Prosecutorial discretion in international criminal justice

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Chapter 4
Selecting Charges

> 'Guys we need to move this case. What evidence do we have? We have evidence against killings?'
> 'No.'
> 'Rapes?'
> 'No.'
> 'What you have?'
> 'Child soldiers.'
> 'Okay, we move with child soldiers'.
>
> Interview with P1

1 Introduction

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

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

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

2 The Legal Framework

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

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

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

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

1st ed, 2016) 73, 91.

2 See the summary compiled by Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Springer, 1st ed, 2017), 20; Claus Kreß, 'Nulla poena nullum crimen sine lege' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2010).

3 *Nullum crimen sine lege praevia*.

4 William Schabas, *Unimaginable Atrocities: Justice, politics, and rights at the war crimes tribunals* (Oxford University Press, 1st ed, 2012), 47-48.

5 *Trial of the Major War Criminals (Motion adopted by all defence counsel)* (19 November 1945) 1 Blue Series 168, 168.

6 *Trial of the Major War Criminals (Judgment)* (1 October 1946) 1 Blue Series 171, 219.

7 *Nullum crimen sine lege stricta*.

8 Susan Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law' in Antonio Cassese, Paola Gaeta, and John Jones (eds), *The Rome Statute of the International Criminal Court: A commentary* (Oxford University Press, 1st ed, 2002) 733, 752.

9 *Nullum crimen sine lege certa*. Thomas Rauter notes that the additional requirement that the law be written down (*nullum crimen sine lege scripta*) does not apply in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Hilmi Mohammad Ahmad Zawati, *Symbolic Judgments or Judging Symbols: Fair labelling and the dilemma of prosecuting gender-based crimes under the statutes of the international criminal tribunals* (PhD thesis, McGill University, 2010), 42.

26 Talita De Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18(5) *International Criminal Law Review* 788, 805.

27 Talita De Souza Dias, 'Recharacterisation of Crimes and the Principle of Fair Labelling in International Criminal Law' (2018) 18(5) *International Criminal Law Review* 788, 805-806.

28 Douglas Guilfoyle, 'Responsibility for Collective Atrocities: Fair labelling and approaches to commission in international criminal law' (2011) 64(1) *Current Legal Problems* 255, 268; *Prosecutor v Duško Tadić (Judgment)* (ICTY, Appeals Chamber, IT-94-1-A, 15 July 1999), [192].

29 Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (International Criminal Court Office of the Prosecutor, June 2014), [72].

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

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

3 Functional Considerations

3.1 Likelihood of arrest

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

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

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

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

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

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

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

33 Interview with P7.

34 Interview with P7.

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

36 Interview with P7.

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

38 Interview with P5.

39 Interview with P5.

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

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

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

> 'Guys we need to move this case. What evidence do we have? We have evidence against killings?'
>
> 'No.'
>
> 'Rapes?'
>
> 'No.'
>
> 'What you have?'
>
> 'Child soldiers.'
>
> 'Okay, we move with child soldiers'.[43]

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

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

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

43 Interview with P1.

44 Interview with P5.

45 Interview with P5.

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

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

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

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

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

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

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

3.2 Increasing the prospects of a guilty verdict

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

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

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

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

51 Interview with P19.

52 Interview with P19.

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

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

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

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

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

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

55 Interview with P20.

56 Interview with P29.

57 Interview with P29.

58 Interview with P29.

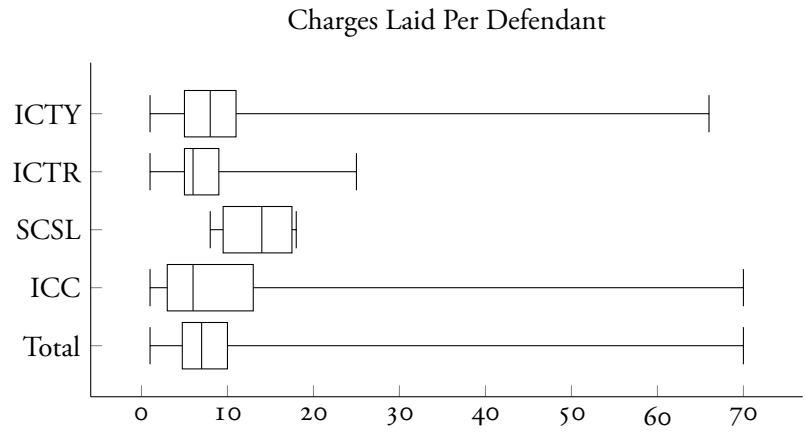

Figure 4.1: The number of charges alleged against individual defendants is generally between 5 and 10. Data from Cale Davis, *International Criminal Law Charging Document Database* (DOI 10.17026/dans-zcc-zdhp, 2021) version 6.

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

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

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

3.3 The likely sentence

A concern related to the desire to increase the prospects of a defendant being found guilty, though unique to from it, is an awareness of the likely sentence the defendant will receive in the event that they are found guilty. One prosecutor questioned whether it was worth their while to prosecute additional charges if the defendant was going to nevertheless get a "fair sentence".[60] They explained that they were "not at all favour the kitchen sink approach of charging every single possible charge you can" in circumstances where more serious conduct also involved "relatively mild mistreatment", and wondered aloud whether "it really necessary—if you're charging the person with murder, and that's … your prime case—to charge every little possible act you could? I don't think so".[61] 'Necessary', they explained, referred to justice, process, and the victims.

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

60 Interview with P20.

61 Interview with P20.

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

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

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

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

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

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

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

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

4 Normative Considerations

4.1 Advancing the law

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

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

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

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

The historical context in which international prosecutors exercise or exercised the charging discretion sheds some light on why some prosecutors have been motivated by this consideration. One ICTY prosecutor correctly observed that "[a]part from Nuremberg, … and Tokyo for that matter, there had been no real attempt to develop the international criminal law" prior to the creation of the ICTY in 1993.[69] They observed that before that happened, international criminal law had been primarily an academic exercise with little means through which it could be judicially enforced.[70] This meant that when the ICTY and the ICTR became operational in the early '90s, prosecutors were confronted with a situation in which they could now make the 'real attempt' at padding out the body of law that had been largely neglected since the late 1940s.

Given the lack of jurisprudence, some prosecutors enthusiastically jumped at the opportunity to start work on building a body of law. One SCSL prosecutor, noting that international law contains many rules that have never been enforced, noted "you really want to build the law and you want to use the opportunity to do it".[71] Another reflected that the undeveloped state of international humanitarian law meant that its development "needed to be pursued".[72] This desire to advance the law had practical consequences for how the charging discretion was exercised. An ICTY prosecutor reflected, for example, that Deputy Prosecutor Graham Blewitt introduced a "policy" for all investigators, and "in particular, the Senior Trial Attorneys", under which "they should not be afraid to advance legal arguments and legal theories in prosecuting the cases".[73]

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

69 Interview with P4.
70 Interview with P4.
71 Interview with P9.
72 Interview with P4.
73 Interview with P4.

sexual violence in armed conflict. Patricia Sellers and Nancy Patterson, for example, led the way with these developments by notably seeking permission from the Prosecutor and the Deputy Prosecutor to charge rape as torture.[74] They were by no means alone in wanting to prove the criminality of sexual assault, and the work of prosecutors in getting these charges to be accepted as crimes is one of the lasting and laudable legacies of the Tribunal.[75] "I think it was probably always recognised that plundering and raping and pillaging was part of the process of conquering the enemy", remarked one prosecutor, adding that "it was nothing that was previously prosecuted, and the Tribunal had been urged to examine this aspect of the conflict, and of course we did that".[76] It was the "dearth" of jurisprudence regarding this category of crime that allowed prosecutors to be creative in the formulation of these charges, which saw sexual violence be charged as "cruel treatment, torture, persecution, enslavement, and genocide".[77] These charges led to the "rapid development of sexual violence jurisprudence".[78] The focus on developing the law through the forward-thinking charging of sexual violence left a positive legacy for ICC prosecutors, who themselves have made a policy decision to focus on charging sexual and gender-based violence as crimes *per se*.[79]

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

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

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

76 Interview with P4.

77 Michelle Jarvis and Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 1st ed, 2016) 33, 58.

78 Michelle Jarvis and Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases' in Serge Brammertz and Michelle Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, 1st ed, 2016) 33, 58.

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

ble populations".[80] The charges laid against Bosco Ntaganda, they pointed out, were an attempt to prove that it was a crime for a member of an armed group (in the case, the *Forces Patriotiques pour la Libération du Congo*) to commit war crimes (specifically rape and sexual slavery) against members of that same armed group. "[P]eople think of the law of armed conflict as essentially focussed on the so-called enemy population or the opponents in the conflict", the prosecutor explained, "[b]ut we said no… children don't lose those protections simply because they'd been conscripted into armed forces".[81] The decision to press this point ultimately led to Appeals Chamber judges stating that "there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law".[82] While the Appeals Chamber's judges have been criticised for going too far in claiming that it is irrelevant whether the victims of sexual violence were *hors de combat*,[83] the judgment has also been held by Patricia Sellers as yielding a "steadily durable paved road of redress" and "[illuminating] the extent of protection afforded to children".[84] Yvonne McDermott wrote that the Trial Chamber judges' decision (which the Appeals Chamber judges agreed with) was "clearly founded in a desire to offer the greatest level of protection to victims of sexual violence in armed conflict, regardless of their status".[85]

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

80 Interview with P14.

81 Interview with P14.

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

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

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

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

Stanislav Galić with unlawfully inflicting terror upon civilians was motivated by the idea that "there was an international crime of terror and that it came within the jurisdiction of ICTY", despite there being no on-point jurisprudence to clearly justify this position.[86] This "discretionary additional charge" was selected because, according to one prosecutor, "we thought it was important to nail [the infliction of terror upon civilians as] an express crime", and added that they saw this as a "a responsible exercise of our power".[87] Daniela Kravetz wrote that the recognition of terrorising the civilian population as an express crime would "transcend the sphere of competence of the ICTY" and affect the work of other tribunals, both international and domestic, in prosecuting acts of terror against civilians.[88] For their part, SCSL prosecutors alleged in *Prosecutor v Alex Tamba Brima and Santigie Borbor Kanu* that forced marriage constituted an 'other inhuman act' despite the fact that this was "a crime not known to international criminal law" at the time.[89] While the Trial Chamber judges rejected this charge on the basis that it was not distinct from the existing charge of sexual slavery,[90] it was ultimately upheld by the Appeals Chamber judges as a unique crime.[91] The decision to charge the crime of forced marriage arguably contributed to a greater awareness of the gender dimensions of conflict and will help to ensure the successful prosecution of this conduct in the future.[92]

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

86 Interview with P19.

87 Interview with P19.

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

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

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

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

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

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

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

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

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

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

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

94 Interview with P4.
95 Interview with P4.
96 Interview with P4.
97 Interview with P15.
98 Halbe Zijlstra, 'Speech by Minister Zijlstra (Foreign Affairs) at the closing of the International Criminal Tribunal for the Former Yugoslavia (ICTY)' (Speech delivered at the ICTY Closing Ceremony, The Hague, 21 December 2017).

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

Another constraint was that any development of the law needed to respect prior judgments: prosecutors should not stray too far from what they, and the judges, would consider reasonable interpretations of the law. Even though Blewitt had introduced the policy that Senior Trial Attorneys should not be afraid to advance "novel" legal arguments, this was on the *proviso* that "they had a fall-back position of a more traditional position".[99] Further, any argument that was advanced to develop the law in new directions needed to be reasonable. "[W]e were going to be asking the judges to make rulings that were unique", one senior ICTY prosecutor noted, "I certainly felt the obligation to ensure that what we were putting up to the judges was sound and would enable them to bring rulings that would … withstand international scrutiny and withstand the test of time".[100] Another prosecutor explained that "it was fine for us to stretch the envelope, but there's no ruddy way in which we should be ripping the edges off".[101] They described that this philosophy affected the charges laid against Duško Tadić, explaining that there were some members within the Office who wanted to argue that grave breaches of the *Geneva Conventions* applied to non-international armed conflicts. The prosecutor described that, in their view, this was "just not so" and that the only way those arguments would be advanced was going to be "over [their] dead body".[102] One prosecutor observed that they "had the responsibility of making sure that the judgments that came out of the trial chambers, but more particularly out of the Appeals Chamber, would withstand international scrutiny" and saw it as a "major responsibility to put up good, sound legal arguments".[103] Prosecutors played a role in acting as guardians of the law's integrity by ensuring that international criminal law developed as a coherent, consistent, and reasoned body of judicial decisions.

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

99 Interview with P4.
100 Interview with P4.
101 Interview with P13.
102 Interview with P13.
103 Interview with P4.

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

5 Strategic Considerations

5.1 Judicial criticisms

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

104 Interview with P24.

105 Interview with P24.

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

work together, often for long periods of time, and sometimes across different courts.[107] Within the courtroom environment, social dynamics manifest in different ways, such as by affecting the assessment of evidence. Laurie Levenson observed that while courts are sometimes seen as "a controlled laboratory in which the science of the law is performed", "this sanitised venue for trials is a fantasy".[108] In her summary of the voluminous work done (particularly in the US) on the relationship between jurors' assessments of evidence and the appearance of defendants, she noted that a defendant's courtroom demeanour "can have potentially serious ramifications on the outcome of a case".[109] How lawyers behave in court can also affect jury verdicts. Victor Gold observed in 1987 that something of a cottage industry had sprung up in the US to teach trial lawyers about 'psychological courtroom techniques' to sway jurors' opinions by controlling everything from a witness's dress to unspoken premises during questioning.[110] Though international criminal judges—as generally, but bizarrely not always, trained judges or lawyers[111]—might be more immune to these social influences than lay jurors, it would be naïve to think that they account for nothing. On the other side of the coin, social dynamics also affect lawyers' experiences in court. In a professional publication produced by the American Bar Association, one practitioner offered his readers tips on how lawyers could overcome perceived instances of judicial bias against 'out of town' advocates.[112] In some jurisdictions, it is alarmingly common to hear stories of judges bullying counsel or making snide or unsettling remarks about their

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

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

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

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

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

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

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

appearance.[113]

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

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

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

114 Interview with P20.

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

116 Interview with P27.

117 Interview with P20.

indictment was amended to exclude these two charges and include an additional count of genocide and a count of attacking civilians. One prosecutor reflected that these changes were made primarily to ensure a manageable trial, but then added that "the OTP had been criticised by the judges in the past" and they "had, in a number of other cases, asked the OTP to reduce by a certain percentage the indictments".[118] When Alan Tieger for the Prosecution explained that the amended indictment would ensure "the most heightened specificity" and allow the most efficient presentation of the case "in light of both the evolving jurisprudence, evolving procedures, and the adjudicated facts",[119] this appears to be attributable to both prosecutors' and the judges' desires to have an efficiently-presented, representative, and manageable case.

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

118 Interview with P5.

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

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

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

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

5.2 Public expectations

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

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

122 Interview with P11.

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

5.3 Closing the tribunal

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

6 Conclusion

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

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

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

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

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

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

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

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