engaged with whether international criminal justice procedures should accommodate negotiated outcomes in the first place, and thus demonstrate that they have contributed to the procedural framework governing the conclusion of criminal proceedings.

Prosecutors also appear to have been informed by their role as *builders*. When they have considered the strength of the evidence and the alleged conduct of the accused, prosecutors have arguably been motivated by their role as agents of institutional transformation. These decisions demonstrate that prosecutors have grappled with the respective roles of prosecutors and judges within courts as arbiters of a defendant's guilt. They have also acted as builders of history, when they have emphasised the value of negotiated outcomes in establishing 'the truth'.

Finally, and most significantly, the thematic windows discussed in this chapter suggest that prosecutors have been motivated by their role as *guardians*. While the fact that prosecutors have considered the risks to victims and witnesses when deciding whether to negotiate outcomes with defendants indicates that they have assumed the role of their protector, they have also acted as guardians over themselves and over their respective courts. This is evidenced by prosecutors considering the strength of the evidence, efficiency gains, establishing the truth, and their own social capital. All of these considerations demonstrate that prosecutors have been attuned to the fact that their decision-making can have a significant impact on their social capital and the reputations of their institutions. Negotiated outcomes have therefore been informed by prosecutors engaging with the question of what would be in their own, and their courts', best interests.

Negotiated outcomes, therefore, are about more than advancing investigations or increasing the prospects of convictions. When prosecutors decide to negotiate an outcome with a defendant, they act as norm performers, builders, and guardians.

Chapter 6

Selecting Witnesses

People don't tell the truth.
They tell a combination of things.

INTERVIEW WITH PII

1 Introduction

Witnesses are the lifeblood of a criminal trial. They are the primary mechanism through which prosecutors attempt to prove beyond reasonable doubt that a defendant committed the crimes they have been charged with. Their evidence is broadcast on the websites of the courts. People gather in affected communities thousands of kilometres away to watch their evidence via satellite in makeshift viewing rooms. Judges and defence counsel digest the words they say and how they say them, balancing the cases of both parties to determine whether prosecutors have crossed the threshold. Ultimately, cases live and die by the evidence witnesses give. Moreover, their live performance is “essential to legal procedure”.¹ Yet how they come to be in a witness box is a mystery.

Despite the experience of witnesses at international criminal courts having attracted significant scholarly attention,² the question of how witnesses

1 Philip Auslander, *Liveness: Performance in a mediatised culture* (Routledge, 1st ed, 1999), 133.

2 See, for example, Rebecca Horn, Simon Charters, and Saleem Vahidy, ‘Testifying in an International War Crimes Tribunal: The Experience of Witnesses in the Special Court for Sierra Leone’ (2009) 3(1) *International Journal of Transitional Justice* 135; Kimi King and James Meernik, *The Witness Experience: Testimony at the ICTY and its*

come to be before a court in the first place has gone by largely unnoticed. When it has been raised, it has largely ignored the role of prosecutorial decision-making. Eric Stover, for instance, asked “[w]hat motivated these men and women to testify?”,³ and did not address the question of how they came to be asked in the first place. Kimi King and James Meernik similarly pondered “[w]hat paths and pain take the witnesses from the war and its aftermath to the rarified courtrooms of an international tribunal?”, and touched on the issue of prosecutorial discretion merely in their (undoubtedly accurate) concession that witnesses testify for a variety of reasons, “most especially because they are asked to”.⁴ These approaches focus too heavily on the questions that arise *after* potential witness have been chosen and approached by the prosecution, and not sufficiently on the questions prosecutors ask themselves before requesting a witness attend court to give evidence.

The purpose of this chapter is to describe the factors prosecutors have considered in exercising their discretion regarding which witnesses to call, and how these decisions are underpinned by different roles that international prosecutors adopt. To achieve this, this chapter is structured as follows. First, section 2 explains that there is no legal framework governing the selection of witnesses in international criminal justice. The decision to select witnesses is therefore unique in the context of the decisions discussed in this thesis, because it is the only one on which the law is completely silent. Second, section 3 provides context to the decision to select witnesses by presenting a summary of how many witnesses are generally called by prosecutors in international criminal trials. This chapter then turns to describing the factors that have informed prosecutors when they have been deciding which witnesses to call. It addresses the functional considerations of evidential factors and the risk of trauma to witnesses in section 4. The normative consideration of the importance of public evidence is then discussed in section 5. Finally, the strategic consideration of the importance of emotions and storytelling ability is discussed in section 6. This chapter concludes by reflecting on how these factors reflect that prosecutors have

impact (Cambridge University Press, 1st ed, 2017); and Eric Stover, *The Witnesses: War crimes and the promise of justice in The Hague* (University of Pennsylvania Press, 1st ed, 2005).

3 Eric Stover, *The Witnesses: War crimes and the promise of justice in The Hague* (University of Pennsylvania Press, 1st ed, 2005), 3.

4 Kimi King and James Meernik, *The Witness Experience: Testimony at the ICTY and its impact* (Cambridge University Press, 1st ed, 2017), 1 and 165.

assumed the role of norm performers, builders, and guardians.

2 The Legal Framework

The legal framework governing the selection of prosecution witnesses can be summarised quite simply: there is not one. Prosecutors are free to call whoever they like as witnesses, and there is nothing in any statute, any rules of procedure, any case law, or any guidelines that oblige prosecutors to consider or prevent them from considering any factor whatsoever when deciding who to put in the witness box.

This is not to say, however, that there are not rules related to a witness's *testimony*. There are. Witness testimony is evidence in the same way that exhibits are. The rules of evidence in international criminal law are exceptionally limited, with the general rule simply being that any evidence should be relevant. This 'liberal' rule sets a low threshold that simply requires the evidence to have a connection to an allegation against the accused and that it must be capable of affecting the assessment of a fact in issue.⁵ The question of what weight should be afforded to that evidence is therefore the more significant issue, and this is assessed through the witness's credibility. For this, judges have developed a raft of criteria to assess a witness's competence, quality of testimony, and objectivity.⁶ All these rules do, however, is specify when evidence can be *admitted* and how that evidence should be *assessed*. They do not direct a prosecutor with regard to who they can *call*.

The legal framework therefore provides no unequivocal indication of what has influenced prosecutors when they are deciding who to call as witnesses. While assumptions might be made about what has influenced prosecutors on the basis of the rules regarding the admissibility and assessment of evidence, these are not capable of providing an unequivocal insight into the underlying motivations and assumptions that have informed prosecutorial decision-making. The remainder of this chapter provides this insight.

5 Gideon Boas et al, *International Criminal Law Practitioner Library* (Cambridge University Press, 1st ed, 2011) vol 3, 338-339.

6 Gabrielè Chlevickaitė, Barbora Holá, and Catrien Bijleveld, 'Judicial Witness Assessments at the ICTY, ICTR, and ICC' (2020) 18(1) *Journal of International Criminal Justice* 185, 192.

3 Witness Statistics

The types of crimes that attract the focus of international criminal prosecutors are, by and large, going to require many witnesses to prove. To put this in perspective, the average number of witnesses called by the prosecution in a trial before the ICTY was 80.1; at the ICTR 25.9; at the SCSL 79.8; and at the ICC 45.8.⁷ The most prosecution witnesses ever called in an international criminal proceeding was in *Prosecutor v Radoslav Brđanin*, where the Trial Chamber heard from a massive 202 witnesses on an indictment that was only slightly larger than normal, with 12 counts.⁸ At the other end of the scale, prosecutors presented only 8 witnesses against Anto Furundžija in a trial that lasted roughly two weeks.⁹

Table 6.1 shows a statistical overview of the number of witnesses called by the prosecution in each of the four courts within the scope of this study. The same data is presented visually, with box plots, in figure 6.1. The lines at each end of the box plots represent the highest and lowest 25% of witness numbers in trials (the ‘scores’). The boxes in the middle are the middle 50%, with the vertical lines dividing the boxes in two as the median scores (the ‘middle-most’ numbers of witnesses once the number of witnesses per trial are arranged in order from lowest to highest). Each half of each box therefore represents another 25% of scores. As such, the box plots depict the distribution of prosecution witnesses across all trials. They show areas of consistency, but also how far the number of prosecution witnesses in any given trial is likely to be from the median (based on the range of the top 50% and bottom 50% of scores).

There are several observations that can be made about the number of prosecution witnesses called by prosecutors displayed in table 6.1 and fig-

7 Cale Davis, *International Criminal Law Prosecution Witness Statistics* (DOI 10.17026/dans-2z4-2d3b, 2019) version 2 <<https://easy.dans.knaw.nl/ui/datasets/id/easy-dataset:213819>>. This dataset is the source of all figures contained in this section. These figures are only for trials involving the core international crimes of crimes against humanity, war crimes, and genocide: contempt charges are excluded. They also do not include those trials that were aborted after commencement for reasons unrelated to evidence (like *Milošević*); nor retrials.

8 *Prosecutor v Radoslav Brđanin (Judgment)* (ICTY, Trial Chamber, IT-99-36-T, 1 September 2004). 102 witnesses were heard in person, the rest were tendered under Rule 98bis (see [1180]). For information regarding the average number of charges alleged against individual accused, see figure 4.1 on page 121.

9 *Prosecutor v Anto Furundžija (Judgment)* (ICTY, Trial Chamber, ICTY-95-17/1-T, 10 December 1998). In the initial round of evidence the Prosecution called six witnesses, and two experts were called after the trial was reopened.

Court	Mean	Median	Mode	Q ₁	Q ₃	Min	Max	N
ICTY	80.1	64.0	81.0	45.0	104.0	8.0	202.0	41
ICTR	25.9	20.0	24.0	17.0	26.5	10.0	82.0	43
SCSL	79.8	80.0	-	71.0	88.8	59.0	100.0	4
ICC	45.8	38.0	-	33.3	50.5	25.0	82.0	4
All	53.3	38.5	24.0	20.8	81.0	8.0	202.0	92

Table 6.1: Summary statistics describing the number of prosecution witnesses called at trial at each of the four courts within the scope of this study. Note that the SCSL and the ICC have only run four trials each to conclusion. While the statistics for the ICTY, ICTR, and SCSL are accurate (as these courts have now closed), the ongoing practice of the ICC may prove that these statistics are unrepresentative as the number of observations increases over time. This same data is presented visually in Figure 6.1. Cale Davis *International Criminal Law Prosecution Witness Statistics* (DOI 10.17026/dans-224-2d3b, 2019) version 2.

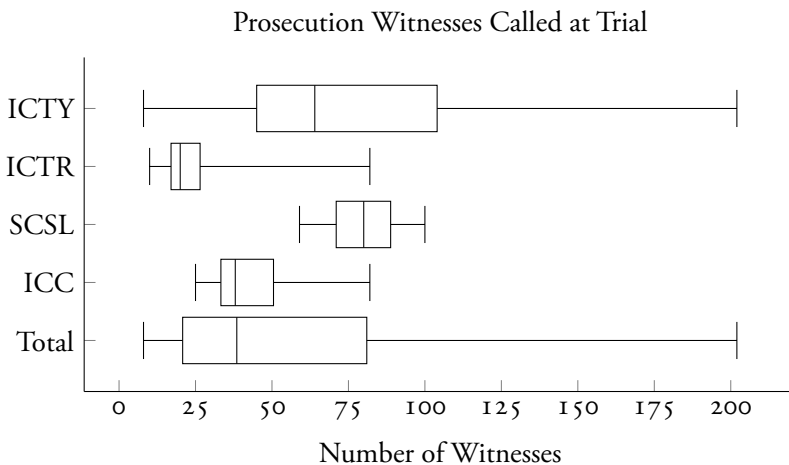


Figure 6.1: The number of prosecution witnesses called in each trial, represented with box plots. Note the variation between the minimum and maximum numbers at the ICTY and the ICTR in contrast to the upper and lower quartiles. The statistics on which these plots are based are contained in Table 6.1.

ure 6.1. First, ICTY prosecutors were the least consistent when it came to the number of prosecution witnesses called in each trial. This can be seen by the data being spread over such a wide range. Second, at all courts except the SCSL, prosecutors had the tendency to call *more* witnesses than *fewer* witnesses than the median number in trials. This is demonstrated by the ranges from the median points to the maximum points being greater than the ranges from the median points to the minimum points. At the ICTR, for example, the top 50% of prosecution witness numbers per trial fell within a range of 62 witnesses (the lowest 50% fell within a range of only 10 witnesses). At the ICTY, the top 50% of prosecution witness numbers per trial fell within a range of 138 witnesses (and the lowest 50% was in a range of 56 witnesses). ICTR prosecutors were therefore *more* likely to call more witnesses than the median than ICTY prosecutors. Further, the *maximum* number of prosecution witnesses called by these prosecutors extends far beyond the upper limit of the interquartile range for each court. In other words, 25% of trials at the ICTY, ICTR, and ICC saw prosecution witness numbers far exceed the range experienced by the middle 50%. Third, the SCSL displays the most normal distribution, where the median point sits equidistant from the lowest score and the highest score. Nevertheless, the number of trials conducted by SCSL prosecutors was far fewer than that conducted by their colleagues at the ICTY or the ICTR. Fourth, there appears to be no consistency across any court with respect to the number of prosecution witnesses to be called in any given trial.

But why have prosecutors called witnesses in the first place? And, apart from the obvious reality that each case is unique, is there anything else that accounts for the diverse range of witness numbers across trials? The following three sections peer through four thematic windows to understand the motivations and assumptions that have informed prosecutorial decision-making.

4 Functional Considerations

4.1 Evidential factors

The first set of considerations that prosecutors have considered relevant to identifying which witnesses to call concern the *evidence* that a potential witness is capable of giving. “[F]irst of all, you have to prove your case”,

remarked one prosecutor.¹⁰ They emphasised that the primary purpose of a criminal trial is to prove the guilt of a defendant, “[s]o”, they continued, “you have to have witnesses that you believe will present credible evidence to prove your case”.¹¹

The assessment of whether or not a potential witness is capable of giving credible and reliable evidence is not one that can be easily reduced to a formulaic checklist. It is a matter of professional judgement based on experience. Further, Gabrielè Chlevickaitė, Barbora Holá, and Catrien Bijleveld demonstrated how the factors relevant to assessing competence, quality of evidence, and witness objectivity are in a steady state of ongoing development by judges.¹²

Prosecutors, however, have stressed two points that are apparently particularly important. They are whether the statements the potential witness has provided are internally consistent, and whether they are consistent with evidence given by other witnesses.¹³ In addition, the prosecutor’s “personal reaction... to body language” also plays an important role.¹⁴ One prosecutor described how it was important to assess not just the words a witness was using to describe what they experienced, but also how they said them. The prosecutor described that a witness’s evidence may be “easy to see and it flows, and it’s like ‘that all makes sense’, and then... you ask them about a certain individual, or a certain event, or a certain location, and then suddenly there’s a change in demeanour, in speed, in... all kinds of subtle little things to deal with; inter-human communication. And you say, ‘oh, what’s with that?’”.¹⁵

While a witness may appear capable of providing evidence that appears credible furthers the prosecution’s case, prosecutors also need to be satisfied that this evidence can be relied upon as being a truthful account of the witness’s experiences and be seen as such. As bluntly stated by one prosecutor, “I’ve certainly never called a witness... who I was so concerned about having made up evidence. I mean, I wouldn’t do that to be honest”.¹⁶ Another prosecutor termed the assessment of a potential witness’s credibil-

10 Interview with P12.

11 Interview with P12.

12 Gabrielè Chlevickaitė, Barbora Holá, and Catrien Bijleveld, ‘Judicial Witness Assessments at the ICTY, ICTR, and ICC’ (2020) 18(1) *Journal of International Criminal Justice* 185, generally, however a visual overview is provided at 192.

13 Interview with P17; Interview with P23; Interview with P25.

14 Interview with P17.

15 Interview with P17.

16 Interview with P25.

ity as a “major consideration”, reflecting that they saw it as a prosecutor’s “duty... to be essentially satisfied as to the credibility of the witnesses that they call”.¹⁷ To illustrate the point, the same prosecutor described that in one ICTY prosecution they had planned to call a member of UNPROFOR to give evidence. However, in conference with the witness immediately prior to calling them, the witness said things “that led me to think that he shouldn’t be called by the Prosecution”.¹⁸ The prosecutor remarked that some members of UNPROFOR “saw their involvement in peacekeeping forces as an opportunity to make money by selling fuel to some of the forces that were involved in the armed conflict, and food and so on. And there was a credible issue of how dependable some of these people were”.¹⁹

To complicate matters further, not only do credibility and reliability come in shades of grey, but also vary depending on what the witness is giving evidence about. Herein lies another problem that prosecutors have confronted: *what* evidence needs to be assessed by the prosecution as being reliable? Is it all of the witness’s evidence, or just those parts related to facts in issue? “[T]here’s quite a cultural difference between certainly me and American lawyers, and quite possibly English lawyers”, remarked one prosecutor.²⁰ They continued:

American lawyers tend to, or seemed to me to say, ‘only call a witness if each and every word in his witness statement can be relied on’. And we would say ‘well, that’s silly, because witnesses often, most people who are caught up in terrible circumstances like these, may lie in part and tell the truth in part. And you should be able to trust your judges to work it out. You don’t have to present only those people whose every single word can be accepted’.²¹

The prosecutor stated that they would often call witnesses and be prepared to have the judges decide that in some parts their evidence was unreliable, while on the central issue they were reliable. “My American junior colleagues would sort of suck on their teeth and I’d tell them grow up. People don’t tell the truth. They tell a combination of things”, they concluded.²²

17 Interview with P19.

18 Interview with P19.

19 Interview with P19.

20 Interview with P11.

21 Interview with P11.

22 Interview with P11.

Sometimes, though, it is only in the witness box that the cracks in a witness's reliability and credibility begin to appear; at which point the opportunity to prevent the damage has well and truly passed. There have been several notable instances of where the prosecution has called witnesses where their conduct in court has cast doubts over whether they were witnesses of truth. In the ICC Prosecutor's first trial, for example, Witness DRC-OTP-WWWW-0298 was the first witness called to testify against Thomas Lubanga. The witness claimed that during the fifth grade of school, after the conflict in the DRC broke out, several students were recruited and taken to training camps. In response to the question "[a]mongst these school people who were taken away, were you one of them?", the witness responded "Yes, I was one of those who were taken to the camps".²³ After a lunch break, in which the witness received advice regarding the privilege against self-incrimination, the witness gave evidence that appeared to conflict with their evidence before the break. Judge Adrian Fulford asked the witness:

This morning you told the Court about a time when you were going home from school when some soldiers from the UPC came and took you and your friends away. Was that story from you true or false?

To which the witness replied:

That's not true.²⁴

The witness's retraction raised concerns that intermediaries had improperly interfered with the witness's evidence. Several other witnesses also appeared to have been affected by the same problems, spurring on a controversial and embarrassing series of events in which prosecutors were ordered to disclose the names and details of intermediaries to the Defence. Reflecting on the problems with witness evidence in *Lubanga*, one ICTR prosecutor observed that the first assessment of witness credibility should be "taken very carefully".²⁵

23 *Prosecutor v Thomas Lubanga Dyilo (Transcript of 28 January 2009)* (ICC, Trial Chamber, ICC-01/04-01/06-T-110-Red3-ENG, 28 January 2009), 28. Between these two quotes there was a short exchange that clarified the question.

24 *Prosecutor v Thomas Lubanga Dyilo (Transcript of 28 January 2009)* (ICC, Trial Chamber, ICC-01/04-01/06-T-110-Red3-ENG, 28 January 2009), 41. One journalist at the time wrote that the "mishaps marked a shambolic opening day's testimony": David Charter, 'Chaos reigns at International Criminal Court trial of Thomas Lubanga', *The Times* (Online), 29 January 2009 <<https://www.thetimes.co.uk/article/chaos-reigns-at-international-criminal-court-trial-of-thomas-lubanga-6c61b3766666>>.

25 Interview with P27.

The risks of witnesses giving unreliable evidence appear more pronounced with respect to so-called ‘insider’ witnesses. While prosecutors have called these people “essential”²⁶ and “valuable”, bringing “incontrovertible benefits” to the prosecution’s case,²⁷ one prosecutor described that they needed to be “mindful of the risk that... one of these witnesses could kind of blow up”.²⁸ In this light, one prosecutor described that the “most difficult decision” regarding witness selection was whether to call an insider.²⁹

The risk of insider witnesses ‘blowing up’ is by no means illusory. Some witnesses may, for example, deliberately attempt to derail the prosecution case. One prosecutor recalled how a prosecutor and an investigator found Milorad Dodik to be “extremely friendly during the interview” and “[e]xtremely helpful”, and they assessed that he “had quite good information about what had been happening”.³⁰ Despite the fact Dodik had “spent his whole political career... [saying] how awful the Tribunal is and all the rest of it”, prosecutors decided to call him as a witness in *Brdanin*—a decision the prosecutor described as “an enormous error”.³¹ “[I]t was a disaster”, they said, “I mean, he just went back on everything. And [he made] all sorts of accusations about... [how the Office] misled him and all sorts of stuff like that. You know”, the prosecutor continued, “it taught me a lesson... [about] these sorts of witnesses”.³²

The lessons from both *Lubanga* and *Brdanin* concern the importance of thoroughly vetting witnesses—those who are insiders and those who are not—prior to deciding whether to call them to ensure that they do not turn; the evidence they do give will be reliable and credible; and knowing what evidence will not be so as not to lead it. In the *Milošević* trial, for example, prosecutors decided to call Dragan Vasiljković as a witness. Vasiljković was an important witness for the Prosecution, and the one through which the Kula Camp video was entered into evidence. This video famously showed

26 Stephen Rapp, ‘The Challenge of Choice in the Investigation and Prosecution of International Crimes in Post-Conflict Sierra Leone’ in Charles Chernor Jalloh, *The Sierra Leone Special Court and its Legacy: The impact for Africa and international criminal law* (Cambridge University Press, 2014) 23, 34.

27 Carla del Ponte, ‘Investigation and Prosecution of Large-scale Crimes at the International Level: The experience of the ICTY’ (2006) 4(3) *Journal of International Criminal Justice* 539, 544.

28 Interview with P8.

29 Interview with P23.

30 Interview with P23.

31 Interview with P23.

32 Interview with P23.

Milošević at an event marking the anniversary of the formation of the Red Beret unit, and “showed knowledge by Milošević of what had been done in his name, but more importantly was what it showed of his criminal mind”.³³ “I believe that when I call a witness, that has to be a witness who I have vetted”, one of the *Milošević* prosecutors said, adding that “I’m not able just to take a witness who sounds favourable to me and... just throw them up on the stand... I really see that a prosecutor has the obligation to vet that evidence”.³⁴ With Vasiljković, they explained, “we worked really hard to vet all of his evidence”.³⁵ While his evidence regarding Croatia was strong, the prosecution team had concerns about whether he would be truthful with respect to events in Bosnia as they had information he had been complicit in crimes there.³⁶ At trial, prosecutors put their concerns on record. Immediately prior to finalising his examination-in-chief, Senior Trial Attorney Dermot Groome told the trial judges that there was material “which, if believed, would be in direct conflict with [Vasiljković’s] testimony as to events after the period with which he’s already testified”. Therefore, Groome said, “in light of my obligations as an attorney and a prosecutor, [I] will conclude my examination at this point in time”.³⁷ Groome’s decision not to lead evidence regarding Bosnia from Vasiljković demonstrates the role of the prosecution in carefully assessing the credibility and reliability of a potential witness’s evidence, and exercising professional judgement regarding whether to lead it.

Nevertheless, vetting does not ensure a witness will give reliable evidence. Some witnesses may become unfavourable for other reasons that vetting would not have revealed. For example, on the second day of his evidence, Vasiljković almost “irreparably discredited himself in court”.³⁸ His evidence the day previously started off as “very powerful”.³⁹ However, af-

33 Geoffrey Nice, ‘Statement’ (Speech delivered at Panel on the Legacy of Milosevic Trial, Helsinki Committee for Human Rights in Serbia, 31 March 2007) <http://www.helsinki.org.rs/doc/GN_bgdspeech.doc>, 13, quoted in Lara Nettelheld, *Courting Democracy in Bosnia and Herzegovina* (Cambridge University Press, 1st ed, 2010), 61.

34 Interview with P8.

35 Interview with P8.

36 Interview with P8.

37 *Prosecutor v Slobodan Milošević (Transcript of 20 February 2003)* (ICTY, Trial Chamber, IT-02-54, 20 February 2003), 16565.

38 Nevenka Tromp, *Prosecuting Slobodan Milošević: The unfinished trial* (Routledge, 1st ed, 2016), 131.

39 Interview with P8. Tromp regarded the evidence as “rehearsed”: Nevenka Tromp,

ter an overnight adjournment, he became an “agitated and short tempered” hostile witness.⁴⁰ “[H]e completely flipped and tried to damage our case”, described a prosecutor, speculating that “[i]t seems that some of Milošević’s cronies got to him overnight”.⁴¹

The extent of an insider witness’s alleged or suspected criminal conduct has also been considered a relevant factor in the determination of whether to call them, again acting as a qualifying factor. One prosecutor described that the decision of whether to call as witnesses those people who were alleged to have committed offences was “really always the difficult decision to make”, suggesting that the extent of their alleged offending made it “really just unconscionable to deal with them”.⁴² In July 1995, for example, OTP investigators became aware of a video tape showing the execution of several civilians at Trnovo by members the Skorpions. After eight years of trying to locate the video, ICTY investigator Tore Soldal received information from the Sarajevo Field Office that they had been approached by an intermediary claiming to be in contact with the owner of a copy of the tape.⁴³ On 9 September 2004, Soldal and Groome met with the intermediary and viewed the tape and confirmed that it was the footage they were looking for: however the intermediary informed them that the owner of the tape—who would become known as protected witness ‘B-345’ (and, perhaps, ‘JF-024’)—wanted €200,000 for a copy.⁴⁴ Moreover, B-345 was also a

Prosecuting Slobodan Milošević: The unfinished trial (Routledge, 1st ed, 2016), 131.

40 Nevenka Tromp, *Prosecuting Slobodan Milošević: The unfinished trial* (Routledge, 1st ed, 2016), 131. See *Prosecutor v Slobodan Milošević (Transcript of 20 February 2003)* (ICTY, Trial Chamber, IT-02-54-T, 20 February 2003), 16560.

41 Interview with P8.

42 Interview with P8.

43 *Prosecutor v Zdravko Tolimir (Declaration by OTP Investigator Tore Soldal regarding the video containing the killing of 6 Muslim men from Srebrenica by the Skorpions paramilitary unit at Godinjske Bare (Trnovo) – V000-5095-V000-5095)* (ICTY, Trial Chamber, IT-05-88/2, 23 September 2010), [6].

44 *Prosecutor v Zdravko Tolimir (Declaration by OTP Investigator Tore Soldal regarding the video containing the killing of 6 Muslim men from Srebrenica by the Skorpions paramilitary unit at Godinjske Bare (Trnovo) – V000-5095-V000-5095)* (ICTY, Trial Chamber, IT-05-88/2, 23 September 2010), [7], [17]. For the proposition that B-345 is also JF-024, see *Prosecutor v Jovica Stanišić and Franko Simatović (Transcript of 5 May 2011)* (ICTY, Trial Chamber, IT-03-69-T, 5 May 2011), 11472 (line 12), which links JF-024 to the video. JF-024 was granted protective measures in response to threats his family had received in retaliation for his provision of evidence to the ICTY: *Prosecutor v Jovica Stanišić and Franko Simatović (Transcript of 11 July 2011)* (ICTY, Trial Chamber, IT-03-69-T, 11 July 2011), 12619-12620. The implication may be that B-345 and JF-024 are the person who provided the video to the OTP.

member of the Skorpions. A few days later on 15 September, Soldal met with B-345 in person, who agreed to provide the video without payment but with the assurance he and his family would be protected.⁴⁵ One of the challenges facing prosecutors was how to carefully assess whether they could work with the Skorpions member.⁴⁶ After meeting with them in “secret meetings at another city”, prosecutors came to the opinion that the individual was a person with whom they could “appropriately deal with” and protect.⁴⁷ While the video was not admitted into evidence in the *Milošević* trial, the individual who provided it later “testified in a number of trials”.⁴⁸ Reflecting on being confronted with the choice to call a witness who was suspected of committing crimes, the prosecutor remarked that “each of those is a real difficult decision”.⁴⁹

Prosecutors will not call *all* available witnesses who can provide reliable and credible evidence. There are several qualifying factors that mean they cannot, the first of these being that judges have the power to effectively override prosecutorial decisions. The *Rules* of the ICTY, ICTR, and SCSL all contained a provision that enabled the bench to order the prosecution restrict the number of witnesses they would present.⁵⁰ The *Regulations* of the ICC similarly contain such a provision.⁵¹ These provisions were used, for example, in the *Milošević* trials where prosecutors were ordered to reduce their witness list on the Kosovo indictment from 110 people to 90; and on the Croatia and Bosnia indictment to 177 from the proposed 275.⁵²

45 *Prosecutor v Zdravko Tolimir (Declaration by OTP Investigator Tore Soldal regarding the video containing the killing of 6 Muslim men from Srebrenica by the Skorpions paramilitary unit at Godinjske Bare (Trnovo) – V000-5095-V000-5095)* (ICTY, Trial Chamber, IT-05-88/2, 23 September 2010), [9].

46 Interview with P8.

47 Interview with P8.

48 Interview with P8. At around the same time, the ICTY OTP also received a copy of the same video from human rights campaigner Nataša Kandić, who herself had received the video from a member of the Skorpions: Iva Vukušić, ‘Nineteen Minutes of Horror: Insights from the Skorpions execution video’ (2018) 12(2) *Genocide Studies and Prevention* 35, 42; Tim Judah and Daniel Sunter, ‘How the video that put Serbia in the dock was brought to light’, *The Guardian* (online), 5 June 2005 <<https://www.theguardian.com/world/2005/jun/05/balkans.warcimes>>.

49 Interview with P8.

50 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 73bis; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 73bis; Special Court for Sierra Leone, *Rules of Procedure and Evidence* (31 May 2012), r 73bis.

51 International Criminal Court, *Regulations of the Court*, r54(e).

52 Human Rights Watch, *Weighing the Evidence: Lessons from the Slobodan Milosevic*

Judicial pressure also came in softer forms, such as an invitation or urging to prosecutors to reduce the number of witnesses they planned on calling. For example, in *Milutinović et al*, judge Iain Bonomy said to the prosecutor, “[w]ell, Mr Hannis, all I can do in the circumstances is invite you to review your witness list as expeditiously as you can and decide what changes you can make to make things progress smoothly”.⁵³ In *Dragomir Milosević*, judge Patrick Robinson similarly stated “the Chamber sets the number of witnesses to be called by the Prosecution at 104 but urges the Prosecution to reconsider the number of witnesses to be called”.⁵⁴ It may also come in the form of an order to *attempt* to reduce the number of witnesses (such as in *Galić* and *Naletilić and Martinović*).⁵⁵

The overall effect of all this was to make prosecutors aware that even though they needed to prove the defendant’s guilt, “you can do it in an efficient manner”.⁵⁶ Judges’ efforts to “prune the witness list of the prosecution”⁵⁷ to whittle down the number of people that would give evidence, in its hard or soft forms, was felt by prosecutors. “We had constant pressure from the judges”, remarked one prosecutor, “and quite justified, looking back... [b]ecause we served a witness list originally which was taking us till the 23rd century to call”.⁵⁸ Further, they added, “their view [was] that we should keep it shorter or that we should go faster... [o]bviously I resisted it at the time... I had good arguments resisting some of their pressure. But their pressure was plainly right”.⁵⁹

Prosecutorial discretion therefore enters the picture when prosecutors need to identify *which* witnesses to call in light of time constraints. Efficiency is paramount: the ramification being that those witnesses who can

Trial (Human Rights Watch, 1st ed, 2006) <<https://www.hrw.org/reports/2006/milosevic1206/milosevic1206webwcover.pdf>>, footnote 247; *Prosecutor v Slobodan Milošević* (*Transcript of 9 January 2002*) (ICTY, Trial Chamber, IT-02-54-T, 9 January 2002), 246; *Prosecutor v Slobodan Milošević* (*Transcript of 25 July 2002*) (ICTY, Trial Chamber, IT-02-54-T, 25 July 2002), 8641.

53 *Prosecutor v Milan Milutinović et al* (*Transcript of 7 July 2006*) (ICTY, Trial Chamber, IT-05-87-PT, 7 July 2006), 375.

54 *Prosecutor v Dragomir Milosević* (*Transcript of 10 January 2007*) (ICTY, Trial Chamber, IT-98-29/1-PT, 10 January 2007), 224.

55 *Prosecutor v Stanislav Galić* (*Scheduling order*) (ICTY, Trial Chamber, IT-98-29-T, 4 July 2000); *Prosecutor v Mladen Naletilić and Vinko Martinović* (*Scheduling order*) (ICTY, Trial Chamber, IT-98-34, 1 September 2000).

56 Interview with P12.

57 Interview with P19.

58 Interview with P11.

59 Interview with P11.

give the *broadest* range of evidence have been prioritised. As one prosecutor explained, “we’re talking about so huge a number of crimes over such a period of time and such a wide geographic area that you have to prove your case but you have to do it in a reasonable period of time. So you basically choose witnesses who can give you the most varied, credible evidence”.⁶⁰ “[Y]ou look for people who basically can give you the biggest bang for the buck”, they added.⁶¹ “I would maybe try and take two or three witnesses for each village who could give me the broadest range of information. And if there was overlap, I would eliminate one”, explained another.⁶² This meant that prosecutors would not be able to present their “perfect case”, as they would need to make concessions regarding how many witnesses gave evidence about a particular topic.⁶³ The challenge therefore became “[t]rying to figure out how you can efficiently prove your case with a minimum number of witnesses, even though the number you end up with may still involve a prosecution case lasting almost a year or longer”.⁶⁴ This process was practical and ongoing. One prosecutor described that they “literally graded [witnesses] in their value”,⁶⁵ and as the evidence unfolded in court, witnesses would be subject to a “constant evaluation process” to assess the value of their evidence.⁶⁶

Judicial pressure has also led to the prosecution calling witnesses to give evidence about particular facts. While under the *Rules* the ICTY and ICTR judges had the capacity to call their own witnesses,⁶⁷ judges have requested parties to call witnesses to give evidence about particular topics. In *Hadžihasanović and Kubura*, for instance, the judges requested “that either the Prosecution or the Defence possibly, or perhaps the Chamber itself... [bring] in an expert in history in order to place matters in the political and historical context of the events and the acts committed”.⁶⁸ Similarly, in another ICTY trial, one prosecutor recalled informing the judges that “we

60 Interview with P12.

61 Interview with P12.

62 Interview with P28.

63 Interview with P11.

64 Interview with P19.

65 Interview with P11.

66 Interview with P12.

67 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 98; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 98.

68 *Prosecutor v Enver Hadžihasanović and Amir Kubura* (Transcript of 28 November 2003) (ICTY, Trial Chamber, IT-01-47-PT, 10 January 2007), 300.

wouldn't call a historian. And they said no, no no, we'd like a historian", and so a historian was called in light of this suggestion.⁶⁹ In these types of cases, pressure from the judges has resulted in the prosecution calling evidence that they would not otherwise have called.

The above accounts demonstrate that prosecutors have been firmly focussed on the importance of factual accuracy when assessing whether to call a particular witness. This reflects a narrow understanding of the value of witness testimony. These decisions appear to be underpinned by prosecutors adopting two roles. First, they have acted builders of a (limited) historical record. As Dori Laub argued, the reproduction of facts is merely one aspect testimony: the giving of evidence is an event itself that conveys trauma, amazement, shock, and other aspects of history that cannot be reduced to words.⁷⁰ Laub observed that "[t]here are never enough words or the right words, there is never enough time or the right time, and never enough listening or the right listening to articulate the story that cannot be fully captured in *thought, memory, and speech*".⁷¹ Courtroom environments are never capable of completely capturing the lived experience of a witness.⁷² Further, the selection of witnesses is an act of narrative screening and an act of silencing. Witnesses whose stories do not fit the fact-based truth paradigm treasured by the legal tradition are denied the opportunity to testify, despite their stories nevertheless being evidence of a *something else* that cannot be captured in the words they speak. The recollections recounted above support the views of Mark Drumbl and Richard Wilson that international criminal trials are ill-equipped for producing historical records because of their focus on the minutiae, selectivity, and prioritisation of certain types of evidence over other historical accounts.⁷³ Second, by affirming this limited view of evidence, prosecutors have adopted the roles of insti-

69 Interview with P11.

70 Dori Laub, 'Bearing Witness or the Vicissitudes of Listening' in Dori Laub and Shoshana Felman (eds), *Testimony: Crises of witnessing in literature, psychoanalysis, and history* (Routledge, 1st ed, 1992) 57, 62.

71 Dori Laub, 'Truth and Testimony: The process and the struggle' (1991) 48(1) *American Imago* 75, 77. Original emphasis.

72 See, generally, Nicola Henry, 'The Impossibility of Bearing Witness: Wartime rape and the promise of justice' (2010) 16(10) *Violence Against Women* 1098. Henry discusses the limits of language in representing rape.

73 Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 1st ed, 2007), 176; and, generally, Richard Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 1st ed, 2011). For more on the capacity of international criminal trials to produce 'truth', see page 4.1

tution builders and reinforced the nature of international criminal trials. Nora Strejilevich claimed that testimony is “often seen as a commodity that must provide practical use”, and the belief that it can be objective betrays the reality that truths are conveyed in more complex ways.⁷⁴ By adopting a limited and narrow view of what witness testimony looks like in international criminal justice, prosecutors have acted to promote the traditional shape of trial proceedings.

Finally, the fact that prosecutors have been responsive to concerns raised by judges about the length of witness lists is arguably evidence that they have been acting as guardians over their own self-interest. This responsiveness ensures that prosecutors are seen as reasonable—a trait which, in law, is arguably one of the most important elements of a lawyer’s symbolic capital. Moreover, by adjusting witness lists to accommodate types of evidence that judges would like to hear ensures that prosecutors maximise the prospects that a prosecution will be successful and they avoid the embarrassing situation of the defendant being acquitted because, in part, they chose to ignore what a judge was suggesting. The attention given to evidential matters thus appears to be in some way also motivated by the prosecutor adopting the role of a guardian over their own self-interests.

4.2 Health, risk, and trauma

The health of a potential witness, and the possibility that they will be exposed to risk or traumatised as a result of giving evidence, have been considered by prosecutors as relevant factors in the exercise of discretion regarding which witnesses should be called to give oral evidence.

Turning first to the matter of a potential witness’s health, there are no specific rules to guide prosecutors on whether this needs to be considered when deciding if they should be called. Nevertheless, an ICTY prosecutor recalled that in one prosecution, “there was a very senior witness who had cooperated in other trials but had been suffering some health issues, [and] had some serious security issues”.⁷⁵ Despite some disagreement among the prosecution team, the prosecutor decided not to call the witness. Reflecting back on their decision, they remarked that “I think I’d make the same decision again... when I looked at everything there, and kind of weighing his contribution to the body of evidence and the cost to that witness... I

74 Nora Strejilevich, ‘Testimony: Beyond the language of truth’ (2006) 28(3) *Human Rights Quarterly* 701, 703, 709.

75 Interview with P8.

thought the equities weighed in favour of not calling him”.⁷⁶

On the subject of exposure to risk and trauma, there is slightly more guidance. Once prosecutors have decided to call witnesses, they are entitled to safety and protection. All *Rules of Procedure and Evidence* of the ICTY, ICTR, SCSL, and ICC contain provisions relating to the protection of victims and witnesses (allowing, for example, the adoption of protective or security measures). The ICC’s *Regulations of the Office of the Prosecutor* go further in obliging investigators and prosecutors to take various measures to ensure the protection of witnesses. These include—*inter alia*—gathering “as much information as possible on the level of risk involved” and ‘considering’ alternatives to questioning in the investigation stage;⁷⁷ ensuring “discreet and secure contact with witnesses” as well as implementing “other preventive measures”;⁷⁸ considering the presentation of “documentary or summary evidence at the confirmation hearing” when taking into consideration the interests of victims and witnesses;⁷⁹ and consulting with, and requesting, staff from the Victims and Witnesses Unit to “provide support and assistance” to witnesses that prosecutors intend to call.⁸⁰ The *Code of Conduct for the Office of the Prosecutor* also requires OTP staff to be “respectful”, “courteous”, “considerate”, and “dignified” to witnesses.⁸¹

However, there are only two documents that specifically oblige prosecutors to consider the potential risk and trauma to a witness when exercising discretion in selecting who will be called at trial. Both come from the ICC. The first is the Prosecutor’s *Policy on Children*. Under section 68, “[i]n its deliberations on whether to interview or take evidence from a child”, prosecutors need to consider the “age, development, level of maturity, capabilities and vulnerabilities” of the child witness, and the “the availability of alternate forms of evidence”.⁸² Other obligations are contained in section 89, which

76 Interview with P8.

77 Office of the Prosecutor, ‘Regulations of the Office of the Prosecutor’ (International Criminal Court Office of the Prosecutor, 23 April 2009), r 36(2).

78 Office of the Prosecutor, ‘Regulations of the Office of the Prosecutor’ (International Criminal Court Office of the Prosecutor, 23 April 2009), r 45(c) and (f).

79 Office of the Prosecutor, ‘Regulations of the Office of the Prosecutor’ (International Criminal Court Office of the Prosecutor, 23 April 2009), r 59(2).

80 Office of the Prosecutor, ‘Regulations of the Office of the Prosecutor’ (International Criminal Court Office of the Prosecutor, 23 April 2009), r 61(5).

81 Office of the Prosecutor, ‘Code of Conduct for the Office of the Prosecutor’ (International Criminal Court Office of the Prosecutor, 5 September 2013), s (5) and (26)(d).

82 Office of the Prosecutor, ‘Policy on Children’ (International Criminal Court Office

oblige consideration of the child's vulnerabilities; capabilities; resilience; the relevance of their evidence; any psycho-social and security assessments; "any possible healing effect which may be associated with providing evidence"; and whether the process will benefit or harm the child.⁸³ The second is the *Policy Paper on Sexual and Gender-Based Crimes*. Under section 70, prosecutors need to consider the "security, social, and psychological risks, as well as any possible healing effect which may be associated with providing evidence of sexual and gender-based crimes", and whether the witness will be benefitted or harmed by giving evidence.⁸⁴

There are two points that emerge from the above documents. First, they demonstrate what appears to be a strong presumption in favour of witnesses being called to give evidence, and the desirability of mitigating any risks to them through the adoption of security or protective measures. Second, with respect to ICC prosecutors, children and alleged victims of sexual and gender-based crime are uniquely positioned in that prosecutors must consider various factors relating to them in determining whether they should be called to give evidence at all.

Formal obligations aside, prosecutors have considered the risks witnesses may be exposed to and the prospects of their being re-traumatised in the exercise of discretion regarding whether they should be called to give evidence. Prosecutors have tried to select those witnesses who "are best able to withstand the court process".⁸⁵ As one prosecutor observed, "these are some of the most traumatised people I've ever encountered", adding that "I definitely saw that I had a responsibility to get them through the process whole" out of "just human decency" and their domestic experience where they felt they "really... had this obligation to represent victims and to advocate for them".⁸⁶ The prosecutor explained that some witnesses "might just wither and crumble on the witness stand by the pressure of seeing [the defendant] across the room from them", and this simple fact was something that prosecutors needed to consider in assessing the witness's vulnerability.⁸⁷ The importance of prosecutors liaising with investigators and those

of the Prosecutor, November 2016), s 68.

83 Office of the Prosecutor, 'Policy on Children' (International Criminal Court Office of the Prosecutor, November 2016), s 89.

84 Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (International Criminal Court Office of the Prosecutor, June 2014), s 70.

85 Interview with P21.

86 Interview with P8.

87 Interview with P8.

who have had contact with the witness in order to make these assessments of vulnerability cannot be understated.

Some witnesses may simultaneously be capable of providing evidence that is crucial to the prosecution case, while also appearing unable to withstand the process of giving evidence. One ICTY prosecutor reflected that while they had the power to request a subpoena for the witness (needing only to demonstrate the witness was “necessary for the purposes of... [the] conduct of the trial” in that there is a “good chance” they will “materially assist” the prosecution case⁸⁸), they felt they “had larger obligations”, and reflected that they “had to exercise my discretion more carefully”.⁸⁹ There are examples of where prosecutors have withdrawn charges due (in part) to believing that crucial witnesses would be too traumatised by giving evidence. “Sometimes we gave up on that part of the case or that event because... the only witness we had and the best one really didn’t want to [give evidence], really couldn’t, and it probably would have been worse for him or her if we had made them do it”, recalled one prosecutor.⁹⁰ In the ICTY OTP’s prosecution of Mitar Vasiljević, for example, charges concerning the ‘Bikavac Fire’ (in which approximately 70 people were burnt to death inside a locked house) were withdrawn after one critical witness was deemed too fragile to call.⁹¹

A related consideration is a witness’s *expressed unwillingness* to give evidence, irrespective of a prosecutor’s assessment regarding the risk or trauma they may be exposed to if they did give evidence. This, too, has been considered a relevant factor in determining whether a witness should be called. In what could be seen as an admission that some prosecutors emotionally blackmailed witnesses to strengthen their cases, one prosecutor confessed, “I feel guilty sometimes, because prosecutors can play the card sometimes

88 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 54; *Prosecutor v Radoslav Krstić (Decision on Application for Subpoenas)* (ICTY, Appeals Chamber, IT-98-33-A, 1 July 2003), [10].

89 Interview with P8.

90 Interview with P17.

91 The prosecution’s evidence relating to Mitar Vasiljević’s involvement in the Bikavac Fire appears to have centred around the evidence of witness VG058—who provided identification evidence placing him at the fire. The assumption is that VG058 was the one deemed “too fragile”. This assumption is based on *Prosecutor v Mitar Vasiljević (Prosecutor’s pre-trial brief pursuant to Rule 65ter(E)(i))* (ICTY, Trial Chamber, IT-98-32-PT, 11 December 2000), footnote 7; *Prosecutor v Milan Lukić and Sredoje Lukić (Judgment)* (ICTY, Trial Chamber, IT-98-32/1-T, 20 July 2009), [644]; and Interview with P8. In the later and related trial of Milan Lukić and Sredoje Lukić, it appears the prosecution’s assessment of the witness’s fragility changed, and they were called.

that this [witness] is important to my case, I really need this witness. And you can say things to people like, ‘well, you know, your brother and your daughter and your husband are dead and there’s nobody to speak for them. Who’s going to tell their story?’ I mean, we would say things like that to them”.⁹² However, they added, “I never subpoenaed somebody who said ‘I just can’t do it, I don’t want to do it’”.⁹³ Similarly, one ICTR prosecutor recalled being confronted with how to prove the identity of someone speaking on an audio recording. One of the OTP investigators was able to identify the voice, however as they were a close family friend of the speaker, they told the prosecutor that “I’m simply not prepared to give the evidence”, which meant that prosecutors had to find other ways of proving the speaker’s identity.⁹⁴

Witnesses may also be unwilling to give evidence unless the prosecution grants them particular assurances. “I recall speaking to an elderly woman in a mud hut in southern Rwanda”, reflected the same ICTR prosecutor, “who I distinctly recall her saying to me, ‘you want me to give evidence, can you promise to me that nothing like what I experienced during the genocide will ever happen again? Because the reason I was able to survive is because these people who lived around me protected me’”.⁹⁵ They continued:

She said, ‘the same people—their sons, brothers, husbands—have been arrested. And they haven’t said anything directly to me, but I know they are looking at me and thinking, ‘well, we saved you, what are you going to do to save... the men in our lives?’’

And ultimately, as I remember saying to her, ‘listen, I’m not going to force you to do anything. As you will know, one of the reasons that the genocide did occur is because people had done nothing previously. And I can’t give you that promise, however. [These are] the things that I simply ask you to consider. We’ll come back to you’.⁹⁶

The prosecutor concluded: “I don’t know that, especially when you’re talking of victims, forcing them to give evidence or requiring them to give

92 Interview with P17.

93 Interview with P17.

94 Interview with P25.

95 Interview with P25.

96 Interview with P25.

evidence is the way to proceed”.⁹⁷

Not all prosecutors are necessarily in agreement with the proposition that an expressed (or predicted) unwillingness to testify is a relevant consideration. For example, in response to the question “was the reluctance of a witness to give evidence ever a factor that you would consider to be relevant in determining whether or not a witness should be called?”, one prosecutor bluntly responded, “[w]ith victim witnesses, yes. With what we called the insider witnesses, no. Absolutely not”.⁹⁸ One prosecutor recalled their decision to subpoena a very high-level insider witness in an ICTY prosecution, who they suspected would provide “essential evidence”.⁹⁹ “I knew that I was putting the witness in an incredibly difficult situation”, they said, “... I imagine he came under tremendous pressure after he testified, and I was kind of mindful that I was putting him in this extremely difficult position”.¹⁰⁰ However, the value of the evidence they could provide outweighed these other considerations, and the prosecutor decided that it was therefore appropriate that they be called.¹⁰¹

Similarly, not all prosecutors agree that an alleged *victim* witness who is unwilling to testify, *and* is critical to the prosecution’s ability to prove a charge, should not be called. “[S]ome of the people who worked [at the ICTY] were—I’m trying to think of the right way of putting this”, began one prosecutor, “[t]hey really empathised with the victims. I mean... you couldn’t not. But in the end, your job as a lawyer, in my view, is not to let your empathy outweigh your obligation to get the best evidence available”.¹⁰² Even when only one witness was capable of providing evidence of a crime, the prosecutor explained, “sometimes we would say ‘look, I know you don’t want to do this. I know you’re back in Kozarac or whatever. We will give you full witness protection. And I’m afraid we are going to insist, unless you’ve got a very good reason. You gave us a statement, you’re going to have to come and testify’”.¹⁰³ In a different context, the same prosecutor remarked that “you lose a lot of your national characteristics as a prosecutor doing international work”, but “[t]he one you should not lose is the one

97 Interview with P25.

98 Interview with P23.

99 Interview with P8.

100 Interview with P8.

101 Interview with P8.

102 Interview with P23.

103 Interview with P23.

that you are not the victim's representative in court. That is not your job".¹⁰⁴ To them, the role of the prosecutor was clear: get the best evidence at trial, and not to let feelings towards the alleged victims impede the pursuit of this objective.

The relevance of risk and trauma in prosecutorial decision-making highlights a tension between two different role identities. On the one hand, the prosecutor is a guardian of the victims who prioritises personal wellbeing over the production of courtroom truths and convictions. There is a hesitation to sacrifice victims and witnesses in the pursuit of a trial's historical purposes. This concern for the wellbeing of victims and witnesses is an act of symbolic violence committed against the notion of the trial and courts as institutions. By refusing to call witnesses because of the risk they face, prosecutors are internally rebelling against both the tribunal fulfilling its *raison d'être* in the assessment of guilt, and their role in the objective pursuit of the allegations they have laid against an accused. On the other hand, prosecutors have also felt tied to their historical roles as accusers and acted to reinforce this institutional role. The examples discussed in this section therefore reveal how different conceptions of the prosecutorial role have a direct affect on how prosecutors choose witnesses to call at trial.

5 Normative Considerations

5.1 Public evidence

One relevant aspect of the legal framework governing the selection of witnesses is the presumption against *in camera* proceedings. This presumption is reiterated in various places throughout the *Rome Statute*¹⁰⁵ and the various *Rules of Procedure and Evidence*.¹⁰⁶ While these rules are best seen as generalised proclamations about the need for trials to be open to the public eye, they are arguably relevant, in a very small way, to the selection of witnesses. This is because they may create a presumption against selecting witnesses who wish to give evidence in closed session.

Prosecutors have also preferred witnesses who are capable of giving ev-

¹⁰⁴ Interview with P23.

¹⁰⁵ See articles 64(7) and 67(1).

¹⁰⁶ International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), and Special Court for Sierra Leone, *Rules of Procedure and Evidence* (31 May 2012) r 78.

idence in open court rather than those who would need to give evidence *in camera*. “[T]he general principle is that justice should not only be done, but be seen to be done”, observed one prosecutor, “[a]nd closed testimony is... anathema to that principle”.¹⁰⁷

Prosecutors have spoken of three reasons why it is preferable to select witnesses who are capable of giving their evidence in open session. The first of these is that public evidence allows the creation of what Nigel Eltringham called the ‘validating public’ to construct and strengthen the courts’ “monopolies of violence, censure and regulation”¹⁰⁸ by openly displaying the means and processes through which punishment and censure is delivered. Prosecutors have been conscious of this public’s existence; “the crowded courtroom behind plexiglass... basically anybody interested in the trial. Reporters from all over”.¹⁰⁹ “What you don’t want”, remarked one prosecutor, “is at the end [of the trial] there’s a conviction and nobody outside the courtroom can understand... why”.¹¹⁰ If prosecutors exercise their discretion to lead key evidence through witnesses who will give evidence *in camera*, one ICC prosecutor with ICTY experience remarked, “it gives room to people who want to say ‘look,... how could this be proven? Look at the judgment... half of it’s hidden’”.¹¹¹ This would serve to reject and alienate the validating public, diminishing the court’s already weak grasp on the monopolies it enjoys.

Rule 92*bis* and *ter*—under which witness statements are tendered without the need for the witness to be examined in chief—put prosecutors in a difficult position if they want to rely on the spectacle of evidence. Even though the tendered statements will be public and available through the online judicial records databases, they may never be read; abandoned and forgotten, inaccessible to anyone not familiar with the intricacies and complexities of how to use the search function. The lacklustre image of a statement being tendered is far less powerful than the spectacle of a witness holding an audience captive with the story of the harm they allege to have

107 Interview with P23.

108 Nigel Eltringham, ‘Spectators to the Spectacle of Law: The formation of a “validating public” at the International Criminal Tribunal for Rwanda’ (2012) 77(3) *Ethnos* 425, 433. See also, generally, Michel Foucault, *Discipline and Punish: The birth of the prison* (Penguin, 1st ed, 1991) regarding the notion that publicity and spectacle serves to reinforce the sovereign’s supreme legitimate authority over punishment, which Eltringham builds on in his article.

109 Interview with P28.

110 Interview with P20.

111 Interview with P20.

suffered. To reduce lived, human experiences to combinations of glyphs set in 12pt Times New Roman printed on flaccid, lifeless sheets of A4 copy paper is to strip them of the intonation, pace, physical expression, gestures, and humanity afforded by the oral evidence experience. The spectacle presented to the validating public is not one that entices viewing, alienating the very audience the court relies on for the maintenance of its authority. To counter this, one prosecutor took to reading out a brief summary of evidence they intended to tender not for the benefit of the judges, but “for the audience to know why [this] witness [is] being called”.¹¹² While this method cannot be held to be a true replacement for oral witness testimony, it nevertheless provides the validating public with something slightly more interesting and informative than the alternative.

The second reason why prosecutors have preferred witnesses who are capable of giving their evidence in public is due to the ‘expressive’ contribution of witness testimony to bringing about broader changes in society. “[W]e had an interest in letting people know that we were trying to present what had happened”, remarked one prosecutor.¹¹³ If the society is to move forward with an understanding of what had occurred in a conflict, another prosecutor observed, this is “going to be harder if the best evidence is all hidden”: “if the best evidence which might be insider evidence or very sensitive documents are not portrayed, then it does look like there may be just a hole and the judges saying ‘trust us’... is not as good”.¹¹⁴ Similarly, another prosecutor remarked that “the witness you should call should also be somebody that if... in a Serb perpetrator case, that Serbs watching it could say ‘god, this witness can’t be lying. I mean, this has got the ring of truth about it’”.¹¹⁵ As such, they later continued, “it was preferable that they would give evidence openly” so that “anybody watching could realise what went on”.¹¹⁶ The giving of public testimony—“having the truth come out in the broad sense”—therefore “hopefully lead[s] to peace and reconciliation and deterrence and hopefully the avoidance of future crimes”.¹¹⁷

Finally, the third reason that prosecutors have preferred witnesses who

112 Interview with P28.

113 Interview with P17.

114 Interview with P20.

115 Interview with P23.

116 Interview with P23. The interview subject initially denied that it was a relevant consideration in the selection of witnesses that the witnesses should give evidence in open court, but later reconsidered their answer and agreed “that was a consideration at the time”.

117 Interview with P20.

can give evidence in open session is that the image of a witness giving evidence in public may unearth additional evidence that the prosecution was previously unaware of. One prosecutor believed that there was always the possibility that other potential witnesses had gone unnoticed by investigators; deterred from approaching the OTP by having heard stories of witnesses being treated poorly or cross-examined by the defendant.¹¹⁸ “[I]n the back of my mind”, they said, “... it was like maybe I’ll encourage somebody else who’s been reluctant, they’re still hanging out there, they don’t know whether they want to testify”.¹¹⁹

The importance of public evidence therefore appears to have been driven by prosecutors adopting two roles. First, they have been institution builders. Public evidence reinforces the strength of the court through the creation of a validating public. By selecting witnesses who can tell their stories in open session, prosecutors have ensured that the reasons behind judicial decisions are transparent and credible. Second, they have been performers of moral norms. Open testimony serves a didactic function in that it allows the public to be informed about what prosecutors submit was behaviour that offended standards of morality, and offers the opportunity for the public to see human stories of the effects of reprehensible conduct.

6 Strategic Considerations

6.1 Emotions and storytelling

In the context of victim witnesses, being able to give valuable evidence in a reliable and credible manner are not the only factors that have been considered relevant by prosecutors in exercising their discretion to select witnesses. Testimony consists of not just *what* a witness says, but also *how* they say it. As such, prosecutors have considered the emotional effect of a witness’s evidence and their storytelling abilities when deciding whether they should be called.

The emotions displayed by a witness while they give evidence are likely to influence how the listener assesses the witness’s credibility. Studies, many concerning evidence of rape, have shown that this principle applies in a variety of situations both inside and outside the courtroom.¹²⁰ While it remains

¹¹⁸ Interview with P17.

¹¹⁹ Interview with P17.

¹²⁰ For example, see Ellen Wessel et al, ‘Credibility of the Emotional Witness: A Study of Ratings by Court Judges’ (2006) 30 *Law and Human Behaviour* 221;

remarkably difficult for listeners to correctly discern whether emotionally-charged evidence is credible or untrustworthy,¹²¹ there is little doubt that emotional evidence is more likely to be seen as accurate and believable.

Judges are certainly not immune from these effects. The image of judicial officers as somehow above emotion and human frailty has long been regarded as “aesthetically pleasing but inaccurate”¹²² or “naïve and uninformed”.¹²³ Some have claimed that it is actually desirable that judges let their emotions influence their decision making, with Gabrielle Appleby and Suzanne Le Mire arguing that “their humanity allows them to determine credibility of witnesses and resolve difficult questions of fact and law”.¹²⁴ In other words, just as what the witness says will affect the verdict, so too will the emotions they display while they are in the witness box.

Prosecutors have been attuned to how emotional witnesses will be (and the emotional effect of their evidence) when deciding who will be called. One prosecutor, for instance, described the feeling among colleagues at the ICTY that the judges “[didn’t] want to hear any more crying witnesses” adding that “[i]t makes them uncomfortable”.¹²⁵ “[J]udges are human beings like everybody else”, remarked another.¹²⁶ “[L]istening to somebody describe the, you know, the death of their whole family and the lot, was incredibly powerful”, they observed.¹²⁷

In a remarkably self-aware reflection on how they selected witnesses, a prosecutor suggested that they harboured some reservations regarding the manner in which witnesses were identified. The prosecutor hinted that they were unsettled by the need to prioritise those witnesses who were par-

Aldert Vrij and Agneta Fischer, ‘The Expression of Emotions in Simulated Rape Interviews’ (1995) 4 *International Review of Victimology* 64; Gier Kaufmann et al, ‘The Importance of Being Earnest: Displayed emotions and witness credibility’ (2003) 17 *Applied Cognitive Psychology* 21; and Ronald Riggio, Joan Tucker, and Barbara Throckmorton, ‘Social Skills and Deception Ability’ (1988) 13(4) *Personality and Social Psychology Bulletin* 568.

121 Bella DePaulo et al, ‘Cues to Deception’ (2003) 129(1) *Psychological Bulletin* 74, 106.

122 Joel Grossman, ‘Social Backgrounds and Judicial Decision-Making’ (1966) 79(8) *Harvard Law Review* 1551, 1551. Grossman was writing with respect to the judiciary in the United States, but there is no reason the principle does not translate to the international criminal law judiciary.

123 Gregory Sisk, ‘Judges Are Human, Too’ (2000) 83 *Judicature* 178.

124 Gabrielle Appleby and Suzanne Le Mire, ‘Judicial Conduct: Crafting a system that enhances institutional integrity’ (2014) 38(1) *Melbourne University Law Review* 1, 2.

125 Interview with P17.

126 Interview with P23.

127 Interview with P23.

ticularly good at telling their emotional stories. By drawing an analogy to a 1950s American television show that has been described as stirring up “schadenfreudic pleasures”¹²⁸ in middle-class viewers taking comfort in the misfortune of working-class American housewives,¹²⁹ the prosecutor suggested that they were uncomfortable selecting witnesses who had the most gut-wrenching and heart-rending tales:

Like, you want to talk about the massacres here or the tortures in this camp or the rapes in this village. You made a selection based partly on personality, in terms of ‘this is a witness who has a tear-jerker, [an] incredible story to tell. Tells it well. Is sympathetic. Moving. And will represent the picture. I can’t call all thirteen people—the judge won’t let me—but this one tells the story the best’. And it’s—*it feels kind of sick in a way*. That, you know, in America we used to have a TV show back in the fifties called *Queen for a Day*. People, homeless people or other people, would come in and tell their story; the audience would applaud; and the one who got the applause for the most pitiful story won a dishwasher and five hundred dollars, or something like that. It was a bizarre thing. *It’s kind of what this felt like sometimes*. We were sort of putting on the most tear-jerking story we [could].¹³⁰

Beyond the emotional appearance and effect of a witness’s evidence, whether evidence assists the prosecution in proving its case is going to depend in part on the witness’s skill in presenting it. In the same way that those people who can give the broadest range of evidence have been prioritised as witnesses (as discussed in section 4.1), so to have those that can present their evidence as a good oral story. This is due in a large part to the inability of international prosecutors to present all witnesses at trial due to time or resource constraints, necessitating the prioritisation of witnesses who can convey their evidence in a compelling narrative. As one prosecutor explained, “[i]nternationally you have to choose the evidence which best

128 Amber Watts, ‘Queen for a Day: Remaking consumer culture, one woman at a time’ in Dana Heller (ed), *The Great American Makeover: Television, history, nation* (Palgrave Macmillan, 2006) 141, 147.

129 Georganne Scheiner, ‘Would you like to be Queen for a day? Finding a working class voice in American television of the 1950s’ (2003) 23(4) *Historical Journal of Film, Radio and Television* 375, 377.

130 Interview with P17. Emphasis added.

represents the criminality. And if someone can tell the story better, yeah, you would choose that person”.¹³¹

Prosecutors have identified several traits that characterise a potential witness as a ‘good storyteller’. One prosecutor, with experience at the ICC and the ICTY, agreed that it was important when exercising the discretion of selecting witnesses to call “articulate, smart witnesses who can tell the story”.¹³² The reason for this, they explained, is that “these trials last for years” and “can be very dry”.¹³³ Therefore, they posited, “every now and then, everybody in the room needs a sort of reality check of why we’re here and what this is about”, so the gravity and the harm of the alleged offending does not get forgotten.¹³⁴ Another prosecutor described that it was important to liaise with the investigators who initially interviewed the potential witness to determine whether “they’re going to be convincing”, and whether “they’re going to be able to answer a question without digressing three pages of transcript into issues that aren’t relevant” while still covering “all the salient points”.¹³⁵ Characteristics of good storytellers therefore seem to include the ability to focus their evidence; present it articulately; convey a sense of the gravity of harm they have suffered to those in the courtroom; and be intelligent enough to realise—and act upon—the purpose of their courtroom examination.

Two points emerge from the above discussion. The first is that the selection of witnesses based on their storytelling ability—the ability to respond directly to questions, the ability to answer succinctly, the ability to tell a narrative through the question-and-answer format of witness examination—is an act of institutional reinforcement. Trials prioritise narratives. Narrative structures inform both what facts are and how they are perceived.¹³⁶ The selection of witnesses based on whether they match the paradigmatic format of trial narratives reinforces the types of truths that trials can produce. It also limits the frame of the trial to the story that the prosecutor wants to tell. Witness experiences are rejected if they do not align with the paradigm of courtroom testimony. This demonstrates the power that prosecutors have

131 Interview with P21.

132 Interview with P20.

133 Interview with P20.

134 Interview with P20.

135 Interview with P23.

136 Lisa Griffin, ‘Narrative, Truth, and Trial’ (2013) 101 *Georgetown Law Journal* 281, 287. See also Mark Kelman, ‘Interpretive Construction in the Substantive Criminal Law’ (1981) 33(4) *Stanford Law Review* 591.

over the facts that are produced in a courtroom, how they are perceived, and reinforces the inability of trials to produce complex accounts of history.

The second point is that the prosecutor is a performer of moral norms. They are not simply agents through which facts are presented in the hope that the judges will be able to adjudicate history devoid of emotion. Emotion, or *pathos*, is one of the three pillars of rhetorical persuasion.¹³⁷ The selection of witnesses based on the emotional impact of their stories demonstrates the importance prosecutors place the acceptance of stories to promote deterrence and moral transformation.

The act of giving evidence at trial has been observed to have positive effects on the emotional states of witnesses. In their 2017 study—run with the assistance of the ICTY—King and Meernik found that witnesses reported “significantly lower levels of negative affect states following testimony”,¹³⁸ suggesting that the act of evidence-giving had cathartic benefits for witnesses. Similar results were found at the ICC.¹³⁹ Stover also found that 79 ICTY witnesses (equating to 90% of participants in his study) expressed that it was their “moral duty” to give evidence,¹⁴⁰ suggesting that the fulfilment of this ‘duty’ would have a positive effect on the witness’s emotional state. Both findings align with one prosecutor’s recollection that some witnesses in the *Lukić* trial “were delighted they’d had the opportunity to come and testify” about being raped and “that their voices had been heard”, *even though* the allegations were used merely to rebut the Defence’s alibi evidence and formed no part of the indictment.¹⁴¹ Those witnesses, the prosecutor recalled, “didn’t need an individual conviction”—the act of giving evidence (and seeing the defendant convicted for murder) was rewarding enough.¹⁴² Another prosecutor considered that “there’s a very important

137 The other two being *logos* and *ethos*. See Birju Kotecha, ‘The Art of Rhetoric: Perceptions of the International Criminal Court and legalism’ (2018) 31 *Leiden Journal of International Law* 939, 945–946; Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 105–106.

138 Kimi King and James Meernik, *The Witness Experience: Testimony at the ICTY and its impact* (Cambridge University Press, 1st ed, 2017), 129–130.

139 Human Rights Law Centre, ‘Bearing Witness at the International Criminal Court: An interview survey of 109 witnesses’ (University of California Berkeley School of Law, June 2014) <[https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL\(3\).pdf](https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL(3).pdf)>, 50.

140 Eric Stover, *The Witnesses: War crimes and the promise of justice in The Hague* (University of Pennsylvania Press, 1st ed, 2005), 76.

141 Interview with P18.

142 Interview with P18.

restorative benefit to a witness standing up in open court, [and] confronting the people that were responsible for the crimes against them".¹⁴³

In what one prosecutor described as one of their "most satisfying experiences as a Prosecutor", emotions, storytelling, and the cathartic effects of evidence-giving were all on display in their decision to call as a witness a woman from a small village.¹⁴⁴ She could give evidence that Serbian soldiers and police raided her village early in the morning, separated the woman and children from the men, and killed her husband and son.¹⁴⁵ "So we're calling her as a witness because that's a good story. You know, for us. About that village", the prosecutor said.¹⁴⁶ In evidence-in-chief, "she was so terrified and upset. I had to ask her to speak up, and she had her hair down. And she was shrunk in her chair", the prosecutor explained, slouching in their chair to demonstrate the timidness that had come over them.¹⁴⁷ But then she was cross-examined by a Defence lawyer, who conducted the cross "in the fashion of he was attacking her".¹⁴⁸ The prosecutor continued:

And then it was like a steel rod went up her back. And she sat up straight. And she's, 'your man came to my village and killed my son and my father!' Bah bah bah! It was great. I'm getting, you know, emotional just remembering it. And I went and saw her in the witness room afterwards and she was like, and her psychologist, and it was yes! This was what, it was a catharsis for her. You know. Because she'd been helpless during that time, but when she was in the courtroom and they did that, she was in charge. She got to point her finger at, you know, [the defendants]. And say that was your guys. It was great. I'm still excited about it.¹⁴⁹

Yet international prosecutors do not generally appear to regard *facilitating* the act of storytelling (for reasons unrelated to the prosecutor's role of establishing the charges) as a relevant factor in exercising the discretion of which witnesses to call at trial. In response to a question about whether they thought facilitating storytelling to let a witness have 'their day in court' was

143 Interview with P8.

144 Interview with P17.

145 Interview with P17.

146 Interview with P17.

147 Interview with P17.

148 Interview with P17.

149 Interview with P17.

relevant to the selection of witnesses to give oral evidence, one prosecutor bluntly responded “[n]o, I don’t”.¹⁵⁰ Another emphasised that the trial was an adversarial process: “Prosecutor versus Accused X”.¹⁵¹ As such, they explained, while some jurisdictions such as the ECCC, ICC, or STL allow for the participation of victims so they they can present their views, “[t]hat’s not something a prosecutor considers”.¹⁵² Similarly, Alan Tieger and Milbert Shin have confirmed that the decision of which witnesses to call is ultimately driven by evidential considerations, and those who “most want to be heard may thus be bypassed”.¹⁵³ This is consistent with one ICTY prosecutor’s recollection about a number of witnesses who insisted that they wanted to come and testify but were superfluous to the prosecution’s requirements. “We had a couple of those”, they remembered, “[a]nd there were a couple of times where we said, ‘it’s great, I appreciate that you want to do this, but the judges have... put limitations on the, in terms of the number of witnesses, the number of hours, etcetera. We already have some evidence in on that and I’m sorry, we won’t be calling you in this case’”.¹⁵⁴

Another ICTR prosecutor offered a slightly different perspective. They rejected the proposition that providing someone with the opportunity to tell their story for cathartic purposes was a relevant consideration in identifying who should be called to give oral evidence. “That’s not the role, in my view, or the purpose of the international tribunals”, they explained.¹⁵⁵ “I agree entirely”, they continued, “that [trials] can have that effect and I do think it is important that witnesses have the opportunity to give that information”.¹⁵⁶ In this respect, the prosecutor explained that the act of storytelling can be achieved through the person giving their evidence to *investigators*, rejecting the idea that oral examination-in-chief was the appropriate means through which any emotional benefit should be obtained. “There is a difference”, the prosecutor went on, “between... giving the witness the opportunity to say that to an investigator and leading the evidence”.¹⁵⁷ “I came from more of a background where I saw the tribunals as

150 Interview with P19.

151 Interview with P21.

152 Interview with P21.

153 Alan Tieger and Milbert Shin, ‘Plea Agreements in the ICTY: Purpose, effects, and propriety’ (2005) 3(3) *Journal of International Criminal Justice* 666, 675.

154 Interview with P17.

155 Interview with P25.

156 Interview with P25.

157 Interview with P25.

courts”, they added, “... and my role was to put the evidence forward in support of the charges that had been brought”.¹⁵⁸ The prosecutor explained that while they had “no difficulty in listening to witnesses and hearing them tell their story” and that “hopefully I was able to show empathy” towards them, “in terms of the evidence that I led at the trials, I tried to focus primarily on what evidence would be [led], which would support the charges”.¹⁵⁹

Yet the same prosecutor who rejected the idea that the prosecution should present witnesses superfluous to prosecutorial requirements because they want to have their day in court *did* still see an important role for storytelling with respect to *how* selected witnesses gave their evidence. Under rules 92*bis* and *ter* of the ICTY’s *Rules of Procedure and Evidence*, parties had the power to tender transcripts and statements of witnesses in lieu of requiring the witnesses to give evidence in court. The prosecutor expressed a strong preference that witnesses should give oral evidence. “It was hard for all of us to listen to... these stories of what one human being can do to another”, they recalled, “[b]ut we thought it was important to tell those stories”.¹⁶⁰ When asked why, they empathetically explained that “if I were a victim, I would want to tell my story”.¹⁶¹ The prosecutor appeared to express dismay at the operation of the law contained in what are now rules 92*bis* and *ter*. Unlike those prosecutors who regarded the trial as an inappropriate forum for facilitating storytelling for cathartic reasons, or who considered they could be achieved through other means, the prosecutor recalled the disappointment felt by some witnesses who were not examined in-chief. Reflecting on parts of the *Milošević* trial, the prosecutor described:

So they would bring in some farmer from this small village where these terrible things happened. And the judges had decided they wanted to speed the trial up. So they told the Prosecution, ‘you’ve got his witness statement, you can put in his written statement with all the details. We don’t need to hear him testify about that. So... you’ll have a written statement from him that you’re going to tender into evidence. You call the witness. You ask him his name, where are you from, etcetera. You ask him if that statement, has he read it, is it true. Yes. And then you admit the statement. Then we don’t

158 Interview with P25.

159 Interview with P25.

160 Interview with P17.

161 Interview with P17.

have to spend two hours of listening to the details’.

And then that witness gets cross-examined by Slobodan Milošević, who doesn’t ask him a single fucking question about the torture or the massacre in his village. He says, ‘did you hear about what the Croats did to the Serbs in such and such a village? Oh, you didn’t know about that?’ Etcetera etcetera.

And the witness went home, or would tell the victim witness representative, ‘Prosecutor, I don’t understand. I came in here to tell my story. I didn’t even get to tell it’. You know, ‘the Prosecutor read out a two-paragraph summary of my story. And then that bastard asked me questions about stuff I don’t know anything about’.

Very unsatisfactory experience for those witnesses.¹⁶²

The prosecutor’s disappointment—and anger—at the operation of what is now Rules 92*bis* and *ter* (and the judges’ use of it) is palpable. The prosecutor’s implicit suggestion appears to be that oral evidence is preferable for the primary reason that it gives the witness the opportunity to tell their story. Considerations concerning proof are marginalised—perhaps because it is difficult to determine whether judges afford different weights to oral and written evidence.¹⁶³ In any event, the prosecutor’s emphatic embrace of oral storytelling as preferable to the provision of written evidence is at odds with those who rejected the need to facilitate storytelling as relevant to their discretion.

Generally speaking, the above discussion emphasises once again that prosecutors have acted as institution builders by reinforcing the importance of a particular type of narrative structure in international criminal trials. Further, the importance prosecutors have placed on emotions and storytelling ability reinforces the claim made elsewhere in this chapters that the selection of witnesses is informed by prosecutors adopting the role of norm performers. Witness testimony, particularly gripping witness testimony, makes harm visible and affirms the importance of certain moral values.

162 Interview with P17.

163 Yvonne McDermott, ‘The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A socio-legal analysis’ (2013) 26(4) *Leiden Journal of International Law* 971, 987.

7 Conclusion

In conclusion, this chapter has demonstrated that the factors that inform prosecutors when they are deciding which witnesses to call have fulfilled functional, normative, and strategic goals. It has also argued that these decisions have been motivated by prosecutors adopting three role identities.

Two of these identities are particularly prominent. The first is the role of the prosecutor as a *norm performer*. The selection of witnesses based on their ability to tell a compelling and emotional story, as well as the importance of witness testimony being public, serves to affirm particular moral norms by illustrating the effects of these norms being transgressed. Trials serve as forums in which prosecutors can play a didactic role in educating the public about historical events and contributing to deterrence through the witnesses they select to give evidence.

The second is that the selection of witnesses appears to be driven by prosecutors adopting the role of institution *builders*. This is evidenced by the fact that witness selection decisions appear to have been heavily influenced by prosecutors affirming the importance of paradigmatic legal evidence and implicitly silencing other forms of truth-telling. They have therefore served to transpose the domestic conception of trials to international courts, as embodied in the prioritisation of narrative structures and particular forms of evidence.

Finally, prosecutors have acted as *guardians* over victims. They have done so by not calling witnesses who would be exposed to risk or traumatised by the experience of giving evidence. However, this role is in tension with the role of the prosecutor as a legal institution builder in which they serve to reinforce the traditional role of the prosecutor in criminal law proceedings. They have also, to some degree, acted as guardians over their own self-interest by listening to, and taking into account, suggestions of the judges regarding the length of witness lists and the types of evidence that they wish to hear. This is because these choices reaffirm a prosecutor's reasonableness, which is arguably one of the most important aspects of social capital in the legal profession.

Witness selection is therefore informed by more than the mere need to prove the prosecutor's case. Who prosecutors choose to put in the witness box is contingent upon the way they act as norm performers, builders, and guardians, and the factors these roles subsequently lead them to considering when exercising discretion.

Chapter 7

Appealing

[W]hat the heck are these judges going to do for the next six months if I don't send them this appeal?

INTERVIEW WITH P9

1 Introduction

The decision of whether or not to appeal is the last major choice that prosecutors can make in an international criminal proceedings. It can also be a very important one. Appeals are the last chance for prosecutors to receive favourable decisions. Appeals jurisprudence will be scoured over by scholars and practitioners hoping to clarify the state of the law. The decision to appeal can have significant consequences for a defendant's liberties. Yet there has been no explanation for why international prosecutors appeal. What informs how prosecutors exercise a discretion that can have such significant consequences for the outcomes of prosecutions? For this first time, this chapter answers this question. By peering through a set of thematic windows that emerged from original interviews with current and former senior prosecutors, it uncovers the hidden motivations and assumptions that have informed how the discretion to appeal has been exercised.

To do so, this chapter is structured as follows. First, it places the appeal discretion within its legal framework in section 2. Second, it illustrates the practice of the appeal discretion in section 3 by drawing on an empirical, quantitative study of prosecutorial appellate practice. It reveals the types of prosecution appeals and their success rate. Third, it looks through six

thematic windows to identify the stakeholders prosecutors relate to when exercising their discretion and the roles they adopt with respect to these stakeholders. Unlike the previous chapters concerning prosecutorial decisions, the decisions to appeal do not appear to have been motivated by functional considerations. As such, section 4 deals with the normative consideration of the need for appropriate sentences, developing the law, and protecting the integrity of the law. Section 5 then turns to the strategic considerations of communicating disagreement and garnering the support of external actors, providing work to judges, and responding to the interests of the victims. This chapter concludes by arguing that these factors appear to be motivated by prosecutors assuming the role of norm performers, builders, and guardians.

2 The Legal Framework

There is very little statutory or case law that concerns a prosecutor's discretion to commence an appeal. At the ICTY, ICTR, SCSL, and ICC, prosecutors could and can appeal on the basis of a factual error or a legal error. The ICC and SCSL *Statutes* also permit prosecutors to appeal on the basis of procedural errors; and the ICC additionally allows appeals to be raised against sentences. The tests that the prosecutors needed and need to meet in order to succeed on appeal are slightly different between each court. The ICTY, ICTR, and SCSL required prosecutors to demonstrate that a factual error had occasioned a miscarriage of justice and a legal error had invalidated the decision.¹ The SCSL *Statute* did not specify a standard that prosecutors needed to meet in order to succeed on a basis of an alleged procedural error, although Appeals Chamber judges established that they would succeed if they resulted in a miscarriage of justice or "affected the fairness of the trial".² At the ICC, prosecutors will succeed on legal, factual, or procedural grounds if they demonstrate that the error resulted in an unfair proceeding "that affected the reliability of the decision or sentence" or if the decision was "materially affected" by the error.³ In addition, an ap-

1 *Statute of the International Criminal Tribunal for the Former Yugoslavia* (September 2009), art 25; *Statute of the International Criminal Tribunal for Rwanda* (31 January 2010), art 24; *Statute of the Special Court for Sierra Leone*, art 20.

2 *Prosecutor v Moinina Fofana and Allieu Kondewa (Appeals Judgment)* (SCSL, Appeals Chamber, SCSL-04-14-A, 28 May 2008), [35].

3 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 83(2).

peal against sentence will succeed if prosecutors can demonstrate that the sentence was “disproportionate to the crime”.⁴

While the drafters of the ICTY and the ICTR *Statutes* neglected to include a clear mandate for parties to appeal sentences, Appeals Chamber judges provided a mechanism through which the sentencing discretion of the trial judges *as such* could be challenged on appeal. In *Prosecutor v Duško Tadić*, the Appeals Chamber judges were invited by the Defendant to overturn his 20-year sentence on the basis that “the Trial Chamber failed to adequately consider his personal circumstances” (among other things).⁵ The judges observed that there was “no discernible error in the exercise of discretion” that would allow the sentence to be disturbed, and in doing so opened the door for parties to challenge the exercise of discretion as such.⁶ The next year in *Prosecutor v Zejnil Delalić et al*, the Appeals Chamber judges had the opportunity to expand on the meaning of this phrase and remarked that a sentencing decision could be disturbed if it could be shown the Trial Chamber judges made a discernible error and “ventured outside [their] discretionary framework in imposing [a] sentence”.⁷ This was later described in *Prosecutor v Stanislav Galić* as being akin to taking a decision “from the wrong shelf”.⁸ This quasi-ground was relied upon by prosecutors both independently and in explicit conjunction with the statutory grounds.⁹

In addition, ICTY and ICTR Appeals Chamber judges were warm to the idea of receiving grounds that merely invited them to make declarations on law, rather than upset the trial judgment in any way. The first time prosecutors filed some of these grounds was in June 1997. ICTY pros-

4 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 83(3).

5 *Prosecutor v Duško Tadić (Judgment in Sentencing Appeals)* (ICTY, Appeals Chamber, IT-94-1-A, 26 January 2000), [22].

6 *Prosecutor v Duško Tadić (Judgment in Sentencing Appeals)* (ICTY, Appeals Chamber, IT-94-1-A, 26 January 2000), [22].

7 *Prosecutor v Zejnil Delalić et al (Appeals Judgment)* (ICTY, Appeals Chamber, IT-96-21-A, 20 February 2001), [725].

8 *Prosecutor v Stanislav Galić (Appeals Judgment)* (ICTY, Appeals Chamber, IT-98-29-A, 30 November 2006), [455].

9 See, for example, *Prosecutor v Zlatko Aleksovski (Prosecution's Appeal Brief)* (ICTY, Appeals Chamber, IT-95-14/1-A, 24 September 1999), [4.8]; *Prosecutor v Vidoje Blagojević and Dragan Jokić (Prosecution's Appeal Brief)* (ICTY, Trial Chamber, IT-02-60-A, 9 May 2005), [6.1]-[6.62]; *Prosecutor v Vlastimir Đorđević (Notice of filing public redacted version of Prosecution appeal brief)* (ICTY, Trial Chamber, IT-05-87/1-A, 17 August 2011), [59].

ecutors raised three grounds in *Prosecutor v Duško Tadić* that asked the Appeals Chamber judges to clarify whether prosecutors needed to prove beyond reasonable doubt that an accused knew of the widespread and systematic nature of crimes against humanity; whether discriminatory intent is an element of all crimes against humanity; and whether Trial Chamber judges could order the Defence to produce prior witness statements.¹⁰ The Appeals Chamber judges agreed to engage with these questions—despite them being irrelevant to the outcome of the trial—on the basis that they were matters of “general significance for the Tribunal’s jurisprudence” and “of importance and worthy of an expression of opinion by the Appeals Chamber”.¹¹ The ICTY and ICTR Appeals Chamber judges subsequently engaged with these ‘clarifying’ grounds in *Prosecutor v Jean-Paul Akayesu*¹² and *Prosecutor v Sylvestre Gacumbitsi*;¹³ however denied to address them in *Prosecutor v Naser Orić*¹⁴ and *Prosecutor v Enver Hadžihasanović and Amir Kubura*.¹⁵ The SCSL Appeals Chamber judges, too, exercised their “discretion” to consider one of these grounds “as guidance to the Trial Chamber”.¹⁶ Suffice to say, however, that the practice of prosecutors raising appeal grounds merely to clarify the law is not widespread. Only 5% of all appeal grounds ever filed by prosecutors seek to do nothing more than receive authority from Appeals Chamber judges on a point of law (in other words, 10 grounds out of 219).¹⁷

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- 10 *Prosecutor v Duško Tadić (Notice of Appeal)* (ICTY, Appeals Chamber, IT-94-I-A, 6 June 1997), [3]-[5].
- 11 *Prosecutor v Duško Tadić (Appeals Judgment)* (ICTY, Appeals Chamber, IT-94-I-A, 15 July 1999), see [247], [281], [315]-[316].
- 12 *Prosecutor v Jean-Paul Akayesu (Appeals Judgment)* (ICTR, Appeals Chamber, ICTR-96-4-A, 23 November 2001), 127-143.
- 13 *Prosecutor v Sylvestre Gacumbitsi (Appeals Judgment)* (ICTR, Appeals Chamber, ICTR-2001-64, 7 July 2006), [147]-[157].
- 14 *Prosecutor v Naser Orić (Appeals Judgment)* (ICTY, Appeals Chamber, IT-03-68-A, 3 July 2008), [175]-[179].
- 15 *Prosecutor v Enver Hadžihasanović and Amir Kubura (Appeals Judgment)* (ICTY, Appeals Chamber, IT-01-47-A, 22 April 2008).
- 16 *Prosecutor v Moinina Fofana and Allieu Kondewa (Appeals Judgment)* (SCSL, Appeals Chamber, SCSL-04-14-A, 28 May 2008), [451].
- 17 Cale Davis, *International Criminal Law Prosecution Appeals Briefs Database* (DOI 10.17026/dans-xwq-ka6y, 2020) version 1 <<https://easy.dans.knaw.nl/ui/datasets/id/easy-dataset:213874>>.

Court	Convicted	Appealed Against	As %	Acquitted	Appealed Against	As %	Total Appealed
ICTY	97	51	53%	14	9	64%	60
ICTR	63	26	41%	10	3	30%	29
SCSL	9	9	100%	0	0	NA	9
ICC	5	2	40%	3	3	100%	9
All	174	88	51%	27	15	56%	103

Table 7.1: The likelihood that an individual who received a conviction or was wholly acquitted would be subjected to a prosecution appeal. Cale Davis, *International Criminal Law Prosecution Sentencing Recommendation Statistics* (DOI 10.17026/dans-xd5-hyuz, 2019) version 1.

3 Appeals Statistics

Prosecutors have raised post-trial judgment appeal grounds against a total of 103 individual defendants.¹⁸ Roughly half of all individuals who had been convicted or acquitted were subjected to a prosecution appeal. Table 7.1 reveals the number of individuals who prosecutors appealed again at each of the four courts. It shows that—while on the whole—the likelihood of prosecutors appealing against an individual who was convicted or acquitted is roughly equal, the practice within each prosecution office varied significantly. At the ICC, for instance, prosecutors appealed against all individuals who were acquitted; but at the ICTR, they merely appealed against 30%. With regard to convicted individuals, similar differences are apparent. SCSL prosecutors had a perfect record when it came to getting convictions, yet prosecutors pursued appeals against every convict. ICTY, ICTR, and ICC prosecutors, however, were less likely to appeal in the event of a conviction.

As outlined in section 2, there are four primary grounds on which prosecutors can appeal: a legal error, a factual error, a procedural error, and an error in sentencing. Table 7.2 shows legal errors have and are clearly the most common ground relied on by prosecutors on appeal, outnumbering

¹⁸ Two datasets are relied upon for the statistics in this section: Cale Davis, *International Criminal Law Prosecution Appeals Briefs Database* (DOI 10.17026/dans-xwq-ka6y, 2020) version 1 <<https://easy.dans.knaw.nl/ui/datasets/id/easy-dataset:213874>>, and Cale Davis, *International Criminal Law Prosecution Sentencing Recommendation Statistics* (DOI 10.17026/dans-xd5-hyuz, 2019) version 1 <<https://easy.dans.knaw.nl/ui/datasets/id/easy-dataset:213875>>.

Court	Legal Error	Factual Error	Procedural Error	Sentencing Error
ICTY	53%	33%	NA	14%
ICTR	57%	35%	NA	8%
SCSL	45%	40%	15%	0%
ICC	50%	19%	19%	13%
All	53%	34%	3%	10%

Table 7.2: The errors alleged in post-judgment prosecution appeal grounds. Cale Davis, *International Criminal Law Prosecution Appeals Briefs Database* (DOI 10.17026/dans-xwq-ka6y, 2020) version 1.

factual errors by almost 20%. In their notices and briefs, however, prosecutors regularly characterise their chosen grounds under more than one legal avenue. 48% of all grounds that prosecutors have filed are a combination of two or more legal characterisations.

In terms of whether prosecutors have been successful on appeal, the numbers again demonstrate a mix of outcomes. In most cases, or 52%, prosecutors have succeeded or partially succeeded on at least one of the grounds of appeal that they raised. If success is determined by the number of grounds of appeal granted or partially granted on appeal as a percentage of grounds pressed on appeal (excluding those still pending, those that the judges decided they did not need to address, or those that were terminated or withdrawn), the picture is less rosy: prosecutors have only succeeded or partially succeeded on 35% of grounds. In fact, at all courts, prosecutors have been far less successful on appeal than they have been successful or partially successful. In table 7.3, it is revealed that prosecutors at all courts have had notably less success on appeal than failures. ICC prosecutors have never succeeded—either wholly or in part—with a post-judgment appeal ground. Of all the prosecution offices, ICTY prosecutors had the best appeal track record, having some success in 46% of the grounds they pursued.

But why have these appeals been pursued in the first place? And what influenced prosecutors' decisions to invest time, effort, and resources in a process that has to date resulted in such a miserable success rate? The following two sections explore six thematic windows into the possible motivations and assumptions that may answer these questions.

Court	Granted	Partially Granted	Dismissed	Sum of Grounds
ICTY	35%	11%	55%	110
ICTR	14%	10%	76%	80
SCSL	26%	9%	65%	23
ICC	0%	0%	100%	6
All	25%	10%	65%	219

Table 7.3: The judicial outcome of prosecution appeal grounds. Cale Davis, *International Criminal Law Prosecution Appeals Briefs Database* (DOI 10.17026/dans-xwq-ka6y, 2020) version 1.

4 Normative Considerations

4.1 A ‘need’ for appropriate sentences

Prosecutors have acted as performers of moral norms in the exercise of their discretion whether to appeal. As mentioned in section 3, 10% of all appeal grounds raised on appeal challenged directly how the Trial Chamber judges exercised their sentencing discretion. While prosecutors only succeeded or partially succeeded in challenging sentences in 12 out of 41 cases where a sentence was challenged (or 29%), 53% of all cases prosecutors took on appeal sought a higher sentence for the defendant. One prosecutor described that an appeal was a “chance to make law and to show that... this kind of conduct, even if it may only be complicity... needs to be represented by a more substantial sentence”.¹⁹

The arguments prosecutors have raised in appeal briefs on grounds concerning sentences at the ICTY, SCSL, and ICC²⁰ reveal that “this kind of conduct” is a broad church of considerations. This is not surprising, given the scope that Trial Chamber judges have to take into account an endless number of factors in arriving at an appropriate sentence.²¹ Prosecutors have,

¹⁹ Interview with P9.

²⁰ The ICTR has been excluded for the purposes of the analysis that follows in this section due to the large number of appeal briefs that remain under seal.

²¹ See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (September 2009), art 24(2); *Statute of the Special Court for Sierra Leone*, art 19(2); *Statute of the International Criminal Tribunal for Rwanda* (31 January 2010), art 23(2);

for example, justified their claims for higher sentences by reference to a defendant's premeditation; mode through which they committed the offences; rank and level of authority; knowledge and intent; and attempts to block the arrival of help. They have argued that a defendant's education and training should be counted against them. They have emphasised the vulnerability of the victims; their number; whether they were terrorised; the 'inherent gravity' of the defendant's offences; the geographic and temporal spread of the crimes; and their systematic nature.

On the other side of the coin, prosecutors have been dismissive of some factors relied upon in mitigation. In what reads almost like a roll-call of arguments raised by defendants in the hope of receiving a lighter penalty, prosecutors have criticised sentences being reduced on the basis that a defendant was not an active participant in the offending. They have rejected the importance of a defendant's moral character; expressions of sympathy for the victims; concerns about the conduct they were engaging in; the attempts they made at remediation; their age; medical conditions; submissive character; intelligence; training; lack of training; lack of criminal record; good conduct in detention; and withdrawal from public life. They have even downplayed the significance of a defendant's cooperation with investigators and prosecutors, and the fact they voluntarily surrendered.

But what is the "need" that sentence appeals meet? While it is true that nearly all sentencing appeal briefs do attempt to justify the value of sentencing, it is also true that there is only minimal consistency between them. For example, out of 42 sentencing appeal briefs,²² 11 explicitly refer to the deterrent value of sentences. This is the most prominent justification, though it appears only in just over a quarter of all appeal briefs. The remaining three-quarters take different approaches. 8 briefs justify the need to appeal by reference to the need for retribution and punishment. 4 stress that higher sentences are needed to stigmatise the defendant's conduct or express the international community's *existing* non-tolerance of the crime. 2 emphasise that sentences help in rehabilitation, building peace, delivering 'justice to the victims', or maintaining the general public's confidence in the administration of justice and the efficacy of the court. Finally, there have been solitary references to reconciliation, acknowledging the harm that victims have suffered, and *developing* a non-tolerance of the crime.

International Criminal Court, *Rules of Procedure and Evidence* (2002), r 145(1)(b).

22 The reader is reminded that the ICTR is excluded from this analysis because of the large number of appeal briefs that remain under seal.

Thus, while it is evident that international prosecutors have turned their minds to why it is worth investing time, effort, and resources into appealing sentences, little by way of a coherent justification has emerged since the first sentencing appeal brief was filed in June 1997.²³ There are many reasons, though several stand out as they challenge popular understandings of the purpose and efficacy of international criminal justice.

The first is the emphasis that prosecutors have placed on the deterrent value of sentences. Prosecutors have justified sentence appeals on the basis that higher sentences reduce the prevalence of criminal conduct. But this justification is unsupported and unconvincing. Indeed, the link between international criminal justice and deterrence is tenuous at best. It is difficult to measure and suffers from a lack of empirical evidence. Jennifer Schense, concluding a comprehensive study of the deterrent effect of international criminal courts initiated by the International Nuremberg Principles Academy,²⁴ observed that “[i]t is... problematic to attempt to measure or correlate deterrence with the work of international criminal courts”, and that “[a]t best, it is possible to document parallel events, either a decrease or increase in violence, but there are too many actors and too many variables to find a direct or even indirect effect conclusively”.²⁵ Barrie Sander identified a number of challenges that limit the deterrent effect of sentences, including the limited probability of sentences being imposed against those who engage in criminal conduct, the time between offending and the imposition of a sentence, and the fact that the logic of deterrence is premised on “ill-fitting” assumptions about “perpetrator rationality and prudence”.²⁶

The second is that prosecutors have asserted the expressive power of sentences. They have argued that sentences not only *maintain* existing normative opposition to the prosecuted conduct, but also *transform* existing norms towards stigmatisation and non-tolerance. The expressive potential

23 *Prosecutor v Duško Tadić (Notice of Appeal)* (ICTY, Appeals Chamber, IT-94-I-A, 6 June 1997).

24 The Academy is “dedicated to the advancement of international criminal law”: *International Nuremberg Principles Academy* <<https://www.nurembergacademy.org>>.

25 Jennifer Schense, ‘Conclusion: Findings and recommendations’ in Jennifer Schense and Linda Carter (eds), *Two Steps Forward, One Step Back: The deterrence effect of international criminal tribunals* (International Nuremberg Principles Academy, 1st ed, 2016) 333, 337.

26 Barrie Sander, ‘Justifying International Criminal Punishment: A critical perspective’ in Morten Bergsmo and Emiliano Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational concepts* (Torkel Opsahl Academic ePublisher, 1st ed, 2019) 167, 181-192.

of sentencing (indeed all aspects of criminal justice) is not a new discovery,²⁷ though expressivist theories have recently gained increasing acceptance as compelling justifications for the role of international criminal law.²⁸ These theories emphasise that punishment “carries symbolic relevance” through its messages about retribution, prevention, and restoration.²⁹ What is interesting here, however, is that prosecutors have so warmly embraced their role as architects of public morality as a justification for sentencing appeals. Appeals are more than just vehicles through which general deterrence can be realised and condign punishment meted out. Prosecutors have seen them as a means through which an imagined, future, collective morality can be realised. The justification for sentencing appeals rests strongly on hopes and aspirations.

Finally, the single sentencing appeal that relied (in part) on maintaining the general public’s confidence in the administration of justice and the efficacy of the court demonstrates that sentence appeals can also serve a court’s interest. In the 2001 *Prosecutor v Zejnil Delalić et al* Appeals Judgment, the Chamber held that it was important the Court impose consistent and fair punishments so as not to erode public confidence in the administration of justice.³⁰ Later that year, in their Appeal Brief in *Prosecutor v Dario Kordić and Mario Čerkez*, prosecutors relied on this argument in support of their claim that Kordić’s sentence should be increased from 25 years to somewhere in the realm of the 45 years that was given—in what they argued was a comparable case—to Tihomir Blaškić.³¹ Consistent sentencing, they ar-

27 In 1893, Émile Durkheim argued that the “real function” of punishment is “to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour”: Émile Durkheim, *The Division of Labour in Society* (W D Halls, Free Press, 2nd ed, 2014) [trans of: *De la division du travail social*], 83.

28 See, for example, Barrie Sander, ‘The Expressive Turn of International Criminal Justice: A field in search of meaning’ (2019) 32(4) *Leiden Journal of International Law* 851; Mirjan Damaška, ‘What’s the Point of International Criminal Justice?’ (2008) 83(1) *Chicago-Kent Law Review* 329; Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020); Margaret de Guzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2011) 33 *Michigan Journal of International Law* 265; and many others.

29 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 324, 328.

30 *Prosecutor v Zejnil Delalić et al (Appeals Judgment)* (ICTY, Appeals Chamber, IT-96-21-A, 20 February 2001, [756]).

31 *Prosecutor v Tihomir Blaškić (Judgment)* (ICTY, Trial Chamber, IT-95-14-T, 3 March 2000, 270. It should be noted that on 29 July 2004, Blaškić’s sentence was

gued, is necessary to maintain public confidence in the administration of justice. What is remarkable about this justification (putting aside questions of whether the argument is correct) is that it is entirely introspective. It demonstrates that prosecutors saw that public confidence in the ICTY *itself* was a reason warranting the commencement of an appeal. In doing so, they transformed appeals from serving external interests to personal ones and adopted the role of guardians of the ICTY's integrity.

4.2 Developing the law

The second factor that international prosecutors have considered in the exercise of their discretion whether to appeal is whether the appeal can be used to develop the corpus of international criminal law.

In the mid 1990s, when the ICTY and the ICTR were still in their formative stages, there was little by way of authority for clear pronouncements on procedural and substantive points of law. "I think in the early days", reflected one prosecutor, "lots of it was totally unchartered".³² Another recalled that "a lot of the substantive international criminal law, as well as the procedural law, was still quite undeveloped".³³ The idea that the Appeals Chamber judges could be used to remove this ambiguity appears to have influenced some prosecutors in their discretion to appeal. "[W]hat happens at the appeal level can be very important in terms of the evolution of international criminal law", one prosecutor observed.³⁴ Another believed that "a lot more things would have been appealed simply because there was no authoritative case law on it... [a]nd so it became necessary to get those authorities", adding that "in the early days, one of the considerations was simply getting international criminal case law on things that were important points of law".³⁵ Moreover, they explained, "[i]f [a] point is decided adversely to the Prosecution, ... particularly if it's a point that's likely to come up in future cases, it can be seen that this is a point on which it would be useful to have Appeals Chamber-level authority".³⁶

For one former SCSL prosecutor, the desire to get authority from Appeals Chamber judges even outweighed the expediency, convenience, and

overturned on appeal and he was resentenced to a term of imprisonment of 9 years (to run from that day).

32 Interview with P18.

33 Interview with P15.

34 Interview with P14.

35 Interview with P15.

36 Interview with P15.

financial benefit that would have come from simply not appealing at all. They recalled that after the Trial Chamber judges delivered their judgment in one trial, they were approached by a member of the defence team who proposed that the defence would not appeal “on any of the substance or any of the substantive things that happened” if prosecutors did not appeal the sentence, and they could “close this one down right here and now”.³⁷ This could well have been financially sensible. The SCSL was never a tribunal to be flushed with cash: in 2007, the Tribunal’s President noted the “grave and imminent concern” of the SCSL running out of money,³⁸ and in 2009 the then-Chief Prosecutor Stephen Rapp publicly expressed “real anxiety” that Charles Taylor would be released from custody prior to the Trial Chamber judges publishing their judgment because finding funds was “not easy”.³⁹ In this context, the prosecutor’s response to the defence’s offer is remarkable. “[W]ell”, they said, “if I were in the United States I’d probably agree to that, because I’d have a bunch of other cases to fight the same issues out”.⁴⁰ But this was not the United States, and there was not a bunch of other cases in the pipeline dealing with the same issues. The appeal therefore went ahead, demonstrating a striking degree of opportunism (bearing in mind, of course, that *all* SCSL indictees were convicted at trial). Even when confronted with a defence offer to simply put an end to proceedings—which would undoubtedly have saved significant resources—the prosecutor saw that the opportunity to develop the law needed to be taken.

Prosecutors also appear to have been influenced by a desire to develop what might be termed a ‘principled’ body of law that pays homage to their personal beliefs about what international criminal law should aim to achieve. As one prosecutor vaguely remarked, “I suppose our basic aim is to ensure that justice is done”.⁴¹ Several spoke of the desire to launch appeals with the hope of advancing the scope of protection for vulnerable persons. One prosecutor recalled that they thought that several arguments accepted by

37 Interview with P9.

38 United Nations Security Council, ‘Special Court for Sierra Leone faces funding crisis, as Charles Taylor trial gets under way, Security Council told today in briefing by Court’s senior officials’ (Press Release, SC/9037, 8 June 2007) <<https://www.un.org/press/en/2007/sc9037.doc.htm>>.

39 Constance Johnson, ‘Liberia; Sierra Leone: Financial shortfall may lead to Taylor’s release’, *Global Legal Monitor* (online), 5 March 2009 <<https://www.loc.gov/law/foreign-news/article/liberia-sierra-leone-financial-shortfall-may-lead-to-taylors-release/>>.

40 Interview with P9.

41 Interview with P14.

judges were “wrong” because the interpretation “left a protection gap”.⁴² As an example, they recalled that ICTY and ICTR jurisprudence was not clear with respect to whether “victims of crimes against humanity have to be civilians”—a reference to whether a ‘civilian population’ that was the subject of an attack had to completely consist of civilians. “[I]t was felt that wasn’t right”, they explained.⁴³ Similarly, in the *Ntaganda* case, one prosecutor described that “we thought that girl child soldiers in [Ntaganda’s] ranks were a victim group that needed protection. We needed to make the point that he was responsible for what happened to them and the kind of cruel, sexual exploitation that was occurring with these particular child soldiers was something that was deserving of attention”.⁴⁴ They explained that the decision of the Appeals Chamber judges—though on a Defence appeal—“has now allowed us in other cases... to seek to protect such vulnerable populations”.⁴⁵

Still, international criminal courtrooms are spaces in which humans need to professionally interact—often for long periods of time; and often in relation to tedious (and at times boring) legal or evidentiary matters. As argued by James Eisenstein and Herbert Jacob, courts have a permanence to them and people will often need to work with each other again.⁴⁶ The attractiveness of an argument cannot be completely divorced from the person making it. This was evidenced by one prosecutor, who observed that some prosecutors would try to develop the law in such a way that the judges became annoyed. “There’s no point making an argument that’s rubbish”, they pointed out, explaining that these arguments were pointless and irritated the judges they were trying to convince.⁴⁷ “But I think in some situations those arguments were being made”, they continued, explaining that some prosecutors “... were taking every point under the sun because there was

42 Interview with P18.

43 Interview with P18.

44 Interview with P14.

45 Interview with P14. The matter was resolved in *The Prosecutor v Bosco Ntaganda (Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”)* (ICC, Appeals Chamber, ICC-01/04-02/06 OA5, 15 June 2017).

46 James Eisenstein and Herbert Jacob, *Felony Justice: An organisational analysis of criminal courts* (Little, Brown and Company, 1st ed, 1977), 20, quoted in David Neubauer, ‘The Dynamics of Courthouse Justice: A critical review of the literature’ (1979) 5(1) *Justice System Journal* 70, 71.

47 Interview with P18.

enthusiasm for developing the law".⁴⁸

The desire to develop the law appears to have stemmed (at least in part) from an underlying guardian-ward relationship between prosecutors and imagined, future victims. This relationship demonstrates the panoptic tendencies of prosecutorial appeals. Successful prosecutorial appeals have served to expand prosecutorial authority with respect to more classes of people. Appeals allow prosecutors to increase the number of people who are entitled to claim victim status and who can be successfully prosecuted. Just as Michel Foucault described how the division of social life into smaller parts allows for its administration and control,⁴⁹ the progressive development of the law draws more people into the orbit of international criminal justice. The identification of new classes of victims and defendants allows prosecutors to claim authority over their situation and demonstrate that international criminal law is relevant to their position. Appeals allow prosecutors to identify new classes of victims and defendants, and in doing so, allow them to exercise their power with respect to them.

There is also a notable relationship to future law-users embodied in the desire to develop the law. The desire is based on two presumptions. First, that the law as it stands is undeveloped, incomplete, or inappropriate. Second, that there is a benefit that comes from acting on the first presumption—specifically, that the same or comparable issues will once again arise in future situations and those who will need to deal with them will benefit from the work of previous prosecutors in clarifying rights, obligations, and matters of procedure. Appeals therefore represent an attempt by prosecutors to exercise constructive control over the direction of the law for the benefit of these future law-users by giving them greater clarity and equipping them with the tools they need to navigate the situations they are confronted with.

The desire to develop the law may also be attributable to a prosecutor's socialisation into the college of prosecutors. Group members seek to socialise in order to increase the predictability of their interactions, develop good relations with existing group members, have meaningful exchanges with them, and develop an identity as being a member of the group.⁵⁰ In order to do so, new group members inform themselves about the group's "poli-

48 Interview with P18.

49 See, generally, Michel Foucault, *Discipline and Punish: The birth of the prison* (Penguin, 1st ed, 1991).

50 Georgina Chao, 'Organisational Socialisation: Background, basics, and a blueprint for adjustment at work' in Steve Kozlowski (ed), *The Oxford Handbook of Organisational Psychology* (Oxford University Press, 1st ed, 2012) 579, 584-586.

cies and logistics, the general role expectations and behavioural norms”, and other things, while partially suspending their critical thinking about the paradigm they are entering.⁵¹ It is thus possible that if any given prosecutor understands the archetypal prosecutor to be someone who ‘develops the law’ (for whatever reason), their intention to do the same may in part be attributable to their socialisation into the prosecutorial college. The motivation to appeal may be driven by an exogenous forces, but fuelled internally by the four motivators that drive the socialisation of individuals into groups or organisations.

The value of appeals in filling legal gaps also served the ancillary purpose of allowing prosecutors to realise their imagined future institutional landscape and play a critical role in overcoming the challenges facing this realisation. One prosecutor, reflecting on their time at the ICTR, saw international criminal law as fragile and vulnerable. They were cognisant that the ad hoc tribunals were something of an experiment and liable to failure, and were thus mindful that part of the appeals process involved demonstrating “you can do it. You can establish a Court, bring justice in situations, sometimes even while crimes are being committed”.⁵² The prosecutor explained that because institutions have failed, run aground, and not succeeded, “if you don’t show that you can make it work, it’s not going to happen again” because the whole enterprise was merely a “flash in the pan” and “like the League of Nations or something. It wasn’t going to be able to stop anybody from doing anything”.⁵³ There is an undercurrent of anxiety here that reflects the gravity of the responsibility the prosecutor was feeling. Having been entrusted to play a role in bringing to life the idea of an international criminal court, and thus with international criminal law, they owed a responsibility not only to those who believed that international criminal justice was possible to achieve but also those who may benefit from its existence in the future.

For one ICTY prosecutor, the possibility of the ICC coming into existence was also playing on their mind. “[T]here was a consciousness”, they described, “that... an ICC may follow”.⁵⁴ They were alive to the reality that the jurisprudence produced by the ICTY was relied on by other tri-

51 Blake Ashforth and Fred Mael, ‘Social Identity Theory and the Organisation’ (1989) 14(1) *Academy of Management Review* 20, 26; Blake Ashforth, ‘Climate Formation: Issues and extensions’ (1985) 10(4) *Academy of Management Review* 837, 840.

52 Interview with P9.

53 Interview with P9.

54 Interview with P15.

bunals.⁵⁵ However, they explained, “it wasn’t officially part of the function of the ICTY and therefore not officially part of everyone’s thinking as they’re going about the work that we have to bear in mind [there] is going to be a permanent international criminal court one day”; and no one ever said that “we should exercise our prosecutorial discretion in this way because one day there will be an ICC”.⁵⁶ The prosecutor doubted that the emergence of the ICC “was of direct relevance to the way things were done at the ICTY at the time”.⁵⁷

Yet this consciousness does demonstrate something about the role prosecutors occupy in international criminal law. The prosecutor was aware that the field is not made up of silos, in which the ramifications of a prosecutor’s work are not experienced beyond the court in which they work. To the contrary, prosecutors are part of a multi-institutional epistemic community whose members draw upon, and are influenced by, the work of their peers in other courts. What is interesting is that while the prosecutor was very much aware of this role, they strongly rejected the idea that this awareness influenced their work. In other words, while being aware that their decisions would affect the work of prosecutors in other courts, they did not see any responsibility towards their peers or any other institution. On the basis of how prosecutors spoke about the relationship between appeals and developing the law, one is left with the impression that while some were enthusiastic about the prospect of building a lasting legal system that spanned across multiple institutions, prosecutors may also have been unwilling to actively engage with the issues of how their appeals affected imagined or existing institutions, or their peers within them.

4.3 Protecting the integrity of the law

Prosecutors have also deployed their discretion to appeal in order to ‘protect’ the integrity of the law. The discretion to appeal is a check on judicial discretion. It is a remedial tool through which prosecutors have attempted to correct exercises of judicial discretion that they see as straying too far from the outcomes required by law. This remedial function is a markedly different from the purpose described in section 4.2. Instead of discretion being deployed constructively—to fill a normative void; protect imagined communities; or share the burden of responsibility for its development—the

55 Interview with P15.

56 Interview with P15.

57 Interview with P15.

notion of repair is restorative. The purpose of discretion is on reverting law to the past, rather than advancing it into the future. It is used to stagnate the development of new norms that have been advanced by lower chambers.

Several examples illustrate this. One ICTR prosecutor described that the “critical” consideration for them was simply whether there was “an appealable error” that had “prospects of success”.⁵⁸ Similarly, another described that during their time at the ICTY, they were “much more focussed upon realistic grounds” rather than trying to develop the law, and it was only “... [o]ccasionally there were areas where there was an underdevelopment in the law and we didn’t really know what the answer was”.⁵⁹ While one ICC prosecutor regarded that it was “a bit pretentious” to refer to themselves as “*le garant de l’égalité*”, or the guarantor of equality, they nevertheless considered that “the integrity of the proceedings is part of our business” even though the chief responsibility lay with the judges.⁶⁰ If an issue appeared that affected the integrity of the proceedings, they matter-of-factly elaborated, “I think everyone will tell you we have a duty to raise that issue”.⁶¹

Not everyone had the same view—at least, not in such black-and-white terms. One prosecutor mentioned a significant caveat: if they were going to appeal on the basis of an error, that error had to have affected the *outcome* of the proceedings (rather than its presence merely affecting the decision’s integrity). “It’s no good just finding all kinds of errors if they don’t actually have an impact upon the outcome... the final decision in relation to guilt or innocence”, they explained.⁶² “[S]ometimes you would spot errors that you think ‘oh, that wasn’t right, that wasn’t right, that wasn’t right’”, they continued, “[but] if it didn’t really affect the integrity of the judgment overall it’s not something we would seek to appeal”.⁶³

58 Interview with P26.

59 Interview with P18.

60 Interview with P26.

61 Interview with P26.

62 Interview with P18.

63 Interview with P18.

5 Strategic Considerations

5.1 Communicating disagreement and garnering the support of external actors

Decisions to appeal may also have been made to communicate that a Prosecutor disagreed with a decision in order to ensure the support of external actors. One prosecutor believed that Carla Del Ponte “thought that sometimes you have to appeal *only* to send a clear message to the communities that are affected or lay down the marker that you disagree with a decision”.⁶⁴ This view was supported by another prosecutor, who upon hearing this recollection remarked that they had “heard that said many times by her in different ways”, going on to bitingly remark that “[i]t was a political process to her, it was not a professional process. It was purely and utterly political”.⁶⁵ Obviously, these recollections should not be read literally: no prosecutors would ever appeal if they *agreed* with a decision. The point these prosecutors appear to have been making, however, is that Del Ponte placed significant importance on the communicative potential of commencing an appeal to deliver messages to affected communities.

There is some evidence from Del Ponte herself that she placed great importance on the communicative power of appeal proceedings. In her memoirs, for example, she lamented the decision of the ICTR Appeals Chamber judges to release Jean-Bosco Barayagwiza on the basis of the prosecutors’ significant delay in prosecuting his case (among other things). The judges decided to dismiss the indictment against Barayagwiza ‘with prejudice’, effectively barring prosecutors from ever prosecuting him with respect to the conduct they had originally alleged.⁶⁶ While she was “disturbed that Barayagwiza would escape justice”, Del Ponte recalled that she was “*more concerned*” that the “Rwandan government would retaliate against the [ICTR] itself by permanently refusing to cooperate with its work”.⁶⁷ As such, prosecutors filed a motion for reconsideration in the hope that the Appeals Chamber judges would reverse their earlier decision. In her argument,

64 Interview with P26. Emphasis added.

65 Interview with P29.

66 *Prosecutor v Jean-Bosco Barayagwiza (Decision [against the ‘Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect’])* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 3 November 1999), [113].

67 Carla Del Ponte, *Madame Prosecutor: A memoir* (Other Press, 1st ed, 2008), eBook. Emphasis added.

Del Ponte expressly stated that the Rwandan authorities would “no longer be ‘involved in any matter’” if Barayagwiza was to escape trial.⁶⁸ This, as it turned out, was not without good foundation. The Attorney-General of Rwanda, appearing in-person as amicus counsel, “openly threatened the non-cooperation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review”.⁶⁹

Ultimately, Del Ponte’s request for reconsideration was successful.⁷⁰ The judges decided that prosecutors were not barred from prosecuting Barayagwiza, and Rwandan authorities did not stop cooperating with the ICTR. Whether Del Ponte would have succeeded in maintaining Rwanda’s cooperation in the event that the request for reconsideration was *unsuccessful* is, of course, a matter of speculation. At the least, Del Ponte’s request for reconsideration certainly did not harm the relationship. Paul Kagame, who by that time had become the Rwandan president, “thanked the prosecution for *contesting* the Appeals Chamber’s decision to release Barayagwiza”.⁷¹ While this request for reconsideration is not *strictly* an appeal proceeding, it does serve as evidence to support the two prosecutors’ recollections that some appeals may well have been commenced in order to *communicate* to an affected community that the Prosecutor disagreed with what judges had decided and to garner the support of external actors.

Del Ponte’s concern for using the appeal process as a means of communicating a message and disagreement to external parties for the purpose of obtaining their support is indicative of her being engaged in two power struggles. The first of these was against the judges for control over Rwanda’s cooperation with the ICTR. Prosecutors needed to demonstrate to the Rwandan authorities that they shared their concerns that Barayagwiza would not be prosecuted. By placing significant emphasis on the message that came from *commencing* the appeal, as opposed to the *outcome* of the appeal, Del Ponte had committed an act of symbolic violence both against

68 *Jean-Bosco Barayagwiza v The Prosecutor (Decision [on the] Prosecutor’s Request for Review or Reconsideration)* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 31 March 2000), [24].

69 *Jean-Bosco Barayagwiza v The Prosecutor (Decision [on the] Prosecutor’s Request for Review or Reconsideration)* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 31 March 2000), [34].

70 *Prosecutor v Jean-Bosco Barayagwiza (Decision [on the] Prosecutor’s Request for Review or Reconsideration)* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 31 March 2000).

71 Carla Del Ponte, *Madame Prosecutor: A memoir* (Other Press, 1st ed, 2008), eBook. Emphasis added.

the judges and the judicial process more broadly. Her actions sought to strip the judges and the judgments of their authority and reposition the Prosecutor as the central source of influence over external actors. Regardless of whether or not the Appeals Chamber judges granted the prosecutors' request for reconsideration, Del Ponte's action in filing the application served to dilute the importance of the Appeals Chamber judges' ultimate decision with respect to whether the Rwandan authorities maintained a good relationship with the Prosecutor.

The second of these was a struggle for the Prosecutor's own identity. Accompanying the Rwandan authorities' threat of non-cooperation was an implicit challenge to the Del Ponte's (adopted) role as the guardian of the ICTR's integrity and functional viability. If Del Ponte took action and challenged the Appeals Chamber judges' decision to bar the Prosecutor from pursuing Barayagwiza, she would be able to re-assert the Prosecutor's authority as an effective guardian of a court whose judges appeared to be self-inflicting mortal wounds; but if she stood idly by, she would need to live with the fact that she alone had the opportunity to save the ICTR from falling into obscurity, but failed. Thus, while Del Ponte pleaded to the Appeals Chamber judges "... not to allow... Barayagwiza... to decide on the fate of this tribunal",⁷² the fate of the Tribunal lay more in her hands than the Defendant's.

The idea that appeals could be used merely to show disagreement was, however, not warmly received by other prosecutors. One ICC prosecutor remarked that it was not the ICC Prosecutor's practice to commence appeals only to show that they were doing something—"we are a legal office", they remarked, "... you shouldn't bring an appeal that you think has zero chances of success only because you want to put down your foot".⁷³ If there was no clear error, they argued, bringing an appeal would not be an appropriate use of discretion and would be "frivolous litigation".⁷⁴ However, they added, in borderline cases where prosecutors identified factors that were not considered at first instance might be tipped in favour of an appeal if there were also "serious policy or operational considerations" and the "costs of not appealing are huge".⁷⁵ But, they went on, "[w]hat I don't think this Office will do is bring a hollow appeal only for the purposes of saying 'well, we

72 Carla Del Ponte, *Madame Prosecutor: A memoir* (Other Press, 1st ed, 2008), eBook.

73 Interview with P26.

74 Interview with P26.

75 Interview with P26.

have appealed’”.⁷⁶ Contrary to Del Ponte, this prosecutor’s position does not seek to upset the traditional hierarchy that sees prosecutorial filings as subordinate in influence to judgments, and therefore rejects the idea that the Prosecutor can serve as a guardian of the Court’s functional viability by using appeals to garner the support of external actors.

5.2 Providing work to judges

One of the more peculiar factors that one prosecutor regarded when determining whether to appeal was whether the judges in the Appeals Chamber had any work to keep themselves occupied with. Simply put, appeals would give them something to do. As discussed previously in section 4.2, at the conclusion of sentencing in the *Prosecutor v Moinina Fofana and Allieu Kondewa* trial,⁷⁷ prosecutors were concerned that the sentences (respectively 6 years for Fofana and 8 years for Kondewa) were inappropriate and fell far short of the 30 years that they had recommended for both accused.⁷⁸ The sentences were, in the words of one SCSL prosecutor, “outrageous”.⁷⁹ As such, prosecutors were of the opinion that they needed to appeal. At the same time, Kondewa’s defence team had their own concerns about the law and the facts the Trial Chamber judges relied on to reach their decision that Kondewa was guilty.

After the sentence was delivered, one prosecutor recalled that they were approached by one of Kondewa’s lawyers who proposed a truce: the defence would not appeal if the prosecutors did not appeal, and together they could “close this one down right here and now”.⁸⁰ But the prosecutor rejected this invitation. In addition to seeing an appeal as an opportunity to develop the law, one prosecutor wondered “what the heck are these judges going to do for the next six months if I don’t send them this appeal?”.⁸¹ When asked if this was indeed a factor they considered in the determination of whether to appeal (and thus being given the chance to retract a statement that might

76 Interview with P26.

77 This is also called the *CDF case*. *Prosecutor v Moinina Fofana and Allieu Kondewa (Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa)* (SCSL, Trial Chamber, SCSL-04-14-T, 9 October 2007).

78 *Prosecutor v Moinina Fofana and Allieu Kondewa (Prosecution sentencing submission pursuant to Rule 100(A) of the Rules of Procedure and Evidence)* (SCSL, Trial Chamber, SCSL-04-14-T, 924 August 2007), [183].

79 Interview with P9.

80 Interview with P9.

81 Interview with P9.

have taken liberty with the truth), the prosecutor confirmed that “[y]eah, no, I said it aloud to them” and then named the Defence lawyer who they said it to.⁸² A desire to provide work to the appeals judges was a factor that informed their decision to appeal Kondewa’s sentence.

The remarkableness of this revelation is only mitigated somewhat by the fact that this is not the only time concerns about judges’ workloads had informed a prosecutor’s discretion. It will be recalled that in chapter 3, on page 99, Richard Goldstone described the “huge potential for frustration” when judges did not have trials in the early days of the ICTY,⁸³ and another prosecutor’s recollection that “[t]he judges were on our back, and we were feeling the frustration and the pressure”.⁸⁴ There are, therefore, three independent confirmations that the workloads of judges were playing on the minds of prosecutors when exercising deciding on situations and cases and whether to appeal.

When a prosecutor’s decision to appeal is influenced by the amount of work currently before the Appeals Chamber judges, this reveals two different features of their role identity and belief system. With respect to their role, the prosecutor in the above story about Kondewa saw that they had a responsibility to provide the judges with work. Who this responsibility was owed to is not clear. It may have been towards the judges as people and motivated by a desire to provide them with a task and thus allow them to meaningfully fulfil their role. It may have been towards the Court’s funders, to demonstrate that the Court was functioning and money was being well-spent. Or it may have been towards themselves, stemming from the belief that judges need to be working. Regardless of who the prosecutor believed they were responsible to, it is clear that their understanding that judges need to be working stems from an underlying belief that the value of the appeals judges was a function of the amount of work they were engaged in, as opposed to their output. In other words, the prosecutor’s discretion

82 Interview with P9.

83 Richard Goldstone, ‘A View from the Prosecution’ (2004) 2(2) *Journal of International Criminal Justice* 380, 381. See also Goldstone’s recollection that judges “were beside themselves with frustration and even anger” (Richard Goldstone, ‘The International Criminal Tribunals for the Former Yugoslavia and Rwanda’ in David Crane, Leila Sadat, and Michael Scharf (eds), *The Founders* (Cambridge University Press, 1st ed, 2018) 55, 58), and that one judge was “embarrassed” because “he couldn’t go to his club in his home town because his friends laughed at him” as he was a judge on a United Nations salary without any cases (Richard Goldstone in *Against All Odds* (Sense TV, 2003) <<https://www.sensecentar.org/node/1984>>.

84 Interview with P4.

to commence the appeal was informed by a belief that the value (or the product) of the appeal was that it would result in work—the appeal provided the judges with work, for the sake of having work. The belief appears to be that judicial activity is to be preferred over idleness, regardless of what the result of the activity is.

5.3 Responding to the interests of the victims

Perhaps the most remarkable feature of the discretion to appeal is how few prosecutors spoke about the role of victims in their considerations whether to appeal—and those who did, did so in response to a question or a statement. One prosecutor observed that if the Trial Chamber judges found against prosecutors on a matter of fact that they believed was affected by a legal error, it was important “from a victim perspective as well that that be tested at appellate level”.⁸⁵ Another prosecutor said that “it might be that some victims technically fell out of the judgment”, and wondered “will those victims’ families ultimately be distressed about that? Maybe they will, maybe they won’t”, they answered, before adding “[b]ut the defendant’s still convicted, and that’s really what they’re concerned about. That was the goal: to ensure that the defendant’s convicted and/or remains convicted”.⁸⁶ “[O]f course you’re conscious of the victims”, they observed, explaining that “... [i]t’s very important to have them very clearly in mind”.⁸⁷

When contrasted with the level of detail that prosecutors went into in describing the role of victims in situation and charge selection, the discussion of the role of victims in the discretion to appeal is comparatively limited and superficial. Victims’ interests appear to play a far limited role in the discretion to appeal. This is despite two important realities: first, the decision to appeal—just like the filing of an indictment—is the commencement of a legal proceeding; and second, the decision to appeal can have a material impact on whether the defendant is ultimately acquitted or convicted. In terms of whether the defendant is convicted or acquitted for the harms that they have caused or allegedly caused, the decision to appeal is identical to the decision to charge. So why do the victims feature much less prominently in the considerations to commence this form of proceeding as opposed to the decision to commence a trial? There are several possible explanations.

85 Interview with P15.

86 Interview with P18.

87 Interview with P18.

First, appeals might be seen as less important when it comes to the protection of victims' interests. The reason for this concerns less what appeals achieve, but what they do not when juxtaposed with a conception of trials that emphasises particular core features. If a trial is seen as the forum in which victims emerge to tell their stories; receive the cathartic benefits that flow from confronting their alleged malefactors; build an historical record; transfix spectating populations as they are regaled with emotional and tragic tales; and embody the thrill and challenge of seeing the Prosecutor build a case with the hope the verdict of 'guilty' is pinned on the defendant *for the first time* and for all the world to see, appeals lack all of these features. The interests of the victims may already have been served, or the appeal proceeding may not be a forum in which they can be served any longer.

Second, appeals clearly serve different purposes. While the language of charging is clearly tied to notions of bringing *defendants* to justice and justice to *victims*, the language of appeals is more concerned with the creation and protection of the *law*. Victims and defendants are reduced to the vehicles through which the opportunity to engage in this construction and protection arise. In this sense, appeals may be conceptualised as having less to do with the doing of justice to any particular party, but more to do with ensuring the prosecutor fulfils their role as a guardian of the law's integrity and the builder of a corpus of law that can better protect future alleged victims and make it easier for future prosecutors to effectively prosecute their cases.

Finally, appeals see prosecutors confront a different opponent. In a trial, the prosecutor is opposed to the defendant. On appeal, they confront the defendant only physically in the courtroom and notionally on paper: when launching an appeal, the prosecutor's real opponents are the judges who made the impugned decision. The defendant is not responsible for the wrong that has caused the prosecutor to file the appeal. Moreover, the prosecutor, the Office, and the Prosecutor (as the symbolic and eternal body who is occupied by individuals) have now also joined the victims in their status as victims. The energy and thoughtfulness that prosecutors invested in parts of the trial resulted in nothing. Egos may have been hurt. Thus, the appeal transforms prosecutors into victims and judges into defendants (who can do nothing to defend themselves). It is perhaps unsurprising that the *real* victims (be they actual or alleged) may have been relegated to secondary importance and the appeal process is conceptualised as a battle in which they have only a symbolic role in.

6 Conclusion

This chapter has peered through six thematic windows that emerged from what prosecutors believed were important considerations when exercising their discretion to appeal. In looking through these windows, this chapter has demonstrated three core role identities that appear to have influenced how the discretion to appeal has been exercised.

The first is that prosecutors have adopted the role of moral *norm performers*. This is evidenced by the fact that they have commenced sentencing appeals, in part, to achieve deterrence, stigmatisation, promote rehabilitation, and encourage reconciliation. They have also adopted the role of procedural norm performers, by rejecting the idea that appeals should be used for anything other than correcting problematic legal errors and affirmed the norm that appeals should not be utilised for any other purpose.

Prosecutors have also acted as *builders*. They have been builders of the law, in the sense that they have sought to appeal in order to expand the corpus of jurisprudence on which they can rely to resolve legal problems. In two respects, they have also been builders of their respective courts. On the one hand, they have grappled for power within their institution for the right to affect the cooperation of external actors. On the other hand, they have used the appeal process to expand the category of victims and defendants under international criminal law, thereby serving to expand and cement the relevance of their court and themselves as prosecutors in international relations.

Finally, the most prominent role that is evidenced in decisions to appeal is that of the *guardian*. Prosecutors have acted as guardians over people, roles, institutions, and ideas. They have sought to defend these stakeholders against threats by recognising the dangers of decreasing state cooperation, falling public confidence, judicial inactivity, and judgments that impede the protective scope of the law. Yet they have also adopted a constructive role and sought to build the capabilities of other prosecutors and future law users by clarifying and expanding the corpus of international criminal law. At the same time, the prosecutor's role as a guardian is marked by the notable insignificance of the victims. The protection of the victims appears to be a collateral concern that is served primarily through the protection of the Court, judges, the law, other prosecutors, future law users, and themselves.

Decisions to appeal therefore appear to have been informed by prosecutors adopting three core roles. This chapter has demonstrated that the decision to appeal is influenced by far more than a mere desire to obtain

convictions or increase sentences. Instead, it has demonstrated that—like all other discretionary choices—the forces that have influenced the decision to appeal reflect the complex web of prosecutorial relationships and how individual prosecutors understand their place within it.

Part III

Reflections on International Prosecutorial Discretion

Chapter 8

Prosecutorial Discretion in International Criminal Justice

1 Introduction

The previous five chapters have presented something of mixed bag of factors that prosecutors have considered when exercising their discretion. They have ranged from the very practical to the fundamentally aspirational. There is no natural, pre-existing reason why any of these factors are relevant to the making of any particular decision. Nothing about the selection of witnesses, for example, mandates prosecutors to consider whether the witness will be able to tell an emotive story. Similarly, nothing about the selection of charges mandates prosecutors to try and maximise the prospects of a conviction being obtained. Yet these factors *have* been considered. Individually, these many factors have acted as thematic windows through which to peer to understand the relationships prosecutors have conceptualised between themselves and others, and the roles they occupy within the context of these relationships. Each factor has therefore provided an insight into why prosecutors have understood them to be relevant when making choices.

This thesis began by standing back from the issue of prosecutorial discretion in international criminal justice and looked at the concept of discretion more broadly. It then zoomed in on the issue of prosecutorial discretion specifically. To conclude, this chapter again takes a step back and looks at the issue of prosecutorial discretion in international criminal justice through a wide-angle lens. It does two things.

First, it typologises the roles that have been discussed in this thesis

into three categories. It explains how prosecutorial discretion has been influenced by prosecutors adopting the roles of norm performers, builders, and guardians. It therefore encourages a conception of the prosecutorial role that goes beyond the 'agent of justice' or 'party to the proceedings' dichotomy borne out of a simplified understanding of the common and civil law divide. It advocates for a relational conception of the prosecutorial role which recognises that prosecutors adopt different roles in the context of their many relationships.

Second, it reflects on the importance of role identities in the exercise of prosecutorial discretion. It argues that the identification of prosecutorial roles, when supported by empirical evidence, can be used to map the relationships that exist between prosecutors and others in order to understand why decisions are made. It also encourages a conscious engagement within the college of prosecutors regarding the appropriateness of these roles. An open and transparent dialogue regarding what international prosecutors *do* would foster the crystallisation of discretionary practice around a common and recognised set of role identities. It would constrain decision-making by naming those roles which are inappropriate for prosecutors to adopt; and emancipate practitioners by encouraging them to embrace others. Role identities also encourage a rethinking of how discretion is controlled. This idea invites a multi-dimensional approach that encompasses both the formal mechanisms through which discretion has historically been controlled, and the practices of socialisation through which prosecutors internalise the roles identified in this thesis. Finally, this chapter reflects on the relevance of role identity to prosecutorial performance. It argues in favour of a hybrid model of performance that combines both quantitative and qualitative elements that blends *goal*-based performance indicators with *role*-based performance indicators.

2 Discretion and the Roles of the Prosecutor

The thirty-seven thematic windows discussed over the previous five chapters have demonstrated that international prosecutors do not have just one role, nor is it true that the roles they do have are stagnant. These windows evidence that prosecutors engage in the creative imagining-into-existence of relationships between themselves and other actors or concepts. Within the context of these relationships, they adopt different roles that influence the decisions that they make. These roles can be typologised into three cat-

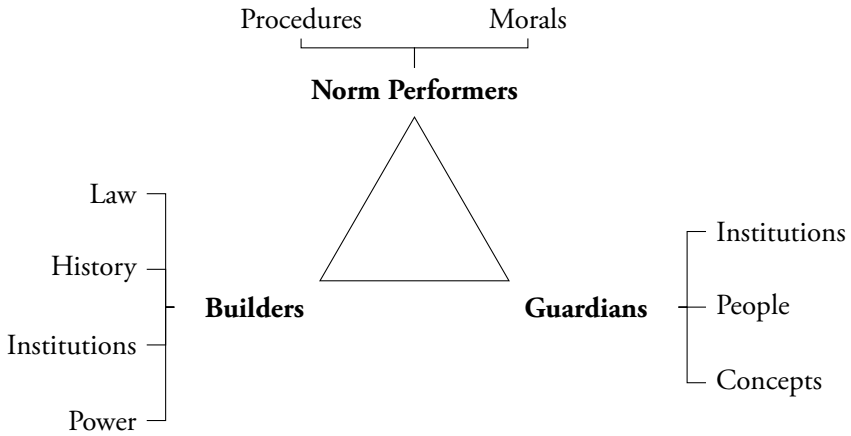


Figure 8.1: The three prosecutorial roles evidenced in decision-making, as well as the notions to which these roles are related.

egories: the prosecutor as a norm performer; the prosecutor as a builder; and the prosecutor as a guardian. These roles are illustrated in figure 8.1.

2.1 Prosecutors as norm performers

There is a long-standing link between justice processes and performances. In the opening pages of *Eichmann in Jerusalem*, Hannah Arendt famously observed that trials have comparable elements to plays.¹ The link is stronger than the mere comparison that both trials and performances demand audiences and performers. Performance explains the very function of justice processes. Shoshana Felman argued that “[t]he legal function of the court... is in its very *moral essence a dramatic function*: not only that of ‘doing justice’ but that of ‘*making justice seen*’ in a larger moral and historically unique sense”.² Performance allows law to serve higher purposes than

1 See, generally, Hannah Arendt, *Eichmann in Jerusalem: A report on the banality of evil* (Penguin, 1st ed, 2006), chapter 1 (‘The House of Justice’). Arendt also claimed that the trial of Eichmann never became a play, but rather a show, due to the minor position occupied by Eichmann during the proceedings (at 8–9).

2 Shoshana Felman, *The Juridical Unconscious: Trials and traumas in the twentieth century* (Harvard University Press, 1st ed, 2002), 162.

the outdated understanding that trials are forums merely concerned with the determination of guilt, such as catharsis or “attempting to make comprehensible the incomprehensible”.³ Performance also explains how justice processes obtain their authority. Julie Peters observed that performances in justice both serve to replay violence “mastered or managed... as rational authority” and make that authority “visual, palpable, [and] bodily” in the sense that it is “accessible to the senses”.⁴ She observed that law and performance are related in two respects. Law relies on performance to execute a function; but also to “represent and replay social conflict and violence, turning history into dramatic narrative, fictionalising social trauma, transforming it into the system of social representations, exchanges, surrogacies that make up the law”.⁵ In other words, law involves both *methexis* and *mimesis*: it participates in reality, but it also imitates reality.

International criminal justice is no exception to the notion that law and performance walk hand-in-hand: it “is a form of social performance”.⁶ Kate Leader argued that international criminal justice relies on performance for authority and legitimacy.⁷ In a similar way that Michel Foucault argued that the performance of punishment is required in order to maintain the authority of the state,⁸ international criminal justice needs to be seen in order to derive its power. Its power is derived from the spectacle of justice.

Prosecutorial discretion reveals that prosecutors have adopted the role of norm performers with regard to both procedural and moral norms. They “perform symbolic, narrative, educational, and transformative functions”.⁹ With regard to procedural norms, prosecutors have displayed elements of fairness and reasonableness; and with regard to moral norms, their decisions evidence that they have tried to affirm, project, and internalise standards of behaviour through such things as the publicity of evidence, the thematic

3 Susan Sontag, *Against Interpretation* (Farrar, Straus, and Giroux, 1st ed, 1967), 126 (in ‘Reflections on *The Deputy*’).

4 Julie Peters, ‘Legal Performance Good and Bad’ (2008) 4(2) *Law, Culture, and the Humanities* 179, 179-180.

5 Julie Peters, ‘Legal Performance Good and Bad’ (2008) 4(2) *Law, Culture, and the Humanities* 179, 184-185.

6 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 8.

7 Kate Leader, ‘The Trial’s the Thing: Performance and legitimacy in international criminal trials’ (2018) 24(2) *Theoretical Criminology* 241.

8 See, generally, Michel Foucault, *Discipline and Punish: The birth of the prison* (Penguin, 1st ed, 1991), Part 1.

9 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 258.

selection of charges, or the pursuit of harsher sentences on appeal.¹⁰ The publication of policy papers on sexual and gender-based violence, crimes against children, and the protection of cultural heritage similarly serve to draw attention and focus to particular issues.

Yet the notion of performance cuts deeper than these two areas. To fulfil many of their guardianship or builder roles, prosecutors need to be visible. This is the case with regard to ‘human-facing’ roles in which prosecutors are concerned with affecting the behaviours or beliefs of people. Prosecutors can only fulfil their roles as guardians over victims if they are *seen* to be providing them with validation, vindication, or redress. Prosecutors can only fulfil their roles as guardians over their court if their decisions *affect the confidence* of the public in the tribunal. They can only build or transform laws or morals if they are *visible*.

The previous chapters in this thesis have been predominantly derived from observing how prosecutors perform the actions of elucidation, explanation, and justification in the context of interviews concerning their decision-making. Yet this focus on the visible risks obscuring or glossing over the invisible elements of discretion. The danger is that by presenting the research contained in this thesis as formal knowledge or truth, it serves to produce “ignorance as a form of non-existence” of the unknown.¹¹ An engagement with silences and gaps helps to make visible ignorances and serve as a reminder that knowledge is always ‘incomplete and inadequate’.¹²

There are four silences in the performance of elucidation, explanation, and justification that warrant further investigation. The first is the *silence of justification*. International prosecutorial discretion has historically been a ‘black box’.¹³ It occurs behind closed doors and out of public view. Specific decisions are rarely explained to audiences outside the prosecution office.

10 This trilogy comes from Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 85-87.

11 See, on the subject of silence, Inês Barbosa de Oliveira, *Boaventura and Education* (Sense, 1st ed, 2017), 50.

12 Boaventura de Sousa Santos, ‘Nuestra America: Reinventing a subaltern paradigm of recognition and redistribution’ (2001) 18(2) *Theory, Culture, and Society* 185, 191. See also Boaventura de Sousa Santos, *The Rise of the Global Left: The World Social Forum and beyond* (Zed Books, 1st ed, 2006), 15-29 and Edilene Mendonça Bernardes and Carla Aparecida Arena Ventura, ‘Sociology of Absences as a Theoretical Reference for Research in Psychiatric Nursing and in Mental Health’ (2017) 26(4) *Texto Contexto Enfermagem* 1, 3-4.

13 This phrase is taken from Marc Miller and Ronald Wright, ‘The Black Box’ (2008) 94(1) *Iowa Law Review* 125.

While there has been a recent, and admirable, push by ICC prosecutors towards better informing the public about what purportedly guides decision-making through the release of policy documentation,¹⁴ this does not represent a universal trend. Calls for prosecutors to be more transparent are regularly made. Anni Pues, for example, advocated in favour of a “principled approach [to procedural discretion] that is more transparent regarding individual decisions” concerning situation and case selection.¹⁵ Birju Kotecha called for “situation-specific goals and priorities” to provide a “more transparent basis for the Office’s explanation of its selection procedure’s consistency”.¹⁶ Within the context of this research, problems with transparency were encountered. A 2018 application to access the 1995 ‘Goldstone Criteria’ (concerning the selection of situations and cases)¹⁷ for the purposes of researching this thesis was denied by MICT prosecutors on the basis that their disclosure “would undermine the Mechanism’s free and independent decision-making process”.¹⁸ This was despite the request relating to a 23-year-old document that pertained to the work of a tribunal that no longer existed. In addition, two current MICT prosecutors declined requests to be interviewed—in almost identically worded emails—on the basis that a higher-ranked prosecutor was ‘better placed’ or ‘in a better position’ to “explain the practice in our office”.¹⁹ Another declined on the basis that a higher-ranked prosecutor was interviewed and “this was understood to be on behalf of others in the OTP”.²⁰ Several ICC prosecutors were contacted directly and tentatively accepted invitations to be interviewed pending the approval of their Office. However, staff within the Office declined to make them available for interviews and instead provided access to three specific (though nonetheless high-ranked) prosecutors of their choosing.²¹

14 Barrie Sander, ‘The Expressive Turn of International Criminal Justice: A field in search of meaning’ (2019) 32(4) *Leiden Journal of International Law* 851, 859.

15 Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart, 1st ed, 2020), generally, but in particular 4, 51, and 86.

16 Birju Kotecha, ‘The International Criminal Court’s Selectivity and Procedural Justice’ (2020) 18(1) *Journal of International Criminal Justice* 107, 138.

17 These are discussed on page 60.

18 The application was denied on the basis of article 10(3)(e) of the *Access Policy for the Records held by the Mechanism for International Criminal Tribunals*, MICT Doc MICT/17 (12 August 2016): Email from Najwa Nabti to Cale Davis, 7 September 2018.

19 Emails on file with the author.

20 The author was, however, not of the same understanding. Email on file with the author.

21 The author is thankful that these three prosecutors were made available for

It is only possible to speculate on the reasons for why prosecutors have been hesitant to embrace a more transparent attitude towards opening the ‘black box’ of prosecutorial decision-making. On the one hand, the reasons may be fundamentally pragmatic. Prosecutors may have denied access to documents or declined to be interviewed because of their workloads or the need to best accommodate interview requests from many researchers keen to gain an insight into their respective offices’ workings. Writing with regard to preliminary examinations, Carsten Stahn suggested that transparency may also “curtail the flexibility of the OTP, trigger additional enquiry, or raise the expectations of affected communities” as well as “compromise access to victims or witnesses or complicate dialogue with states”.²² On the other hand, transparency may harm the legitimacy of the institution. Margaret de Guzman has claimed, contrary to the prevailing stream of thought, that transparency is not *always* conducive to the production of legitimacy and may actually erode it if it reveals goal fragmentation or incoherent processes.²³

There may be another reason why prosecutors maintain the silence of justification: the silence contributes to public confidence in ‘the prosecutor’ and in international criminal justice as a field. Several scholars have highlighted how international criminal justice relies on a form of religious faith to produce a sense of commitment in its adherents.²⁴ Much of this faith is placed in ‘the prosecutor’ to make sensible and informed decisions. Prosecutors occupy an almost god-like position in the international criminal justice belief system. Breaking the silence of justification risks revealing prosecutors as non-omniscient humans. They can never be fully informed before they make a decision, nor can they completely predict the ramifications of their choices. As any human, they are fallible. The silence of

interviews, however it is important—in the interests of transparency—to note that *more* prosecutors had agreed to be interviewed, were not made available, and access was limited to prosecutors chosen by staff within the Office.

- 22 Carsten Stahn, ‘Damned if You Do, Damned if You Don’t: Challenges and critiques of ICC preliminary examinations’ (2017) 15(3) *Journal of International Criminal Justice* 413, 430.
- 23 Margaret de Guzman, ‘Choosing to Prosecute: Expressive selection at the International Criminal Court’ (2011) 33 *Michigan Journal of International Law* 265, 298-299.
- 24 See Immi Tallgren, ‘The Sensibility and Sense of International Criminal Law’ (2002) 13(3) *European Journal of International Law* 561, 593; David Koller, ‘The Faith of the International Criminal Lawyer’ (2008) 40(4) *International Law and Politics* 1019, 102; and Frédéric Mégret, ‘The Anxieties of International Criminal Justice’ (2016) 29(1) *Leiden Journal of International Law* 197, 220-221.

justification therefore helps to sustain the faith of believers in international criminal justice and allows ‘the prosecutor’ to be trusted to make the right decisions, and to deliver upon the believer whatever good they see international criminal justice as promising.

The second silence is the *silence of intuition*. The reality of decision-making, which must be stressed in case the previous chapters have suggested otherwise, is that not all decisions come about through the exercise of discretion. Not all decisions involve the application of *reason*. Keith Hawkins emphasised that “it is necessary to contemplate the possibility that many kinds of legal decisions may be made without being logically thought through, because they are made on impulse, or because they are made in conformity with ‘normal’—often intellectually unexplored—ways of deciding matters”.²⁵ Daniel Kahneman and Amos Tversky famously highlighted two tracks of cognition. On one level is the process of reasoning; and on the other is intuition.²⁶ Yet the role of intuition did not feature as prominently in the previous chapters as might have been anticipated. When prosecutors were asked about the factors that informed their decision-making, they were able to identify what they were and often were able to offer reasons as to why particular factors were relevant. Rarely was it the case that decisions were explained by reference to intuition. This silence may be attributable to various cases. It may simply be that intuition did not feature prominently in the decisions this thesis was concerned with. It may be that few people thought to speak about it. Yet it may also be that deciding something on intuition was seen as contrary to ‘good’ decision-making. Reasons distance the decision-maker from the decision, contributing to the illusion that the decision-maker themselves had minimal role to play in making the decision and maintaining the lie that decision-making is always a carefully-considered and purely rational affair.

The third silence is the *silence of the organisation*. More research can be done on the organisational aspects that affect prosecutorial decision-making. The presence and effect of symbolic economies within prosecution offices, and how these economies affect decision-making, is one such area that invites exploration.²⁷ Others include the role of vertical and horizontal

25 Keith Hawkins, ‘On Legal Decision-Making’ (1986) 43(4) *Washington and Lee Law Review* 1161, 1174.

26 Daniel Kahneman, ‘Maps of Bounded Rationality: Psychology for behavioural economics’ (2003) 93(5) *The American Economic Review* 1449, 1450.

27 See, for an example of a study that investigated this issue within a rural Californian police bureau, Brian Lande and Laura Mangels, ‘The Value of the Arrest: The

organisational dynamics between people, specifically the role of leadership and ‘office politics’, and the effect of performance indicators or the understanding of ‘what counts’ in the act of exercising discretion.²⁸ In addition to other features, such as hiring practices, office morale, routines, and training programmes, the silence of how organisations affect international prosecutorial discretion is an area ripe for investigation.²⁹

The final silence is the *silence of the unknown unknowns*. There are, undoubtedly, many other features that may or may not have affected decision-making or the information contained in the previous chapters. Prosecutors may or may not have lied. Staff within prosecution offices may or may not have ensured that those prosecutors who were made available for interviews were able to give the ‘party line’ and thus minimised the prospect of other prosecutors revealing potentially damaging information. They may or may not have retrospectively created justifications or explanations for their discretion which were not engaged with at the time that they were making decisions. In other words, there may be many other aspects of decision-making that we do not know we do not know and cannot speculate about. The only way to unmask these ‘unknown unknowns’ is by researchers exposing themselves to the practice of discretion and contributing to the ‘thicker’ understanding of international criminal law.³⁰

2.2 Prosecutors as builders

In addition to their role as norm performers, prosecutors have also acted as builders when exercising their discretion. This is with respect to four issues: the law, history, institutions, and power.

The idea that prosecutors play a role in constructing and transforming jurisprudence is not difficult to understand, nor controversial. Prosecutors have assumed the role of builders of the law when they have selected novel charges and when they sought to use appeals to develop jurisprudence. Their decisions have made notable contributions to the law surrounding sexual and gender-based violence, terrorism, and the protection

symbolic economy of policing’ (2017) 58(1) *European Journal of Sociology* 73.

28 See, for example, Evelyn Brodtkin, ‘Policy Work: Street-level organisations under new management’ (2011) 21(2) *Journal of Public Administration Research and Theory* 1253.

29 See, for a sample of organisational features and their effect on decision-making, Martha Feldman, ‘Social Limits to Discretion: An organisational perspective’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 163.

30 This concept is taken from Kieran McEvoy, ‘Beyond Legalism: Towards a thicker understanding of transitional justice’ (2007) 34(4) *Journal of Law and Society* 411.

of vulnerable people during armed conflicts.

Second, prosecutors have adopted the role of history builders. They have used the trial process to transform social facts into legal facts and remove the scope for contested histories. Prosecutors have used representational charging practices to create a record of events. Guilty pleas have been understood as a method through which historical denialism or revisionism can be mitigated through a defendant confessing to their conduct. The selection of witnesses, too, is an act of historical authorship through which factual accuracy is prioritised over other forms of truth. Some prosecutors selected witnesses in part because they were able to capture the emotions of the judges and tell a compelling and believable story. Others selected witnesses on whether they could give testimony in open session, to lend weight to the ultimate findings of the tribunal. Further, their role as history builders is demonstrated in that they have embraced trials as adversarial battles to be resolved through contests of truth, which reinforces the limits on the histories that they can produce.

Third, prosecutors have acted as institution builders. Their decisions demonstrate that they have assumed a role in the structural transformation of justice institutions. In some cases, this role has been explicit. If a defendant was arrested after being indicted, for example, this was seen as a way to defend against the prospect of proceedings which looked like *in absentia* trials. This role has also appeared in more subtle ways. With regard to negotiated outcomes, prosecutors adopted the role of institution builders by transforming the respective roles of themselves and judges in connection with the right to arbitrate on a defendant's (or potential defendant's) guilt. Finally, by selecting evidence that complies with the narrative forms adopted in paradigmatic trial proceedings, prosecutors have affirmed the existing nature and purpose of international criminal courts and mitigated the possibility for them to become forums through which less-traditional forms of evidence can be led.

The final, and perhaps the most interesting way that prosecutors have demonstrated their role as builders, is that their decisions appear to have been motivated by concerns for obtaining power, maintaining relationships of power and dominance, or transforming those relationships. First, prosecutors have been concerned with their own power. Many of the factors that prosecutors have considered when making various decisions can be attributed to a desire to enhance their own standing and reputation by adding to their symbolic capital. Successful investigations, for instance, demonstrate that a prosecutor's power is not illusory by redistributing power be-

tween the alleged offender and the prosecutor and validating the efforts of state representatives to create an international criminal justice system. Representational charging is similarly a practice concerned with building a prosecutor's own power, by invoking feelings of vindication, validation, and redress in victims which, in turn, reflects positively on a prosecutor's work. Second, prosecutorial discretion has been used to build the power of the court. Prosecutors have seen power being produced in two ways. On the one hand, power is exogenous. It is granted to the court by external actors and derived from the recognition of symbolic capital by others. For example, symbolic capital has been understood as being produced through the outward displays of capacity and capability. Arrests are one way in which symbolic capital has been produced, in the hope that the court gaining custody over an individual would prove to state party representatives and the community at large that the court was capable of fulfilling its mandate. In another sense, power has been understood as endogenous and coming from within the court itself. It is capable of internal production independent of the will of outsiders. The discretion of some prosecutors, for example, appears to have been influenced by an expansionist vision of a court's legitimate authority. The use of creative charging policies, for example, has served to expand the categories of crimes a court has jurisdiction over and thus broaden the sphere of a court's influence with regard to the conduct that it is capable of reacting to.

Prosecutorial discretion therefore appears to have been influenced by prosecutors adopting the role of builders. This identity appears to have informed discretionary conduct which serves to construct law, institutions, history, and power.

2.3 Prosecutors as guardians

The previous chapters evidence that many exercises of prosecutorial discretion have been shaped by prosecutors adopting a guardianship role with respect to institutions, people, and concepts. First, prosecutors have acted as guardians over courts. This is most evident in their concern for their tribunal's financial viability. This has caused prosecutors to try and demonstrate the relevance, efficiency, and value for money of their court by issuing indictments and obtaining convictions through the use of plea negotiations. Prosecutors have also been attuned to whether their court is respected by the public at large, and have issued indictments, filed charges that they believe meet public expectations, and attempted to lead as much evidence as

practicable in open court in order to maintain public faith and ensure that the institution maintains the confidence of society that it is functioning as intended. They have tried to give judges trials so the court is not abandoned by its judiciary. Finally, they have been conscious of the importance of not overwhelming their tribunal with matters that are more complicated than court staff can handle. Prosecutors brought small cases early in the existence of several tribunals to ensure procedures and rules were in place for when complicated matters entered the list, and have pursued a fewer number of situations to mitigate the prospect of acquittals which would, in their view, reflect poorly on the institution. Finally, some prosecutors were also alive to the prospect that their tribunals served as institutional guinea pigs, and were aware that their conduct could help the emergence of a permanent international criminal court.

Prosecutors have also adopted the role of guardians over victims. This is event in two respects. On the one hand, they have engaged in proactive protection by expanding the class of people that can fall within the scope of 'victims' under international criminal law. This has been achieved by developing the law around sexual and gender-based violence, violence against children, the scope of civilian protection, and forced marriages through the use of the charging discretion. On the other hand, they have engaged in retroactive vindication, validation, or redress. Prosecutors have done this through the use of representational charging practices. They have split indictments to maximise the prospects of at least some victims receiving vindication and redress in the event the defendant dies before all charges are finalised. They have been concerned with managing the expectations of affected communities by not producing indictments which suggest the defendant will be found guilty on a large number of counts. They have tried to aid reconciliation by concluding plea agreements, while also being aware that these agreements might be demeaning and dilute the suffering that they have endured.

Prosecutors have also acted as guardians over themselves. Prosecutors have been concerned with how they are perceived by other people. They have tried to select situations and cases that portray them as independent and impartial, rather than biased and politicised. They have tried to avoid being seen as immoral, lacking compassion, or inhumane by pursuing cases where the defendant might be sick. They have tried to avoid acquittals at trial by concluding plea negotiations to maintain their social capital. They have been worried about not being seen as fair and trustworthy by defence counsel, and they will be seen as reckless if they start withdrawing charges

in favour of pleas. Prosecutors have also been concerned about how they see themselves, and the importance of being satisfied that they have done a good job, been able to match conduct to a specific crime, or feel as though they have fulfilled what in their mind is the role of the prosecutor. Prosecutors have been concerned about their effectiveness. They have been alive to the risk that they will not be able to run complex trials, or annoy judges and make their professional lives more difficult and more uncomfortable. Finally, prosecutors have been concerned about their futures, and have been attuned to the damage that a failure to close a tribunal in-line with the expectations of state party representatives could have on their professional and personal reputations.

There are other actors or concepts that prosecutors have adopted a guardianship role over, too. For example, they have been aware that giving evidence can be a traumatic experience and have considered the tension between those witnesses they need to call to prove their case, and the harm that those witnesses might experience in the process. The concept of 'the law' has also been treated with care in the knowledge that creative charging or legal arguments could harm the consistency and coherency of international jurisprudence. Finally, prosecutors have tried to protect and respect the 'spirit' of the international prosecutor, in the knowledge that their actions will have ramifications for future prosecutors and the reputation of the Office and its staff.

The above examples demonstrate how prosecutorial discretion has been informed by prosecutors adopting a protective role over institutions, people, and concepts. This guardianship role reveals the existence of an underlying emotional vulnerability. There is now a recognised connection between reasoning and emotions that draws upon research done in the fields of economics and psychology. While emotions may once have been seen as a threat to lucid reasoning and signified "evil, danger, and threat of disorder", there is increasing recognition that emotions are an indelible component of cognition and understanding.³¹ Raymond Dolan observed that "[e]motion exerts a powerful influence on reason".³² In the context of law, Kathryn Abrams and Hila Keren have argued that emotions focus a decision-maker's attention on particular aspects of a case and allow decision-makers to em-

31 Martha Minow and Elizabeth Spelman, 'Passion for Justice' (1988) 10(1) *Cardozo Law Review* 37, 41.

32 Raymond Dolan, 'Emotion, Cognition, and Behaviour' (2002) 298(5596) *Science* 1191, 1191.

pathise with the perspectives of parties.³³ Emily Kidd White observed that emotions also affect how decision-makers interpret ‘evaluative legal concepts’, such as dignity and cruelty.³⁴ Emotions are an inseparable part of the “cognitive process that inform and trigger the making of decisions”.³⁵

The emotional vulnerability evidenced by prosecutors adopting the role of guardians is arguably that to fear. Andrea Bianchi and Anne Saab claimed that fear plays a role in shaping how society views issues (such as climate change and health crises) and informs how law is deployed in response to perceived threats.³⁶ In the context of international prosecutors, fear appears to have shaped their identity. A guardianship role can only arise in response to a perceived threat or risk. To be a guardian is to protect something or someone that is incapable of acting in its or their own best interests. If prosecutors have adopted protective roles over institutions, people, and concepts, it is because they have feared the realisation of an alternative future in which these institutions, people, or concepts will be worse off than they are at the moment of consideration. If an ICTY prosecutor in 1994 factored into their decision-making about the selection of cases the fact that Antonio Cassese was “ready to either resign as a judge or just to give up the process as being unachievable”,³⁷ it is likely because they were fearful of the danger posed to the court if the “chief architect of modern international criminal justice”³⁸ abandoned the very institution he helped to establish. If another wanted to expand the scope of the law to encompass broader protections for people subjected to sexual and gender-based crimes, it may have been because they were fearful that people would continue to commit disgusting violations of human dignity. Fear has, in part, shaped how prosecutors see the world and their role within it and appears to have affected their decision-making.

33 Kathryn Abrams and Hila Keren, ‘Who’s Afraid of Law and the Emotions?’ (2010) 94(6) *Minnesota Law Review* 1997, 2004.

34 See Emily Kidd White, ‘Till Human Voices Wake Us: The role of emotions in the adjudication of dignity claims’ (2014) 3(3) *Journal of Law, Religion, and State* 201.

35 Andrea Bianchi and Anne Saab, ‘Fear and International Law-Making: An exploratory inquiry’ (2019) 32(3) *Leiden Journal of International Law* 351, 351, 354.

36 Andrea Bianchi and Anne Saab, ‘Fear and International Law-Making: An exploratory inquiry’ (2019) 32(3) *Leiden Journal of International Law* 351.

37 Interview with P4. This issue is discussed on page 99.

38 Marlise Simons, ‘Antonio Cassese, War Crimes Law Expert, Dies at 74’, *New York Times* (online), 23 October 2011 <<https://www.nytimes.com/2011/10/24/world/europe/antonio-cassese-noted-italian-jurist-dies-at-74.html>>.

2.4 Towards a relational understanding of the prosecutorial role

The prosecutorial role is often conceptualised through the lens of the ‘agents of justice’ and ‘party to the proceedings’ dichotomy. This dichotomy highlights that prosecutors are both expected to be impartial and partial. They were created through a fusion of the common and civil traditions. They are pulled in two directions, on the one hand expected to be searching for the truth and on the other vigorously pursuing their prosecutions. The dichotomy has been used to explain and critique the prosecutorial role in both domestic³⁹ and international systems.⁴⁰ International criminal judges have also interpreted the prosecutorial role through this lens and grappled with the extent to which prosecutors should be one or the other. In one judgment, Antonio Cassese wrote that the Prosecutor “*is not, or not only, a Party to adversarial proceedings*” but was also obliged to “assist the Chamber to discover the truth in a judicial setting”.⁴¹ In another ICTR case, Mohamed Shahabuddeen observed that the Prosecutor “is not required to be neutral in a case; she *is a party*”, but “while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel ‘ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice’”.⁴²

More recently, it has been argued that prosecutors occupy a third, diplomatic role.⁴³ Prosecutors themselves have claimed this role. Carla del Ponte recalled that her time as Prosecutor of the ICTY was largely spent trying to put political pressure on states to comply with their obligations to cooper-

39 David Sklansky, ‘The Problems with Prosecutors’ (2018) 87(1) *Annual Review of Criminology* 451, 466.

40 See, for example, Kai Ambos, ‘International criminal procedure: “adversarial”, “inquisitorial” or mixed?’ (2003) 3(1) *International Criminal Law Review* 1, 9; Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 1st ed, 2019), 281.

41 See *Prosecutor v Zoran Kupreskić et al (Decision on communications between parties and their witnesses)* (ICTY, Trial Chamber, IT-95-16-T, 21 September 1998), (i). Emphasis added.

42 *Jean-Bosco Barayagwiza v The Prosecutor (Decision (Prosecutor’s request for review or reconsideration))* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 31 March 2000) (Separate Opinion of Judge Shahabuddeen), [68]. Emphasis added.

43 See *Prosecutor v Issa Hassan Sesay (Decision on complaint pursuant to article 32 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone)* (SCSL, President, SCSL-04-15-CCC32, 20 February 2006), [29].

ate.⁴⁴ David Crane estimated that 70% of his job was diplomacy.⁴⁵ Luis Moreno Ocampo developed the Jurisdiction, Complementarity, and Cooperation Division within his office to “undertake diplomacy” out of the recognition that cooperation required him to form diplomatic alliances.⁴⁶ Scholars have referred to the ICC Prosecutor as an “international diplomat as well as an officer of the court”,⁴⁷ and recognised that their role requires “a great deal of diplomatic savvy”.⁴⁸

Despite its prevalence, the ‘agents of justice’ and ‘party to the proceedings’ dichotomy does not provide a means of conceptualising the broad range of roles that international prosecutors occupy. Nor does the role of the prosecutor as a diplomat. This is because these conceptualisations arise out of a popular conception of international justice in which a prosecutor’s role is grounded in a fusion of the civil and common law traditions but requires them to maintain the support of states. This trinity of roles essentially adapts fundamental domestic prosecution models to the international environment without recognising that prosecutors have a richer network of context-specific relationships to other institutions, people, and concepts beyond defendants and states. For example, the ‘agents of justice’ and ‘party to the proceedings’ dichotomy is fixated on the obligations that prosecutors owe (or do not owe) to a defendant within the context of the determination of their guilt within a criminal trial. In other words, it recognises only one relationship (between the prosecutor and the defendant) in one context (the trial). The role of the ‘diplomat’ similarly only accounts for one relationship to states. Neither of these conceptions accommodate, for example, the role of the prosecutor as an agent of moral transformation. This role does not fit into the typology of the prosecutor as an ‘agent of justice’, a ‘party’, or a ‘diplomat’. While this trinity of roles is not *inaccurate*, it does encourage

44 Carla Del Ponte, *Madame Prosecutor: A memoir* (Other Press, 1st ed, 2008), 42.

45 Darren Hawkins and Chad Losee, ‘States and International Courts: The Politics of Prosecution in Sierra Leone’ (2014) 13(1) *Journal of Human Rights* 48, 58.

46 Luis Moreno Ocampo, ‘Keynote by ICC Chief Prosecutor’ (Speech delivered at Colloquium of Prosecutors of International Criminal Tribunals on ‘The Challenges of International Criminal Justice’, Arusha, 25 November 2004), 31: “Diplomatic alliances must be established, even while one maintains independence as a prosecutor”.

47 Benjamin Schiff, ‘Diplomacy and the International Criminal Court’ in Andrew Cooper, Jorge Heine, and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press, 1st ed, 2013) 745, 751.

48 Jenia Turner, ‘Accountability of International Prosecutors’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 1st ed, 2015) 382, 385.

a *narrow* understanding of what prosecutors do that is not reflective of the more nuanced reality of prosecutorial relationships and roles.

A relational understanding of the prosecutorial role, in contrast, takes as its departure point the assumption that prosecutors have numerous relationships. The first step in applying a relational understanding is to identify the contexts in which prosecutors operate (for example, selecting charges, selecting witnesses, or negotiating outcomes). The second step is to identify the subjects of the relationships which arise within these contexts. The final step is to observe the roles that prosecutors occupy within these relationships. A relational understanding of the prosecutorial role therefore invites us to move beyond an understanding of prosecutors as *only* conducting trials while trying to maintain the support of states. In doing so, it foregrounds the numerous roles that prosecutors occupy and provides a nuanced account of the role of prosecutors within international criminal justice.

3 Why are Roles Important?

The above discussion has demonstrated how prosecutorial discretion has been influenced through prosecutors adopting the role of norm performers, builders, and guardians. Prosecutorial discretion should be understood as an action not only through which decisions are made under the influence of these roles, but also as an action which serves to develop and maintain the roles themselves. But what is the relevance of these roles for the future of discretionary conduct? This section advances four arguments to support the claim that role identities are relevant to the study and practice of prosecutorial discretion.

3.1 Roles help us to understand decision-making

The first reason why roles are important to the study and practice of prosecutorial discretion is that they enrich our collective understanding of why decisions are made. The three roles identified above provide a starting point from which it becomes possible to map the relationships that exist between prosecutors and other actors or concepts. The original research contained in the preceding chapters has demonstrated that prosecutorial discretion is rarely as uncomplicated as resulting merely in the making of a decision. Instead, the decision itself is often motivated by a desire to protect something, to build something, and/or to perform something. The process of

discovering what this *something* or who this *someone* is, by interrogating the factors that have informed the making of a decision, permits a more nuanced conception of discretion that lays bare the motivations for discretionary conduct and demonstrates the underlying policy objectives and goals that inform the reasoning that goes into making decisions.

3.2 Roles invite a conscious engagement with their appropriateness

The second reason why roles are important to prosecutorial discretion is that they encourage a conscious engagement with the appropriateness of these roles. There are two problems related to roles. The first problem, experienced by international criminal justice and international criminal courts, is role overload. Mirjan Damaška famously claimed that international criminal law is metaphorically carrying the rock of Atlas, but its courts were not bodies of “titanic strength” capable of living up to all the expectations that had been dumped upon them.⁴⁹ Frédéric Mégret speculated that these expectations may even be “unreasonable and crushing”.⁵⁰ Moreover, these roles sometimes pull actors in different directions, creating unresolvable tensions between various macro goals for which no hierarchy can be established.⁵¹ These tensions and frictions have resulted in a significant body of scholarship which collectively argues the need for actors within the field to manage expectations and cautiously define the ways through which the success or legacy of international courts will be measured.⁵² Marieke de Hoon, for example, called for a ‘serious critique’ of what international criminal law is capable of achieving and argued that the expectations placed on the field needed to be adjusted down to a “realistically achievable level”.⁵³ The question about what roles international criminal justice should collectively pursue has also led to some scholars critically reflecting about even whether

49 Mirjan Damaška, ‘What’s the Point of International Criminal Justice?’ (2008) 83(1) *Chicago-Kent Law Review* 329, 331.

50 Frédéric Mégret, ‘The Anxieties of International Criminal Justice’ (2016) 29(1) *Leiden Journal of International Law* 197, 216.

51 Mark Klamberg, ‘What are the Objectives of International Criminal Procedure? Reflections on the fragmentation of a legal regime’ (2010) 79(2) *Nordic Journal of International Law* 279.

52 Frédéric Mégret, ‘The Anxieties of International Criminal Justice’ (2016) 29(1) *Leiden Journal of International Law* 197, 217.

53 Marieke de Hoon, ‘The Future of the International Criminal Court: On critique, legalism and strengthening the ICC’s legitimacy’ (2017) 17(4) *International Criminal Law Review* 591.

accepted practices are capable even of achieving arguably the most widely-accepted goals. Kate Cronin-Furman, for instance, criticised the extent to which the collective obsession on prosecuting those ‘most responsible’ could ever result in international criminal justice achieving the holy grail of deterrence.⁵⁴

The problems of role overload is not completely a mere structural affair that is attributable entirely to the system being produced without a coherent vision as to why and without a cognisable engagement with how the inevitable doubts about purpose are to be resolved. Institutional actors are themselves partially to blame. On page 214, for example, it was claimed that there is only minimal consistency between prosecution appeal briefs on matters of sentence where prosecutors have attempted to explain the broader purpose that sentencing serves. Elsewhere, this author has argued that the prolific number of references to ‘justice’ in public communications produced by staff at the Office of the Prosecutor risks creating “misconceptions in the community about the [ICC] OTP’s goals, aspirations, and capabilities”.⁵⁵ Similarly, Birju Kotecha argued that staff of the ICC OTP may have fostered unrealistic expectations through the use of rhetoric and “triumphalist tones”.⁵⁶ Luke Moffett argued the Trust Fund for Victims, too, unreasonably ‘bloated’ expectations about what the ICC can achieve by positing that reparations proceedings might be able to produce distributive justice and social inequality.⁵⁷

The second problem, concerned with international criminal prosecutors, is role gravitation. The existential anxiety about what international criminal law should actually do poses a very real problem for international prosecutors because they have historically been recognised as the people who have the greatest control over whether international criminal tribunals succeed in their roles. The responsibility over whether the court or international criminal justice fulfils the roles that have been envisaged gravitates

54 Kate Cronin-Furman, ‘Managing Expectations: International criminal trials and the prospects for deterrence of mass atrocity’ (2013) 7(3) *International Journal of Transitional Justice* 434.

55 Cale Davis, ‘Doing “Justice” at the Office of the Prosecutor: Portrayals of a cultural value’ in Julie Fraser and Brianne McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar, 1st ed, 2020) 209, 221-222.

56 Birju Kotecha, ‘The Art of Rhetoric: Perceptions of the International Criminal Court and legalism’ (2018) 31 *Leiden Journal of International Law* 939, 962.

57 Luke Moffett, ‘Elaborating Justice for Victims at the International Criminal Court: Beyond rhetoric and The Hague’ (2015) 13 *Journal of International Criminal Justice* 281, 295.

towards prosecutors. Luc Reydam and Jed Odermatt claimed that “[t]he mandate of an international tribunal is in the first place the mandate of its prosecutor”, and Marieke Wierda and Anthony Triolo have similarly argued that the prosecutor’s mandate “is the *raison d’être* of the tribunal in question”.⁵⁸ Other have deployed the now-popular metaphor that prosecutors are a court’s “engine room” to stress that the success or failure of a tribunal is dependent on the decisions that prosecutors make.⁵⁹ Elsewhere, they have been called the “gatekeepers” of international criminal justice to emphasise their control over the field.⁶⁰ Prosecutors are therefore confronted not only with the problem that the macro goals of their court are vague and contentious, but also with the more pragmatic issue that they have been charged with ensuring their courts meet whatever those goals are. They face a classic pressure cooker scenario, where they have been given extreme responsibility to achieve *something*, but there is no coherent idea about what that something is.

There may be some ways around the problems of role overload and role gravitation. The first step is to recognise that there may be some value in conceptually severing the roles of the prosecutor from the roles of the court (though, at least in an institutional sense, they will be connected) or the roles of international criminal justice. On a discursive level, one way that this could be achieved is by refraining from talking about prosecutors through metaphors that suggest they are responsible for the success, failure, and functioning of courts. Another way could be through embracing the agency of other actors—particularly defence counsel, judges, and registry staff—as equals in the operation of courts and the progressive development of international criminal justice. They all have different roles to play and

58 Luc Reydam and Jed Odermatt, ‘Mandates’ in Luc Reydam, Jan Wouters and Cedric Ryngaert, *International Prosecutors* (Oxford University Press, 1st ed, 2012) 81, 81; Marieke Wierda and Anthony Triolo, ‘Resources’ in Luc Reydam, Jan Wouters and Cedric Ryngaert, *International Prosecutors* (Oxford University Press, 1st ed, 2012) 113, 114.

59 Birju Kotecha, ‘The International Criminal Court’s Selectivity and Procedural Justice’ (2020) 18(1) *Journal of International Criminal Justice* 107, 107. See also Damien Rogers, *Law, Politics, and the Limits of Prosecuting Mass Atrocity* (Palgrave Macmillan, 1st ed, 2018), 4; and Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 274.

60 Lovisa Bådagård and Mark Klamberg, ‘The Gatekeeper of the ICC: Prosecutorial strategies for selecting situations and cases at the International Criminal Court’ (2017) 48(5) *Georgetown Journal of International Law* 639; Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 1st ed, 2019), 281.

in their own ways can serve as norm performers, builders, and guardians. The value of such a ‘conceptual disbanding’ would be to allow prosecutors to shape a role independent from that of other actors and granting them a mandate in their own right and allow them to shed roles that serve to confuse decision-making or policy formulation. As an example, prosecutors could reject that they have a role in fostering rehabilitation and redistribute this role to the judiciary; or claim that they should not be guardians over the social capital of their institution and instead argue that the registry and the judiciary should be primarily concerned with encouraging the development of a court’s exogenous power.

It is clearly a matter of subjective opinion whether it is appropriate for a prosecutor (or a court) to strive for any given objective. That can never change. People are liable to have differing views on what other people should be doing. Yet this does not deny the possibility for internal consistency to emerge within a college of professionals regarding the roles that they collectively should be fulfilling (or, at least, consistency in action). The second step involved in reversing the problem of role overload and role gravitation is the encouragement of an open and honest discussion within the prosecutorial college regarding the roles that it is appropriate or inappropriate for prosecutors to adopt. This internal dialogue could result in two advantageous scenarios. On the one hand, prosecutorial decision-making could be simplified through constraint. For example, if prosecutors decided that it was not appropriate to concern themselves with building the court’s credibility, this could have tangible impact on their decision to select witnesses who could give evidence in open court. If prosecutors decided that it was not their role to protect their court from threats of non-cooperation, this could have an affect on any number of decisions where the outcome could help or hinder cooperation between the court or its organs and outsiders. On the other hand, prosecutorial decision-making could emancipated. By labelling roles as appropriate, prosecutors give themselves the authority to embrace that role and act within it. If prosecutors embraced a role as an agent of moral change, more charges might be laid or more appeal grounds filed to draw attention to undesirable conduct.

3.3 Roles highlight how discretion can be controlled

Another reason why roles are important to prosecutorial discretion is that they highlight how discretion can be controlled. Definitionally, discretion and control are two closely-related concepts. As argued in chapter 2, the

legal paradigm conceptualises discretion as a space for free choice walled off by a boundary of restrictions. The definition of discretion adopted in this thesis—the act of reaching a reasoned decision about the appropriate course of action to pursue—similarly draws attention to the ways in which reasoning is affected. The two concepts are closely related in practice, too. There is both an external and an internal desire to control decision-making. Externally, it has often been the case that where people enjoy decision-making authority, those that grant them the authority try in some ways to control the decisions that are made. The historical debates around the power of the ICC prosecutor to commence *proprio motu* investigations is an example, which resulted in a process under article 15 of the *Rome Statute* through which all requests for a *proprio motu* investigation needed to be authorised by three judges sitting as the pre-trial chamber. More recently, the Independent Experts Report of September 2020 called for the Prosecutor to focus on a “narrower range of situations, and limit their interventions to the extent possible” while also adopting “a higher threshold for the gravity of the crimes alleged to have been perpetrated”.⁶¹

There is also the internal desire for constraint. One ICC prosecutor remarked that “any good Chief Prosecutor will want to have his or her hands tied” and that “[c]ertainly, our Chief Prosecutor [Fatou Bensouda] wants that”.⁶² They also remarked that “you want to make sure that you limit your own discretion”.⁶³ Another prosecutor explained that the *Policy Paper on the Interests of Justice* was designed to “prevent the institution from going down the path of considering those issues for which it’s not qualified”.⁶⁴ Yet another ICC prosecutor recalled that “I tried to reduce as much as possible my discretion” because in a large prosecution office—they believed—reducing discretion was “the only way to survive”.⁶⁵ As of April 2021, the ICC Prosecutor has published draft or finalised policy papers or guidelines on no less than ten different issues ranging from situation completion to proceedings on the admission of guilt, to the selection of situations and cases, to children and sexual and gender-based crimes.

The desire evident here for prosecutors to tie their own hands may have

61 Anna Bednarek et al, *Independent Expert Review of the International Criminal Court and the Rome Statute System*, ICC Assembly of States Parties, ICC Doc ICC-ASP/19/16 (30 September 2020), annex 1, [54].

62 Interview with P26.

63 Interview with P26.

64 Interview with P24.

65 Interview with P1.

several origins. It may arise from a sense of self-doubt under which prosecutors worry they will not be able to make the right decision in the absence of guidance. It may be attributable to a fear that prosecutors will confirm the long-standing suspicions that they are politically motivated that have marred the institution since its creation, alienating states and contributing to the institution's decline. Prosecutors have invested years of work into emphasising that politics do not factor into their discretionary conduct and decisions are based only on objective circumstances. Written normative standards are perhaps a way of ensuring this perception does not unravel. To place ideas in writing is to give them a legitimacy and authority they lack in speech. To found decisions on reasoned interpretations of texts is to disguise what are otherwise "naked exercises of power".⁶⁶ The practice of formulating guidelines and policy documents pays homage to the 'cult of the text' by refusing to concede the existence of a prosecutor's creative capacity by separating the decision maker from the decision.⁶⁷ It may also be merely human nature. Jan Klabbers has observed that the creation of rules is sometimes merely a "kneejerk deontological reflex" that kicks in when decision makers are afforded the power to make discretionary decisions.⁶⁸ The attempts at constraining discretion are, perhaps, evidence of the human tendency to delimit, regulate, and curtail the scope of people to exercise unfettered expert judgement.

What is important to remember, however, is that beyond the creation of rules, policy papers, guidelines, and diplomatic nudging, discretion is also controlled through a decision-maker's socialisation. Socialisation is "the process by which persons acquire the knowledge, skills, and dispositions that make them more or less able members of society".⁶⁹ Through socialisation, individuals "learn how to act,... what to believe, and who to become".⁷⁰ While socialisation occurs in numerous ways, arguably the most relevant form for the purposes of controlling discretion is professional

66 Pierre Bourdieu, 'The Force of Law: Toward a sociology of the judicial field' (1987) 38(5) *Hastings Law Journal* 814, 818.

67 Pierre Bourdieu, 'The Force of Law: Toward a sociology of the judicial field' (1987) 38(5) *Hastings Law Journal* 814, 851.

68 Jan Klabbers, 'The Virtues of Expertise' in Monika Ambrus et al, *The Role of Experts in International and European Decision-Making Processes: Advisors, decision makers, or irrelevant actors?* (Cambridge University Press, 1st ed, 2014) 82, 90.

69 Orville Brim and Stanton Wheeler, *Socialisation after Childhood: Two essays* (Wiley, 1st ed, 1966), 3.

70 Joslyn Brenton, 'Socialisation' in Kathleen Korgen (ed), *The Cambridge Handbook of Sociology* (Cambridge University Press, 1st ed, 2017) vol 1, 197, 198.

socialisation. Professional socialisation refers to “the processes by which people selectively acquire the values and attitudes, the interests, skills, and knowledge—in short, the culture—current in the groups of which they are, or seek to become, a member”, embodying within them “a more or less consistent set of dispositions which govern [their] behaviour in a wide variety of professional (and extraprofessional) situations”.⁷¹ Professional socialisation internalises within group members particular values, attitudes, identities, expectations, and norms.⁷² These processes of socialisation—be they pre-socialisation, professional socialisation, or otherwise—affect how choices are made. As argued in chapter 2, section 2.2, and claimed by Émile Durkheim and Pierre Bourdieu, people are the products of their own history. What they think, how they reason, and their horizons of appropriate or possible conduct are determined in part by their lived experiences. Carl Schneider argued that discretion is inevitably affected by how a decision-maker has been socialised and trained, and observed that “[d]ecision-makers... do not live and work in a vacuum; they are inevitably products of their environment and their environment is, to some extent, an environment of shared social norms”.⁷³

More attention therefore needs to be given to how international prosecutors are professionally socialised, in order to understand the processes through which they internalise the roles of norm performer, builder, and guardian that appear to have informed how they have made the decisions discussed in the preceding chapters. For example, if the role of the guardian is informed by fear (as argued in section 2.3), an inquiry into professional socialisation could reveal how those feelings of fear are instilled and how prosecutors are taught to be fearful. More pragmatically, it may also be

71 Robert Merton, George Reader, and Patricia Kendall, *The Student-Physician: Introductory studies in the sociology of medical education* (Harvard University Press, 1st ed, 1957), 287, quoted in Shari Miller, ‘A Conceptual Framework for the Professional Socialisation of Social Workers’ (2010) 20(7) *Journal of Human Behaviour in the Social Environment* 924, 927.

72 See K McGowan and Lorraine Hart, ‘Still Different After All These Years: Gender differences in professional identity formation’ (1990) 21(2) *Professional Psychology: Research and Practice* 118, citing Douglas Hall, ‘Careers and Socialisation’ (1987) 13(2) *Journal of Management* 301; Gabriella Pusztai and Cintia Csók, ‘Ambivalence of Professional Socialisation in Social and Educational Professions’ (2020) 9(8) *Social Sciences* 147; and Joslyn Brenton, ‘Socialisation’ in Kathleen Korgen (ed), *The Cambridge Handbook of Sociology* (Cambridge University Press, 1st ed, 2017) vol 1, 197, 198, 200–201.

73 Carl Schneider, ‘Discretion and Rules’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 80.

beneficial to develop socialisation programmes designed to actively inculcate prosecutors with the roles it is appropriate for them to adopt with the view towards coordinating decision-making towards the fulfilment of particular objectives. Despite the increasing professionalisation of international criminal justice—evidenced by the number of practitioners turning notoriously unstable and precarious temporary positions into professional careers⁷⁴ and the recent opening of the Association of Defence Counsel Practising before the International Criminal Tribunals to ICC practitioners⁷⁵—there has never been a pan-institutional formal college of international prosecutors dedicated to the training and education of, or advocacy on behalf of, its members. Perhaps the closest thing to such a body is the International Association of Prosecutors, however it does not have active programmes for international criminal prosecutors and mainly acts as a notice board for events held elsewhere. The last post on its ‘Forum for International Criminal Justice’ was made in 2018. While the window of opportunity for a collective college of prosecutors has probably now closed (the STL is effectively dead after having run out of cash; the MICT has only a handful of prosecutions it is winding up; and the ECCC is closing in the near future), this does not mitigate the importance of role inculcation through professional socialisation to informing decision-making practices. If prosecutors and external actors want guidance on how their discretion should be exercised, a good starting point would be to provide them with guidance about what their roles are and what they are not.

3.4 Roles invite an holistic conception of performance

The final way that an understanding of roles can be translated into practice is that they open the door to an holistic and tailored conception of prosecutorial performance. There has been a recent surge in interest concerning how to measure the performance of international courts. In 2014, the ICC Assembly of States Parties encouraged the ICC to develop key performance indicators through which the work of the court could be measured.⁷⁶ For

74 See Elena Baylis, ‘Tribunal-Hopping with the Post-Conflict Justice Junkies’ (2008) 10 *Oregon Review of International Law* 361.

75 *Decision recognising the name change of the ‘Association of Defence Counsel Practising Before the ICTY’ to ‘Association of Defence Counsel Practising Before the International Courts and Tribunals’* (MICT, MICT-12-01, 16 June 2017).

76 *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC Assembly of States Parties, ICC Doc ICC-ASP/13/Res.5 (17 December 2014), annex 1, 7(b).

her part in contributing towards this project, the ICC Prosecutor's 2016-2018 *Strategic Plan* outlined 14 key indicators of prosecutorial performance across four broad areas. One of these areas was 'prosecutorial effectiveness', a concept which would be assessed purely numerically on the basis of the number of arrest warrants, the number of people who had charges confirmed against them, the number of people convicted, and the counts granted or charged at each stage of the trial process.⁷⁷ When the Prosecutor amended the performance indicators in the 2019-2021 *Strategic Plan*, the method through which prosecutorial results would be measured remained numeric, and would be assessed in terms of the number of people presented and convicted.⁷⁸

The recent focus on performance indicators has also drawn attention to their limits. There are many aspects of performance that are simply unmeasurable.⁷⁹ From the perspective of prosecutorial discretion, perhaps the biggest problem is that the performance indicators used within the Office fail to reflect the diverse roles that prosecutors occupy. A prosecutor's 'performance' relates to more than the number of people or charges they shuffle through the court system.

An awareness of prosecutorial roles provides the opportunity to reconceptualise how the performance of prosecutors is assessed. The roles that prosecutors have occupied when making decisions—as norm performers, builders, and guardians—should be reflected in how their performance is assessed. What is needed is not just a *goal*-based approach to performance that focuses on the extent to which prosecutorial conduct aligns with set benchmarks, but rather one that is supplemented by a *role*-based approach to performance that is founded on a recognition of contributions that prosecutors make to the roles that they deem it is appropriate for them to occupy. In other words, the purely quantitative model of performance should be transformed into a hybrid model that combines both quantitative and

77 Office of the Prosecutor, 'Strategic Plan, 2016-2018' (International Criminal Court Office of the Prosecutor, November 2015), 37-38.

78 Office of the Prosecutor, 'Strategic Plan, 2019-2021' (International Criminal Court Office of the Prosecutor, 17 July 2019), [63].

79 See Open Society Justice Initiative, 'Establishing Performance Indicators for the International Criminal Court' (Briefing Paper, November 2015), 2; Carsten Stahn, 'Is ICC Justice Measurable? Re-thinking means and methods of assessing the Court's practice' on *ICC Forum* (February 2018) <<https://iccforum.com/performance>>; and Birju Kotecha, 'The ICC: What counts as a success?' on *Justice in Conflict* (13 September 2013) <<https://justiceinconflict.org/2013/09/13/the-icc-what-counts-as-a-success/>>.

qualitative elements. These qualitative elements could take the form of mere *recognition* of the ways through which members of a prosecution office have performed the roles that they deem are appropriate for them to perform. For example, a role-based approach to performance may recognise that, within a review cycle, prosecutors contributed to the writing of history; or to the transformation of morals; or to the expansion of a court's scope of legitimate authority through advancing novel legal arguments concerning the applicability of crimes.

4 Conclusion

This thesis has embraced the call for a 'thicker' understanding of the law that gives regard to the role of individuals within the international criminal justice system. It has zoomed in on the practices of discretion and reflected on the "actions, motivations, consequences, philosophical assumptions, or power relations which inform legal actors and shape legal institutions".⁸⁰ By drawing upon empirical, original interviews with the people who *exercised* or *exercise* prosecutorial discretion, it has sought to break down the common misconception that 'the prosecutor' is a 'super person' and demonstrate, instead, that prosecutorial discretion is exercised by many different people who are each trying to reason about what are appropriate courses of action to pursue. It has shown, by peering through a series of thematic windows related to the most important decisions prosecutors have regarded themselves as making, the importance of role identity in shaping discretion. It has revealed that prosecutors are norm performers, builders, and guardians. Finally, it has argued that a relational understanding of the prosecutorial role can help us understand why decisions are made, constrain or emancipate prosecutors when they made choices, invite awareness of the socialisation processes through which these roles are internalised, and provide a more holistic conception of prosecutorial performance. Finally, if there is one thing that this thesis has aimed to convey, it is this: prosecutors are, like you, humans.

80 Kieran McEvoy, 'Beyond Legalism: Towards a thicker understanding of transitional justice' (2007) 34(4) *Journal of Law and Society* 411, 413.

Summary

This thesis is concerned with identifying what international prosecutors have considered when exercising discretion, and why.

Discretion—or the act of reaching a reasoned conclusion about the appropriate course of action to pursue—is the basis of all legal practice. Law has no life independent of people. The choices people make give the law its form. Yet international criminal law scholarship has largely ignored the role that people play in the the law’s development and implementation. While there have been some recent, notable efforts to shake off the shroud of mystery that surrounds the practice of international criminal justice, scholarship still remains dominated by formalist literature which fails to adequately consider the relationship between law and practice.

This thesis is a rejection of the formalist trend, and highlights how the development and implementation of international criminal justice is entirely contingent upon the practices of individuals. In particular, it focuses on the practice of prosecutorial discretion. International prosecutors have the sole authority to prosecute allegations of what are colloquially called ‘the most serious crimes of concern to the international community’ in international criminal courts. They must decide which situations and cases to pursue; what charges they will lay; whether to negotiate an outcome with an actual or potential defendant; who will be called as a witness; and whether to appeal. Every time a prosecutor makes one of these choices, they contribute to the development and implementation of international criminal justice in their own large or small way. But what have they considered when making these decisions, and why?

This is the first study to draw upon first-hand interviews with current and former senior prosecutors, and other primary data, to answer these questions. It illustrates the variety of functional, normative, and strategic considerations that have influenced choices that international prosecutors

have made. In doing so, it cracks open what has historically been a ‘black box’ and reveals what has actually shaped prosecutorial decision-making. More importantly, given that there is no natural or pre-existing relevance of any consideration to any choice, this thesis argues that these considerations have become relevant by prosecutors adopting roles as moral and procedural norm performers, builders (of law, history, institutions, and power), and guardians (over institutions, people, and concepts).

The link between role identity and discretion is important for several reasons. Most obviously, it helps to explain why decisions are made and invites a more nuanced understanding of decision-making that accommodates the motivations and assumptions that underpin discretion. It also encourages a conscious engagement with whether it is appropriate for prosecutors to be adopting these roles in the first place; and foregrounds the importance of professional socialisation in how decision-making is controlled. On an operational level, an awareness of prosecutorial roles may also be useful in assessing prosecutorial performance by encouraging a more holistic role-based conception of performance that can supplement the paradigmatic goal-based one.

Without a more concerted effort to explore the practice of international criminal justice—or, for that matter, any area of law—scholarship remains destined to keep law and the practice of it at arms length from each other. That ignores the reality that the two are intrinsically linked. This thesis embraces the call for greater attention to be given to how the development and implementation of international criminal justice is shaped by individual practices, and highlights that, ultimately, the law cannot be properly understood without exploring the ways in which people make the decisions that transform it from an abstract set of ideas and notions into practical action.

Samenvatting

Dit proefschrift ontrafelt wat internationale aanklagers overwegen wanneer zij hun *discretion* gebruiken en waarom zij die dingen overwegen.

Het gebruik van *discretion* – ofwel het bereiken van een beredeneerde conclusie over het juiste pad om te volgen – is de basis van de rechtspraktijk. Het recht kan niet los van mensen worden gezien. De keuzes die mensen maken, geven vorm aan het recht. Desondanks heeft de internationale strafrechtsgeleerdheid de rol van mensen in het ontwikkelen en toepassen van het recht grotendeels genegeerd. Er zijn recent wel pogingen gedaan om door het mysterie van de internationale strafrechtpraktijk te breken, maar de rechtsgeleerdheid wordt nog steeds gedomineerd door formalistische literatuur die niet kijkt naar de relatie tussen het recht en de praktijk.

Dit proefschrift verwerpt de formalistische trend en benadrukt hoe de ontwikkeling en toepassing van internationaal strafrecht volledig afhankelijk is van de menselijke praktijk. Meer specifiek richt dit proefschrift zich op het gebruik van *discretion* door aanklagers. Internationaal aanklagers hebben de exclusieve autoriteit om in internationale strafhoven vervolging in te stellen tegen wat men ‘de meest serieuze misdaden die de internationale gemeenschap aangaan’ noemt. Zij bepalen welke zaken ze onderzoeken en vervolgen, welke straf ze eisen, of ze in onderhandeling zullen treden over een schikking met de verdachte, wie zij als getuige oproepen en of ze in hoger beroep zullen gaan. Elke keer dat een internationaal aanklager een van deze keuzes maakt, draagt hij of zij bij aan de ontwikkeling en toepassing van het internationaal strafrecht op zijn of haar eigen manier. Waar welke overwegingen hebben zij bij het maken van deze keuzes in acht genomen en waarom?

Dit is het eerste onderzoek dat gebaseerd is op eigen interviews met huidige en voormalige senior aanklagers en andere primaire data om deze vragen te beantwoorden. Het onderzoek laat de variatie zien in de functionele, normatieve en strategische overwegingen die invloed hebben gehad op de keuzes van internationale aanklagers. Hiermee opent dit onderzoek wat voorheen bekend stond als een 'black box' en onthult het hoe de keuzes van aanklagers tot stand zijn gekomen. Nog belangrijker, gegeven dat geen enkele overweging die ten grondslag ligt aan een keuze van nature of bij voorbaat relevant is, wordt in dit proefschrift beargumenteerd dat de overwegingen juist relevant worden doordat aanklagers rollen aannemen als morele en procedurele normuitdragers, bouwers (van het recht, geschiedenis, instituties en macht) en beschermers (van instituties, mensen en concepten).

De link tussen roldidentiteit en hoe aanklagers hun *discretion* gebruiken is belangrijk om meerdere redenen. De meest voor de hand liggende reden is dat die link helpt om uit te leggen waarom bepaalde keuzes gemaakt worden en uitnodigt tot een genuanceerdere blik op besluitvorming, waarbij ruimte wordt gelaten voor de motivaties en aannames die invloed hebben op hoe aanklagers hun *discretion* gebruiken. Het moedigt mensen ook aan om bewust na te denken over of het gepast is dat aanklagers deze rollen überhaupt aannemen en het benadrukt het belang van professionele socialisatie om besluitvorming onder controle te kunnen houden. In de praktijk kan een bewustzijn van de verschillende rollen die aanklagers uitdragen ook nuttig zijn om hun prestaties te beoordelen, omdat het een meer holistische op rollen gebaseerde kijk op prestaties stimuleert die de paradigmatische op doelen gerichte kijk op prestaties aanvult.

Zonder meer toegewijde pogingen om de praktijk van het internationale strafrecht – of welk rechtsgebied dan ook – te verkennen, is het onvermijdelijk dat de rechtsgeleerdheid het recht en de praktijk op afstand van elkaar blijft houden. Daarmee wordt genegeerd dat de twee intrinsiek aan elkaar verbonden zijn. Dit proefschrift omarmt de oproep om meer aandacht te besteden aan hoe de ontwikkeling en de toepassing van het internationaal strafrecht gevormd wordt door individueel gedrag en benadrukt dat het recht uiteindelijk niet echt begrepen kan worden zonder te onderzoeken op welke manieren mensen de beslissingen nemen waarmee zij het recht transformeren van abstracte ideeën en noties naar handelingen in de praktijk.

Curriculum Vitae

Cale Jordan Davis (Tweed Heads, Australia, 1990) attended Somerset College in Mudgeeraba, Australia, from 1995 to 2007. He holds a Bachelor of Laws (Honours) and a Bachelor of International Relations from Bond University (2012); a Master of Laws (Advanced Studies Programme) from Leiden University (2013); and a Graduate Diploma of Legal Practice from the Australian National University (2015).

He worked as a Judge's Associate to Her Honour Justice Judith Kelly and His Honour Acting Justice Dean Mildren at the Northern Territory Supreme Court, and as a prosecutor with the Northern Territory Director of Public Prosecutions. He has taught at Bond University, Charles Darwin University, Leiden University, and The Hague University of Applied Sciences. He was admitted to the legal profession in Darwin, Australia, in 2015.

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