Prosecutorial discretion in international criminal justice

Davis, C.J.

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.

ers'[15] 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 Reydams and Jed Odermatt, 'Mandates' in Luc Reydams, 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 pursing 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 *P*rosecutor), or 'S*n*' (designating that they were a *S*pecial 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).

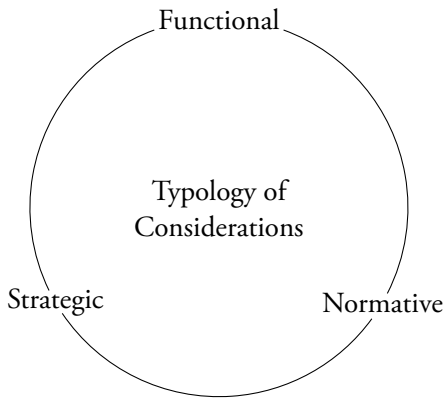

Figure 1.1: A typology of considerations relevant to the exercise of prosecutorial discretion.

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*

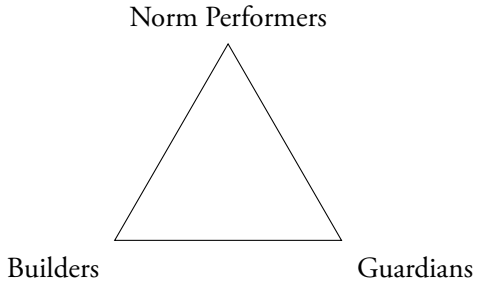

Figure 1.2: A typology of the three prosecutorial roles that are evidenced by decision-making. These are developed further in chapter 8, section 2.

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.