Prosecutorial discretion in international criminal justice

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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 Reydams and Jed Odermatt, 'Mandates' in Luc Reydams, 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 Reydams and Jed Odermatt, 'Mandates' in Luc Reydams, 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-

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.

cutor 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-lineal 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-lineal 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' formulation[39] 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

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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 last[45]) 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 example[63]—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 pursing cases against Laurent Gbagbo and Charles Blé Goudé because the government, under Alassane 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/c17dceaba654ee4ed0cff7bd6c57d719>; *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 co-operate 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-94-1-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 *Karadić* 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 Karadzić 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 Karadzić 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 Nyiramasuhuko 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 pursing.

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 *Karadzić* 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 Karadzić Unsealed' (Press Statement, JL/P.I.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 *Đukić*, 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 P10.

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 pathetic[194] 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, prosectors 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 prosector 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 P10.

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.

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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 respondents[224] 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.

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, bitingly 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 Uganda[229] to the critique that it is a tool of Western neocolonialism[230]).

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-

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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 suđenjima 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 approval[239]—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 prosectors 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 P1.

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 godlike 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]

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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.