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Prosecutorial discretion in international criminal justice

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Chapter 6
Selecting Witnesses

People don't tell the truth.
They tell a combination of things.

Interview with Pii

1 Introduction

Witnesses are the lifeblood of a criminal trial. They are the primary mechanism through which prosecutors attempt to prove beyond reasonable doubt that a defendant committed the crimes they have been charged with. Their evidence is broadcast on the websites of the courts. People gather in affected communities thousands of kilometres away to watch their evidence via satellite in makeshift viewing rooms. Judges and defence counsel digest the words they say and how they say them, balancing the cases of both parties to determine whether prosecutors have crossed the threshold. Ultimately, cases live and die by the evidence witnesses give. Moreover, their live performance is "essential to legal procedure".[1] Yet how they come to be in a witness box is a mystery.

Despite the experience of witnesses at international criminal courts having attracted significant scholarly attention,[2] the question of how witnesses

1 Philip Auslander, *Liveness: Performance in a mediatised culture* (Routledge, 1st ed, 1999), 133.

2 See, for example, Rebecca Horn, Simon Charters, and Saleem Vahidy, 'Testifying in an International War Crimes Tribunal: The Experience of Witnesses in the Special Court for Sierra Leone' (2009) 3(1) *International Journal of Transitional Justice* 135; Kimi King and James Meernik, *The Witness Experience: Testimony at the ICTY and its*

come to be before a court in the first place has gone by largely unnoticed. When it has been raised, it has largely ignored the role of prosecutorial decision-making. Eric Stover, for instance, asked "[w]hat motivated these men and women to testify?",[3] and did not address the question of how they came to be asked in the first place. Kimi King and James Meernik similarly pondered "[w]hat paths and pain take the witnesses from the war and its aftermath to the rarified courtrooms of an international tribunal?", and touched on the issue of prosecutorial discretion merely in their (undoubtedly accurate) concession that witnesses testify for a variety of reasons, "most especially because they are asked to".[4] These approaches focus too heavily on the questions that arise *after* potential witness have been chosen and approached by the prosecution, and not sufficiently on the questions prosecutors ask themselves before requesting a witness attend court to give evidence.

The purpose of this chapter is to describe the factors prosecutors have considered in exercising their discretion regarding which witnesses to call, and how these decisions are underpinned by different roles that international prosecutors adopt. To achieve this, this chapter is structured as follows. First, section 2 explains that there is no legal framework governing the selection of witnesses in international criminal justice. The decision to select witnesses is therefore unique in the context of the decisions discussed in this thesis, because it is the only one on which the law is completely silent. Second, section 3 provides context to the decision to select witnesses by presenting a summary of how many witnesses are generally called by prosecutors in international criminal trials. This chapter then turns to describing the factors that have informed prosecutors when they have been deciding which witnesses to call. It addresses the functional considerations of evidential factors and the risk of trauma to witnesses in section 4. The normative consideration of the importance of public evidence is then discussed in section 5. Finally, the strategic consideration of the importance of emotions and storytelling ability is discussed in section 6. This chapter concludes by reflecting on how these factors reflect that prosecutors have

impact (Cambridge University Press, 1st ed, 2017); and Eric Stover, *The Witnesses: War crimes and the promise of justice in The Hague* (University of Pennsylvania Press, 1st ed, 2005).

3 Eric Stover, *The Witnesses: War crimes and the promise of justice in The Hague* (University of Pennsylvania Press, 1st ed, 2005), 3.

4 Kimi King and James Meernik, *The Witness Experience: Testimony at the ICTY and its impact* (Cambridge University Press, 1st ed, 2017), 1 and 165.

assumed the role of norm performers, builders, and guardians.

2 The Legal Framework

The legal framework governing the selection of prosecution witnesses can be summarised quite simply: there is not one. Prosecutors are free to call whoever they like as witnesses, and there is nothing in any statute, any rules of procedure, any case law, or any guidelines that oblige prosecutors to consider or prevent them from considering any factor whatsoever when deciding who to put in the witness box.

This is not to say, however, that there are not rules related to a witness's *testimony*. There are. Witness testimony is evidence in the same way that exhibits are. The rules of evidence in international criminal law are exceptionally limited, with the general rule simply being that any evidence should be relevant. This 'liberal' rule sets a low threshold that simply requires the evidence to have a connection to an allegation against the accused and that it must be capable of affecting the assessment of a fact in issue.[5] The question of what weight should be afforded to that evidence is therefore the more significant issue, and this is assessed through the witness's credibility. For this, judges have developed a raft of criteria to assess a witness's competence, quality of testimony, and objectivity.[6] All these rules do, however, is specify when evidence can be *admitted* and how that evidence should be *assessed*. They do not direct a prosecutor with regard to who they can *call*.

The legal framework therefore provides no unequivocal indication of what has influenced prosecutors when they are deciding who to call as witnesses. While assumptions might be made about what has influenced prosecutors on the basis of the rules regarding the admissibility and assessment of evidence, these are not capable of providing an unequivocal insight into the underlying motivations and assumptions that have informed prosecutorial decision-making. The remainder of this chapter provides this insight.

5 Gideon Boas et al, *International Criminal Law Practitioner Library* (Cambridge University Press, 1st ed, 2011) vol 3, 338-339.

6 Gabrielė Chlevickaitė, Barbora Holá, and Catrien Bijleveld, 'Judicial Witness Assessments at the ICTY, ICTR, and ICC' (2020) 18(1) *Journal of International Criminal Justice* 185, 192.

3 Witness Statistics

The types of crimes that attract the focus of international criminal prosecutors are, by and large, going to require many witnesses to prove. To put this in perspective, the average number of witnesses called by the prosecution in a trial before the ICTY was 80.1; at the ICTR 25.9; at the SCSL 79.8; and at the ICC 45.8.[7] The most prosecution witnesses ever called in an international criminal proceeding was in *Prosecutor v Radoslav Brđanin*, where the Trial Chamber heard from a massive 202 witnesses on an indictment that was only slightly larger than normal, with 12 counts.[8] At the other end of the scale, prosecutors presented only 8 witnesses against Anto Furundžija in a trial that lasted roughly two weeks.[9]

Table 6.1 shows a statistical overview of the number of witnesses called by the prosecution in each of the four courts within the scope of this study. The same data is presented visually, with box plots, in figure 6.1. The lines at each end of the box plots represent the highest and lowest 25% of witness numbers in trials (the 'scores'). The boxes in the middle are the middle 50%, with the vertical lines dividing the boxes in two as the median scores (the 'middle-most' numbers of witnesses once the number of witnesses per trial are arranged in order from lowest to highest). Each half of each box therefore represents another 25% of scores. As such, the box plots depict the distribution of prosecution witnesses across all trials. They show areas of consistency, but also how far the number of prosecution witnesses in any given trial is likely to be from the median (based on the range of the top 50% and bottom 50% of scores).

There are several observations that can be made about the number of prosecution witnesses called by prosecutors displayed in table 6.1 and fig-

7 Cale Davis, *International Criminal Law Prosecution Witness Statistics* (DOI 10.17026/dans-2z4-2d3b, 2019) version 2 <https://easy.dans.knaw.nl/ui/datasets/id/easy-dataset:213819>. This dataset is the source of all figures contained in this section. These figures are only for trials involving the core international crimes of crimes against humanity, war crimes, and genocide: contempt charges are excluded. They also do not include those trials that were aborted after commencement for reasons unrelated to evidence (like *Milošević*); nor retrials.

8 *Prosecutor v Radoslav Brđanin (Judgment)* (ICTY, Trial Chamber, IT-99-36-T, 1 September 2004). 102 witnesses were heard in person, the rest were tendered under Rule 98*bis* (see [1180]). For information regarding the average number of charges alleged against individual accused, see figure 4.1 on page 121.

9 *Prosecutor v Anto Furundžija (Judgment)* (ICTY, Trial Chamber, ICTY-95-17/1-T, 10 December 1998). In the initial round of evidence the Prosecution called six witnesses, and two experts were called after the trial was reopened.

Court	Mean	Median	Mode	Q1	Q3	Min	Max	*N*
ICTY	80.1	64.0	81.0	45.0	104.0	8.0	202.0	41
ICTR	25.9	20.0	24.0	17.0	26.5	10.0	82.0	43
SCSL	79.8	80.0	-	71.0	88.8	59.0	100.0	4
ICC	45.8	38.0	-	33.3	50.5	25.0	82.0	4
All	53.3	38.5	24.0	20.8	81.0	8.0	202.0	92

Table 6.1: Summary statistics describing the number of prosecution witnesses called at trial at each of the four courts within the scope of this study. Note that the SCSL and the ICC have only run four trials each to conclusion. While the statistics for the ICTY, ICTR, and SCSL are accurate (as these courts have now closed), the ongoing practice of the ICC may prove that these statistics are unrepresentative as the number of observations increases over time. This same data is presented visually in Figure 6.1. Cale Davis *International Criminal Law Prosecution Witness Statistics* (DOI 10.17026/dans-2z4-2d3b, 2019) version 2.

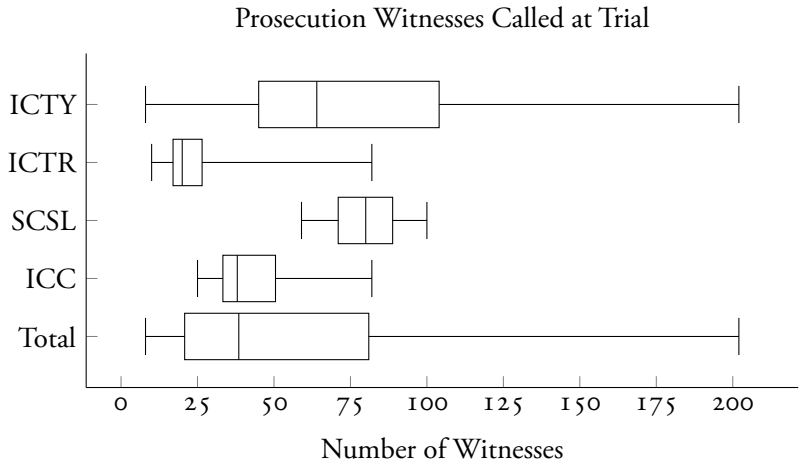

Figure 6.1: The number of prosecution witnesses called in each trial, represented with box plots. Note the variation between the minimum and maximum numbers at the ICTY and the ICTR in contrast to the upper and lower quartiles. The statistics on which these plots are based are contained in Table 6.1.

ure 6.1. First, ICTY prosecutors were the least consistent when it came to the number of prosecution witnesses called in each trial. This can be seen by the data being spread over such a wide range. Second, at all courts except the SCSL, prosecutors had the tendency to call *more* witnesses than *fewer* witnesses than the median number in trials. This is demonstrated by the ranges from the median points to the maximum points being greater than the ranges from the median points to the minimum points. At the ICTR, for example, the top 50% of prosecution witness numbers per trial fell within a range of 62 witnesses (the lowest 50% fell within a range of only 10 witnesses). At the ICTY, the top 50% of prosecution witness numbers per trial fell within a range of 138 witnesses (and the lowest 50% was in a range of 56 witnesses). ICTR prosecutors were therefore *more* likely to call more witnesses than the median than ICTY prosecutors. Further, the *maximum* number of prosecution witnesses called by these prosecutors extends far beyond the upper limit of the interquartile range for each court. In other words, 25% of trials at the ICTY, ICTR, and ICC saw prosecution witness numbers far exceed the range experienced by the middle 50%. Third, the SCSL displays the most normal distribution, where the median point sits equidistant from the lowest score and the highest score. Nevertheless, the number of trials conducted by SCSL prosecutors was far fewer than that conducted by their colleagues at the ICTY or the ICTR. Fourth, there appears to be no consistency across any court with respect to the number of prosecution witnesses to be called in any given trial.

But why have prosecutors called witnesses in the first place? And, apart from the obvious reality that each case is unique, is there anything else that accounts for the diverse range of witness numbers across trials? The following three sections peer through four thematic windows to understand the motivations and assumptions that have informed prosecutorial decision-making.

4 Functional Considerations

4.1 Evidential factors

The first set of considerations that prosecutors have considered relevant to identifying which witnesses to call concern the *evidence* that a potential witness is capable of giving. "[F]irst of all, you have to prove your case",

remarked one prosecutor.[10] They emphasised that the primary purpose of a criminal trial is to prove the guilt of a defendant, "[s]o", they continued, "you have to have witnesses that you believe will present credible evidence to prove your case".[11]

The assessment of whether or not a potential witness is capable of giving credible and reliable evidence is not one that can be easily reduced to a formulaic checklist. It is a matter of professional judgement based on experience. Further, Gabrielė Chlevickaitė, Barbora Holá, and Catrien Bijleveld demonstrated how the factors relevant to assessing competence, quality of evidence, and witness objectivity are in a steady state of ongoing development by judges.[12]

Prosecutors, however, have stressed two points that are apparently particularly important. They are whether the statements the potential witness has provided are internally consistent, and whether they are consistent with evidence given by other witnesses.[13] In addition, the prosecutor's "personal reaction… to body language" also plays an important role.[14] One prosecutor described how it was important to assess not just the words a witness was using to describe what they experienced, but also how they said them. The prosecutor described that a witness's evidence may be "easy to see and it flows, and it's like 'that all makes sense', and then… you ask them about a certain individual, or a certain event, or a certain location, and then suddenly there's a change in demeanour, in speed, in… all kinds of subtle little things to deal with; inter-human communication. And you say, 'oh, what's with that?' ".[15]

While a witness may appear capable of providing evidence that appears credible furthers the prosecution's case, prosecutors also need to be satisfied that this evidence can be relied upon as being a truthful account of the witness's experiences and be seen as such. As bluntly stated by one prosecutor, "I've certainly never called a witness… who I was so concerned about having made up evidence. I mean, I wouldn't do that to be honest".[16] Another prosecutor termed the assessment of a potential witness's credibil-

10 Interview with P12.

11 Interview with P12.

12 Gabrielė Chlevickaitė, Barbora Holá, and Catrien Bijleveld, 'Judicial Witness Assessments at the ICTY, ICTR, and ICC' (2020) 18(1) *Journal of International Criminal Justice* 185, generally, however a visual overview is provided at 192.

13 Interview with P17; Interview with P23; Interview with P25.

14 Interview with P17.

15 Interview with P17.

16 Interview with P25.

ity as a "major consideration", reflecting that they saw it as a prosecutor's "duty… to be essentially satisfied as to the credibility of the witnesses that they call".[17] To illustrate the point, the same prosecutor described that in one ICTY prosecution they had planned to call a member of UNPROFOR to give evidence. However, in conference with the witness immediately prior to calling them, the witness said things "that led me to think that he shouldn't be called by the Prosecution".[18] The prosecutor remarked that some members of UNPROFOR "saw their involvement in peacekeeping forces as an opportunity to make money by selling fuel to some of the forces that were involved in the armed conflict, and food and so on. And there was a credible issue of how dependable some of these people were".[19]

To complicate matters further, not only do credibility and reliability come in shades of grey, but also vary depending on what the witness is giving evidence about. Herein lies another problem that prosecutors have confronted: *what* evidence needs to be assessed by the prosecution as being reliable? Is it all of the witness's evidence, or just those parts related to facts in issue? "[T]here's quite a cultural difference between certainly me and American lawyers, and quite possibly English lawyers", remarked one prosecutor.[20] They continued:

> American lawyers tend to, or seemed to me to say, 'only call a witness if each and every word in his witness statement can be relied on'. And we would say 'well, that's silly, because witnesses often, most people who are caught up in terrible circumstances like these, may lie in part and tell the truth in part. And you should be able to trust your judges to work it out. You don't have to present only those people whose every single word can be accepted'.[21]

The prosecutor stated that they would often call witnesses and be prepared to have the judges decide that in some parts their evidence was unreliable, while on the central issue they were reliable. "My American junior colleagues would sort of suck on their teeth and I'd tell them grow up. People don't tell the truth. They tell a combination of things", they concluded.[22]

17 Interview with P19.
18 Interview with P19.
19 Interview with P19.
20 Interview with P11.
21 Interview with P11.
22 Interview with P11.

Sometimes, though, it is only in the witness box that the cracks in a witness's reliability and credibility begin to appear; at which point the opportunity to prevent the damage has well and truly passed. There have been several notable instances of where the prosecution has called witnesses where their conduct in court has cast doubts over whether they were witnesses of truth. In the ICC Prosecutor's first trial, for example, Witness DRC-OTP-WWWW-0298 was the first witness called to testify against Thomas Lubanga. The witness claimed that during the fifth grade of school, after the conflict in the DRC broke out, several students were recruited and taken to training camps. In response to the question "[a]mongst these school people who were taken away, were you one of them?", the witness responded "Yes, I was one of those who were taken to the camps".[23] After a lunch break, in which the witness received advice regarding the privilege against self-incrimination, the witness gave evidence that appeared to conflict with their evidence before the break. Judge Adrian Fulford asked the witness:

> This morning you told the Court about a time when you were going home from school when some soldiers from the UPC came and took you and your friends away. Was that story from you true or false?

To which the witness replied:

> That's not true.[24]

The witness's retraction raised concerns that intermediaries had improperly interfered with the witness's evidence. Several other witnesses also appeared to have been affected by the same problems, spurring on a controversial and embarrassing series of events in which prosecutors were ordered to disclose the names and details of intermediaries to the Defence. Reflecting on the problems with witness evidence in *Lubanga*, one ICTR prosecutor observed that the first assessment of witness credibility should be "taken very carefully".[25]

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23 *Prosecutor v Thomas Lubanga Dyilo (Transcript of 28 January 2009)* (ICC, Trial Chamber, ICC-01/04-01/06-T-110-Red3-ENG, 28 January 2009), 28. Between these two quotes there was a short exchange that clarified the question.

24 *Prosecutor v Thomas Lubanga Dyilo (Transcript of 28 January 2009)* (ICC, Trial Chamber, ICC-01/04-01/06-T-110-Red3-ENG, 28 January 2009), 41. One journalist at the time wrote that the "mishaps marked a shambolic opening day's testimony": David Charter, 'Chaos reigns at International Criminal Court trial of Thomas Lubanga', *The Times* (Online), 29 January 2009 <https://www.thetimes.co.uk/article/chaos-reigns-at-international-criminal-court-trial-of-thomas-lubanga-6c6lb376666>.

25 Interview with P27.

The risks of witnesses giving unreliable evidence appear more pronounced with respect to so-called 'insider' witnesses. While prosecutors have called these people "essential"[26] and "valuable", bringing "incontrovertible benefits" to the prosecution's case,[27] one prosecutor described that they needed to be "mindful of the risk that… one of these witnesses could kind of blow up".[28] In this light, one prosecutor described that the "most difficult decision" regarding witness selection was whether to call an insider.[29]

The risk of insider witnesses 'blowing up' is by no means illusory. Some witnesses may, for example, deliberately attempt to derail the prosecution case. One prosecutor recalled how a prosecutor and an investigator found Milorad Dodik to be "extremely friendly during the interview" and "[e]xtremely helpful", and they assessed that he "had quite good information about what had been happening".[30] Despite the fact Dodik had "spent his whole political career… [saying] how awful the Tribunal is and all the rest of it", prosecutors decided to call him as a witness in *Brđanin*—a decision the prosecutor described as "an enormous error".[31] "[I]t was a disaster", they said, "I mean, he just went back on everything. And [he made] all sorts of accusations about… [how the Office] misled him and all sorts of stuff like that. You know", the prosecutor continued, "it taught me a lesson… [about] these sorts of witnesses".[32]

The lessons from both *Lubanga* and *Brđanin* concern the importance of thoroughly vetting witnesses—those who are insiders and those who are not—prior to deciding whether to call them to ensure that they do not turn; the evidence they do give will be reliable and credible; and knowing what evidence will not be so as not to lead it. In the *Milošević* trial, for example, prosecutors decided to call Dragan Vasiljković as a witness. Vasiljković was an important witness for the Prosecution, and the one through which the Kula Camp video was entered into evidence. This video famously showed

26 Stephen Rapp, 'The Challenge of Choice in the Investigation and Prosecution of International Crimes in Post-Conflict Sierra Leone' in Charles Chernor Jalloh, *The Sierra Leone Special Court and its Legacy: The impact for Africa and international criminal law* (Cambridge University Press, 2014) 23, 34.

27 Carla del Ponte, 'Investigation and Prosecution of Large-scale Crimes at the International Level: The experience of the ICTY' (2006) 4(3) *Journal of International Criminal Justice* 539, 544.

28 Interview with P8.

29 Interview with P23.

30 Interview with P23.

31 Interview with P23.

32 Interview with P23.

Milošević at an event marking the anniversary of the formation of the Red Beret unit, and "showed knowledge by Milošević of what had been done in his name, but more importantly was what it showed of his criminal mind".[33] "I believe that when I call a witness, that has to be a witness who I have vetted", one of the *Milošević* prosecutors said, adding that "I'm not able just to take a witness who sounds favourable to me and… just throw them up on the stand… I really see that a prosecutor has the obligation to vet that evidence".[34] With Vasiljković, they explained, "we worked really hard to vet all of his evidence".[35] While his evidence regarding Croatia was strong, the prosecution team had concerns about whether he would be truthful with respect to events in Bosnia as they had information he had been complicit in crimes there.[36] At trial, prosecutors put their concerns on record. Immediately prior to finalising his examination-in-chief, Senior Trial Attorney Dermot Groome told the trial judges that there was material "which, if believed, would be in direct conflict with [Vasiljković's] testimony as to events after the period with which he's already testified". Therefore, Groome said, "in light of my obligations as an attorney and a prosecutor, [I] will conclude my examination at this point in time".[37] Groome's decision not to lead evidence regarding Bosnia from Vasiljković demonstrates the role of the prosecution in carefully assessing the credibility and reliability of a potential witness's evidence, and exercising professional judgement regarding whether to lead it.

Nevertheless, vetting does not ensure a witness will give reliable evidence. Some witnesses may become unfavourable for other reasons that vetting would not have revealed. For example, on the second day of his evidence, Vasiljković almost "irreparably discredited himself in court".[38] His evidence the day previously started off as "very powerful".[39] However, af-

33 Geoffrey Nice, 'Statement' (Speech delivered at Panel on the Legacy of Milosevic Trial, Helsinki Committee for Human Rights in Serbia, 31 March 2007) <http://www.helsinki.org.rs/doc/GN_bgdspeech.doc>, 13, quoted in Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina* (Cambridge University Press, 1st ed, 2010), 61.

34 Interview with P8.

35 Interview with P8.

36 Interview with P8.

37 *Prosecutor v Slobodan Milošević (Transcript of 20 February 2003)* (ICTY, Trial Chamber, IT-02-54, 20 February 2003), 16565.

38 Nevenka Tromp, *Prosecuting Slobodan Milošević: The unfinished trial* (Routledge, 1st ed, 2016), 131.

39 Interview with P8. Tromp regarded the evidence as "rehearsed": Nevenka Tromp,

ter an overnight adjournment, he became an "agitated and short tempered" hostile witness.[40] "[H]e completely flipped and tried to damage our case", described a prosecutor, speculating that "[i]t seems that some of Milošević's cronies got to him overnight".[41]

The extent of an insider witness's alleged or suspected criminal conduct has also been considered a relevant factor in the determination of whether to call them, again acting as a qualifying factor. One prosecutor described that the decision of whether to call as witnesses those people who were alleged to have committed offences was "really always the difficult decision to make", suggesting that the extent of their alleged offending made it "really just unconscionable to deal with them".[42] In July 1995, for example, OTP investigators became aware of a video tape showing the execution of several civilians at Trnovo by members the Skorpions. After eight years of trying to locate the video, ICTY investigator Tore Soldal received information from the Sarajevo Field Office that they had been approached by an intermediary claiming to be in contact with the owner of a copy of the tape.[43] On 9 September 2004, Soldal and Groome met with the intermediary and viewed the tape and confirmed that it was the footage they were looking for: however the intermediary informed them that the owner of the tape—who would become known as protected witness 'B-345' (and, perhaps, 'JF-024')—wanted €200,000 for a copy.[44] Moreover, B-345 was also a

Prosecuting Slobodan Milošević: The unfinished trial (Routledge, 1st ed, 2016), 131.

40 Nevenka Tromp, *Prosecuting Slobodan Milošević: The unfinished trial* (Routledge, 1st ed, 2016), 131. See *Prosecutor v Slobodan Milošević (Transcript of 20 February 2003)* (ICTY, Trial Chamber, IT-02-54-T, 20 February 2003), 16560.

41 Interview with P8.

42 Interview with P8.

43 *Prosecutor v Zdravko Tolimir (Declaration by OTP Investigator Tore Soldal regarding the video containing the killing of 6 Muslim men from Srebrenica by the Skorpions paramilitary unit at Godinjske Bare (Trnovo) – V000-5095-V000-5095)* (ICTY, Trial Chamber, IT-05-88/2, 23 September 2010), [6].

44 *Prosecutor v Zdravko Tolimir (Declaration by OTP Investigator Tore Soldal regarding the video containing the killing of 6 Muslim men from Srebrenica by the Skorpions paramilitary unit at Godinjske Bare (Trnovo) – V000-5095-V000-5095)* (ICTY, Trial Chamber, IT-05-88/2, 23 September 2010), [7], [17]. For the proposition that B-345 is also JF-024, see *Prosecutor v Jovica Stanišić and Franko Simatović (Transcript of 5 May 2011)* (ICTY, Trial Chamber, IT-03-69-T, 5 May 2011), 11472 (line 12), which links JF-024 to the video. JF-024 was granted protective measures in response to threats his family had received in retaliation for his provision of evidence to the ICTY: *Prosecutor v Jovica Stanišić and Franko Simatović (Transcript of 11 July 2011)* (ICTY, Trial Chamber, IT-03-69-T, 11 July 2011), 12619-12620. The implication may be that B-345 and JF-024 are the person who provided the video to the OTP.

member of the Skorpions. A few days later on 15 September, Soldal met with B-345 in person, who agreed to provide the video without payment but with the assurance he and his family would be protected.[45] One of the challenges facing prosecutors was how to carefully assess whether they could work with the Skorpions member.[46] After meeting with them in "secret meetings at another city", prosecutors came to the opinion that the individual was a person with whom they could "appropriately deal with" and protect.[47] While the video was not admitted into evidence in the *Milošević* trial, the individual who provided it later "testified in a number of trials".[48] Reflecting on being confronted with the choice to call a witness who was suspected of committing crimes, the prosecutor remarked that "each of those is a real difficult decision".[49]

Prosecutors will not call *all* available witnesses who can provide reliable and credible evidence. There are several qualifying factors that mean they cannot, the first of these being that judges have the power to effectively override prosecutorial decisions. The *Rules* of the ICTY, ICTR, and SCSL all contained a provision that enabled the bench to order the prosecution restrict the number of witnesses they would present.[50] The *Regulations* of the ICC similarly contain such a provision.[51] These provisions were used, for example, in the *Milošević* trials where prosecutors were ordered to reduce their witness list on the Kosovo indictment from 110 people to 90; and on the Croatia and Bosnia indictment to 177 from the proposed 275.[52]

45 *Prosecutor v Zdravko Tolimir (Declaration by OTP Investigator Tore Soldal regarding the video containing the killing of 6 Muslim men from Srebrenica by the Skorpions paramilitary unit at Godinjske Bare (Trnovo) – V000-5095-V000-5095)* (ICTY, Trial Chamber, IT-05-88/2, 23 September 2010), [9].

46 Interview with P8.

47 Interview with P8.

48 Interview with P8. At around the same time, the ICTY OTP also received a copy of the same video from human rights campaigner Nataša Kandić, who herself had received the video from a member of the Skorpions: Iva Vukušić, 'Nineteen Minutes of Horror: Insights from the Scorpions execution video' (2018) 12(2) *Genocide Studies and Prevention* 35, 42; Tim Judah and Daniel Sunter, 'How the video that put Serbia in the dock was brought to light', *The Guardian* (online), 5 June 2005 <https://www.theguardian.com/world/2005/jun/05/balkans.warcrimes>.

49 Interview with P8.

50 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 73*bis*; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 73*bis*; Special Court for Sierra Leone, *Rules of Procedure and Evidence* (31 May 2012), r 73*bis*.

51 International Criminal Court, *Regulations of the Court*, r54(e).

52 Human Rights Watch, *Weighing the Evidence: Lessons from the Slobodan Milosevic*

Judicial pressure also came in softer forms, such as an invitation or urging to prosecutors to reduce the number of witnesses they planned on calling. For example, in *Milutinović et al*, judge Iain Bonomy said to the prosecutor, "[w]ell, Mr Hannis, all I can do in the circumstances is invite you to review your witness list as expeditiously as you can and decide what changes you can make to make things progress smoothly".[53] In *Dragomir Milosević*, judge Patrick Robinson similarly stated "the Chamber sets the number of witnesses to be called by the Prosecution at 104 but urges the Prosecution to reconsider the number of witnesses to be called".[54] It may also come in the form of an order to *attempt* to reduce the number of witnesses (such as in *Galić* and *Naletilić and Martinović*).[55]

The overall effect of all this was to make prosecutors aware that even though they needed to prove the defendant's guilt, "you can do it in an efficient manner".[56] Judges' efforts to "prune the witness list of the prosecution"[57] to whittle down the number of people that would give evidence, in its hard or soft forms, was felt by prosecutors. "We had constant pressure from the judges", remarked one prosecutor, "and quite justified, looking back… [b]ecause we served a witness list originally which was taking us till the 23rd century to call".[58] Further, they added, "their view [was] that we should keep it shorter or that we should go faster… [o]bviously I resisted it at the time… I had good arguments resisting some of their pressure. But their pressure was plainly right".[59]

Prosecutorial discretion therefore enters the picture when prosecutors need to identify *which* witnesses to call in light of time constraints. Efficiency is paramount: the ramification being that those witnesses who can

Trial (Human Rights Watch, 1st ed, 2006) <https://www.hrw.org/reports/2006/milosevic1206/milosevic1206webwcover.pdf>, footnote 247; *Prosecutor v Slobodan Milošević (Transcript of 9 January 2002)* (ICTY, Trial Chamber, IT-02-54-T, 9 January 2002), 246; *Prosecutor v Slobodan Milošević (Transcript of 25 July 2002)* (ICTY, Trial Chamber, IT-02-54-T, 25 July 2002), 8641.

53 *Prosecutor v Milan Milutinović et al (Transcript of 7 July 2006)* (ICTY, Trial Chamber, IT-05-87-PT, 7 July 2006), 375.

54 *Prosecutor v Dragomir Milosević (Transcript of 10 January 2007)* (ICTY, Trial Chamber, IT-98-29/1-PT, 10 January 2007), 224.

55 *Prosecutor v Stanislav Galić (Scheduling order)* (ICTY, Trial Chamber, IT-98-29-T, 4 July 2000); *Prosecutor v Mladen Naletilić and Vinko Martinović (Scheduling order)* (ICTY, Trial Chamber, IT-98-34, 1 September 2000).

56 Interview with P12.

57 Interview with P19.

58 Interview with P11.

59 Interview with P11.

give the *broadest* range of evidence have been prioritised. As one prosecutor explained, "we're talking about so huge a number of crimes over such a period of time and such a wide geographic area that you have to prove your case but you have to do it in a reasonable period of time. So you basically choose witnesses who can give you the most varied, credible evidence".[60] "[Y]ou look for people who basically can give you the biggest bang for the buck", they added.[61] "I would maybe try and take two or three witnesses for each village who could give me the broadest range of information. And if there was overlap, I would eliminate one", explained another.[62] This meant that prosecutors would not be able to present their "perfect case", as they would need to make concessions regarding how many witnesses gave evidence about a particular topic.[63] The challenge therefore became "[t]rying to figure out how you can efficiently prove your case with a minimum number of witnesses, even though the number you end up with may still involve a prosecution case lasting almost a year or longer".[64] This process was practical and ongoing. One prosecutor described that they "literally graded [witnesses] in their value",[65] and as the evidence unfolded in court, witnesses would be subject to a "constant evaluation process" to assess the value of their evidence.[66]

Judicial pressure has also led to the prosecution calling witnesses to give evidence about particular facts. While under the *Rules* the ICTY and ICTR judges had the capacity to call their own witnesses,[67] judges have requested parties to call witnesses to give evidence about particular topics. In *Hadžihasanović and Kubura*, for instance, the judges requested "that either the Prosecution or the Defence possibly, or perhaps the Chamber itself… [bring] in an expert in history in order to place matters in the political and historical context of the events and the acts committed".[68] Similarly, in another ICTY trial, one prosecutor recalled informing the judges that "we

60 Interview with P12.
61 Interview with P12.
62 Interview with P28.
63 Interview with P11.
64 Interview with P19.
65 Interview with P11.
66 Interview with P12.
67 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 98; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), r 98.
68 *Prosecutor v Enver Hadžihasanović and Amir Kubura (Transcript of 28 November 2003)* (ICTY, Trial Chamber, IT-01-47-PT, 10 January 2007), 300.

wouldn't call a historian. And they said no, no no, we'd like a historian", and so a historian was called in light of this suggestion.[69] In these types of cases, pressure from the judges has resulted in the prosecution calling evidence that they would not otherwise have called.

The above accounts demonstrate that prosecutors have been firmly focussed on the importance of factual accuracy when assessing whether to call a particular witness. This reflects a narrow understanding of the value of witness testimony. These decisions appear to be underpinned by prosecutors adopting two roles. First, they have acted builders of a (limited) historical record. As Dori Laub argued, the reproduction of facts is merely one aspect testimony: the giving of evidence is an event itself that conveys trauma, amazement, shock, and other aspects of history that cannot be reduced to words.[70] Laub observed that "[t]here are never enough words or the right words, there is never enough time or the right time, and never enough listening or the right listening to articulate the story that cannot be fully captured in *thought*, *memory*, and *speech*".[71] Courtroom environments are never capable of completely capturing the lived experience of a witness.[72] Further, the selection of witnesses is an act of narrative screening and an act of silencing. Witnesses whose stories do not fit the fact-based truth paradigm treasured by the legal tradition are denied the opportunity to testify, despite their stories nevertheless being evidence of a *something else* that cannot be captured in the words they speak. The recollections recounted above support the views of Mark Drumbl and Richard Wilson that international criminal trials are ill-equipped for producing historical records because of their focus on the minutiae, selectivity, and prioritisation of certain types of evidence over other historical accounts.[73] Second, by affirming this limited view of evidence, prosecutors have adopted the roles of insti-

69 Interview with P11.

70 Dori Laub, 'Bearing Witness or the Vicissitudes of Listening' in Dori Laub and Shoshana Felman (eds), *Testimony: Crises of witnessing in literature, psychoanalysis, and history* (Routledge, 1st ed, 1992) 57, 62.

71 Dori Laub, 'Truth and Testimony: The process and the struggle' (1991) 48(1) *American Imago* 75, 77. Original emphasis.

72 See, generally, Nicola Henry, 'The Impossibility of Bearing Witness: Wartime rape and the promise of justice' (2010) 16(10) *Violence Against Women* 1098. Henry discusses the limits of language in representing rape.

73 Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 1st ed, 2007), 176; and, generally, Richard Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 1st ed, 2011). For more on the capacity of international criminal trials to produce 'truth', see page 4.1

tution builders and reinforced the nature of international criminal trials. Nora Strejilevich claimed that testimony is "often seen as a commodity that must provide practical use", and the belief that it can be objective betrays the reality that truths are conveyed in more complex ways.[74] By adopting a limited and narrow view of what witness testimony looks like in international criminal justice, prosecutors have acted to promote the traditional shape of trial proceedings.

Finally, the fact that prosecutors have been responsive to concerns raised by judges about the length of witness lists is arguably evidence that they have been acting as guardians over their own self-interest. This responsiveness ensures that prosecutors are seen as reasonable—a trait which, in law, is arguably one of the most important elements of a lawyer's symbolic capital. Moreover, by adjusting witness lists to accommodate types of evidence that judges would like to hear ensures that prosecutors maximise the prospects that a prosecution will be successful and they avoid the embarrassing situation of the defendant being acquitted because, in part, they chose to ignore what a judge was suggesting. The attention given to evidential matters thus appears to be in some way also motivated by the prosecutor adopting the role of a guardian over their own self-interests.

4.2 Health, risk, and trauma

The health of a potential witness, and the possibility that they will be exposed to risk or traumatised as a result of giving evidence, have been considered by prosecutors as relevant factors in the exercise of discretion regarding which witnesses should be called to give oral evidence.

Turning first to the matter of a potential witness's health, there are no specific rules to guide prosecutors on whether this needs to be considered when deciding if they should be called. Nevertheless, an ICTY prosecutor recalled that in one prosecution, "there was a very senior witness who had cooperated in other trials but had been suffering some heath issues, [and] had some serious security issues".[75] Despite some disagreement among the prosecution team, the prosecutor decided not to call the witness. Reflecting back on their decision, they remarked that "I think I'd make the same decision again… when I looked at everything there, and kind of weighing his contribution to the body of evidence and the cost to that witness… I

74 Nora Strejilevich, 'Testimony: Beyond the language of truth' (2006) 28(3) *Human Rights Quarterly* 701, 703, 709.

75 Interview with P8.

thought the equities weighed in favour of not calling him".[76]

On the subject of exposure to risk and trauma, there is slightly more guidance. Once prosecutors have decided to call witnesses, they are entitled to safety and protection. All *Rules of Procedure and Evidence* of the ICTY, ICTR, SCSL, and ICC contain provisions relating to the protection of victims and witnesses (allowing, for example, the adoption of protective or security measures). The ICC's *Regulations of the Office of the Prosecutor* go further in obliging investigators and prosecutors to take various measures to ensure the protection of witnesses. These include—*inter alia*—gathering "as much information as possible on the level of risk involved" and 'considering' alternatives to questioning in the investigation stage;[77] ensuring "discreet and secure contact with witnesses" as well as implementing "other preventive measures";[78] considering the presentation of "documentary or summary evidence at the confirmation hearing" when taking into consideration the interests of victims and witnesses;[79] and consulting with, and requesting, staff from the Victims and Witnesses Unit to "provide support and assistance" to witnesses that prosecutors intend to call.[80] The *Code of Conduct for the Office of the Prosecutor* also requires OTP staff to be "respectful", "courteous", "considerate", and "dignified" to witnesses.[81]

However, there are only two documents that specifically oblige prosecutors to consider the potential risk and trauma to a witness when exercising discretion in selecting who will be called at trial. Both come from the ICC. The first is the Prosecutor's *Policy on Children*. Under section 68, "[i]n its deliberations on whether to interview or take evidence from a child", prosecutors need to consider the "age, development, level of maturity, capabilities and vulnerabilities" of the child witness, and the "the availability of alternate forms of evidence".[82] Other obligations are contained in section 89, which

76 Interview with P8.

77 Office of the Prosecutor, 'Regulations of the Office of the Prosecutor' (International Criminal Court Office of the Prosecutor, 23 April 2009), r 36(2).

78 Office of the Prosecutor, 'Regulations of the Office of the Prosecutor' (International Criminal Court Office of the Prosecutor, 23 April 2009), r 45(c) and (f).

79 Office of the Prosecutor, 'Regulations of the Office of the Prosecutor' (International Criminal Court Office of the Prosecutor, 23 April 2009), r 59(2).

80 Office of the Prosecutor, 'Regulations of the Office of the Prosecutor' (International Criminal Court Office of the Prosecutor, 23 April 2009), r 61(5).

81 Office of the Prosecutor, 'Code of Conduct for the Office of the Prosecutor' (International Criminal Court Office of the Prosecutor, 5 September 2013), s (5) and (26)(d).

82 Office of the Prosecutor, 'Policy on Children' (International Criminal Court Office

oblige consideration of the child's vulnerabilities; capabilities; resilience; the relevance of their evidence; any psycho-social and security assessments; "any possible healing effect which may be associated with providing evidence"; and whether the process will benefit or harm the child.[83] The second is the *Policy Paper on Sexual and Gender-Based Crimes*. Under section 70, prosecutors need to consider the "security, social, and psychological risks, as well as any possible healing effect which may be associated with providing evidence of sexual and gender-based crimes", and whether the witness will be benefitted or harmed by giving evidence.[84]

There are two points that emerge from the above documents. First, they demonstrate what appears to be a strong presumption in favour of witnesses being called to give evidence, and the desirability of mitigating any risks to them through the adoption of security or protective measures. Second, with respect to ICC prosecutors, children and alleged victims of sexual and gender-based crime are uniquely positioned in that prosecutors must consider various factors relating to them in determining whether they should be called to give evidence at all.

Formal obligations aside, prosecutors have considered the risks witnesses may be exposed to and the prospects of their being re-traumatised in the exercise of discretion regarding whether they should be called to give evidence. Prosecutors have tried to select those witnesses who "are best able to withstand the court process".[85] As one prosecutor observed, "these are some of the most traumatised people I've ever encountered", adding that "I definitely saw that I had a responsibility to get them through the process whole" out of "just human decency" and their domestic experience where they felt they "really… had this obligation to represent victims and to advocate for them".[86] The prosecutor explained that some witnesses "might just wither and crumble on the witness stand by the pressure of seeing [the defendant] across the room from them", and this simple fact was something that prosecutors needed to consider in assessing the witness's vulnerability.[87] The importance of prosecutors liaising with investigators and those

of the Prosecutor, November 2016), s 68.

83 Office of the Prosecutor, 'Policy on Children' (International Criminal Court Office of the Prosecutor, November 2016), s 89.

84 Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (International Criminal Court Office of the Prosecutor, June 2014), s 70.

85 Interview with P21.

86 Interview with P8.

87 Interview with P8.

who have had contact with the witness in order to make these assessments of vulnerability cannot be understated.

Some witnesses may simultaneously be capable of providing evidence that is crucial to the prosecution case, while also appearing unable to withstand the process of giving evidence. One ICTY prosecutor reflected that while they had the power to request a subpoena for the witness (needing only to demonstrate the witness was "necessary for the purposes of… [the] conduct of the trial" in that there is a "good chance" they will "materially assist" the prosecution case[88]), they felt they "had larger obligations", and reflected that they "had to exercise my discretion more carefully".[89] There are examples of where prosecutors have withdrawn charges due (in part) to believing that crucial witnesses would be too traumatised by giving evidence. "Sometimes we gave up on that part of the case or that event because… the only witness we had and the best one really didn't want to [give evidence], really couldn't, and it probably would have been worse for him or her if we had made them do it", recalled one prosecutor.[90] In the ICTY OTP's prosecution of Mitar Vasiljević, for example, charges concerning the 'Bikavac Fire' (in which approximately 70 people were burnt to death inside a locked house) were withdrawn after one critical witness was deemed too fragile to call.[91]

A related consideration is a witness's *expressed unwillingness* to give evidence, irrespective of a prosecutor's assessment regarding the risk or trauma they may be exposed to if they did give evidence. This, too, has been considered a relevant factor in determining whether a witness should be called. In what could be seen as an admission that some prosecutors emotionally blackmailed witnesses to strengthen their cases, one prosecutor confessed, "I feel guilty sometimes, because prosecutors can play the card sometimes

88 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), r 54; *Prosecutor v Radoslav Krstić (Decision on Application for Subpoenas)* (ICTY, Appeals Chamber, IT-98-33-A, 1 July 2003), [10].

89 Interview with P8.

90 Interview with P17.

91 The prosecution's evidence relating to Mitar Vasiljević's involvement in the Bikavac Fire appears to have centred around the evidence of witness VG058—who provided identification evidence placing him at the fire. The assumption is that VG058 was the one deemed "too fragile". This assumption is based on *Prosecutor v Mitar Vasiljević (Prosecutor's pre-trial brief pursuant to Rule 65ter(E)(i))* (ICTY, Trial Chamber, IT-98-32-PT, 11 December 2000), footnote 7; *Prosecutor v Milan Lukić and Sredoje Lukić (Judgment)* (ICTY, Trial Chamber, IT-98-32/1-T, 20 July 2009), [644]; and Interview with P8. In the later and related trial of Milan Lukić and Sredoje Lukić, it appears the prosecution's assessment of the witness's fragility changed, and they were called.

that this [witness] is important to my case, I really need this witness. And you can say things to people like, 'well, you know, your brother and your daughter and your husband are dead and there's nobody to speak for them. Who's going to tell their story?' I mean, we would say things like that to them".[92] However, they added, "I never subpoenaed somebody who said 'I just can't do it, I don't want to do it' ".[93] Similarly, one ICTR prosecutor recalled being confronted with how to prove the identity of someone speaking on an audio recording. One of the OTP investigators was able to identify the voice, however as they were a close family friend of the speaker, they told the prosecutor that "I'm simply not prepared to give the evidence", which meant that prosecutors had to find other ways of proving the speaker's identity.[94]

Witnesses may also be unwilling to give evidence unless the prosecution grants them particular assurances. "I recall speaking to an elderly woman in a mud hut in southern Rwanda", reflected the same ICTR prosecutor, "who I distinctly recall her saying to me, 'you want me to give evidence, can you promise to me that nothing like what I experienced during the genocide will ever happen again? Because the reason I was able to survive is because these people who lived around me protected me' ".[95] They continued:

> She said, 'the same people—their sons, brothers, husbands—have been arrested. And they haven't said anything directly to me, but I know they are looking at me and thinking, 'well, we saved you, what are you going to do to save… the men in our lives?' '
>
> And ultimately, as I remember saying to her, 'listen, I'm not going to force you to do anything. As you will know, one of the reasons that the genocide did occur is because people had done nothing previously. And I can't give you that promise, however. [These are] the things that I simply ask you to consider. We'll come back to you'.[96]

The prosecutor concluded: "I don't know that, especially when you're talking of victims, forcing them to give evidence or requiring them to give

92 Interview with P17.
93 Interview with P17.
94 Interview with P25.
95 Interview with P25.
96 Interview with P25.

evidence is the way to proceed".[97]

Not all prosecutors are necessarily in agreement with the proposition that an expressed (or predicted) unwillingness to testify is a relevant consideration. For example, in response to the question "was the reluctance of a witness to give evidence ever a factor that you would consider to be relevant in determining whether or not a witness should be called?", one prosecutor bluntly responded, "[w]ith victim witnesses, yes. With what we called the insider witnesses, no. Absolutely not".[98] One prosecutor recalled their decision to subpoena a very high-level insider witness in an ICTY prosecution, who they suspected would provide "essential evidence".[99] "I knew that I was putting the witness in an incredibly difficult situation", they said, "… I imagine he came under tremendous pressure after he testified, and I was kind of mindful that I was putting him in this extremely difficult position".[100] However, the value of the evidence they could provide outweighed these other considerations, and the prosecutor decided that it was therefore appropriate that they be called.[101]

Similarly, not all prosecutors agree that an alleged *victim* witness who is unwilling to testify, *and* is critical to the prosecution's ability to prove a charge, should not be called. "[S]ome of the people who worked [at the ICTY] were—I'm trying to think of the right way of putting this", began one prosecutor, "[t]hey really empathised with the victims. I mean… you couldn't not. But in the end, your job as a lawyer, in my view, is not to let your empathy outweigh your obligation to get the best evidence available".[102] Even when only one witness was capable of providing evidence of a crime, the prosecutor explained, "sometimes we would say 'look, I know you don't want to do this. I know you're back in Kozarac or whatever. We will give you full witness protection. And I'm afraid we are going to insist, unless you've got a very good reason. You gave us a statement, you're going to have to come and testify' ".[103] In a different context, the same prosecutor remarked that "you lose a lot of your national characteristics as a prosecutor doing international work", but "[t]he one you should not lose is the one

97 Interview with P25.
98 Interview with P23.
99 Interview with P8.
100 Interview with P8.
101 Interview with P8.
102 Interview with P23.
103 Interview with P23.

that you are not the victim's representative in court. That is not your job".[104] To them, the role of the prosecutor was clear: get the best evidence at trial, and not to let feelings towards the alleged victims impede the pursuit of this objective.

The relevance of risk and trauma in prosecutorial decision-making highlights a tension between two different role identities. On the one hand, the prosecutor is a guardian of the victims who prioritises personal wellbeing over the production of courtroom truths and convictions. There is a hesitation to sacrifice victims and witnesses in the pursuit of a trial's historical purposes. This concern for the wellbeing of victims and witnesses is an act of symbolic violence committed against the notion of the trial and courts as institutions. By refusing to call witnesses because of the risk they face, prosecutors are internally rebelling against both the tribunal fulfilling its *raison d'être* in the assessment of guilt, and their role role in the objective pursuit of the allegations they have laid against an accused. On the other hand, prosecutors have also felt tied to their historical roles as accusers and acted to reinforce this institutional role. The examples discussed in this section therefore reveal how different conceptions of the prosecutorial role have a direct affect on how prosecutors choose witnesses to call at trial.

5 Normative Considerations

5.1 Public evidence

One relevant aspect of the legal framework governing the selection of witnesses is the presumption against *in camera* proceedings. This presumption is reiterated in various places throughout the *Rome Statute*[105] and the various *Rules of Procedure and Evidence*.[106] While these rules are best seen as generalised proclamations about the need for trials to be open to the public eye, they are arguably relevant, in a very small way, to the selection of witnesses. This is because they may create a presumption against selecting witnesses who wish to give evidence in closed session.

Prosecutors have also preferred witnesses who are capable of giving ev-

104 Interview with P23.

105 See articles 64(7) and 67(1).

106 International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence* (8 July 2015), International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence* (13 May 2015), and Special Court for Sierra Leone, *Rules of Procedure and Evidence* (31 May 2012) r 78.

idence in open court rather than those who would need to give evidence *in camera*. "[T]he general principle is that justice should not only be done, but be seen to be done", observed one prosecutor, "[a]nd closed testimony is… anathema to that principle".[107]

Prosecutors have spoken of three reasons why it is preferable to select witnesses who are capable of giving their evidence in open session. The first of these is that public evidence allows the creation of what Nigel Eltringham called the 'validating public' to construct and strengthen the courts' "monopolies of violence, censure and regulation"[108] by openly displaying the means and processes through which punishment and censure is delivered. Prosecutors have been conscious of this public's existence; "the crowded courtroom behind plexiglass… basically anybody interested in the trial. Reporters from all over".[109] "What you don't want", remarked one prosecutor, "is at the end [of the trial] there's a conviction and nobody outside the courtroom can understand… why".[110] If prosecutors exercise their discretion to lead key evidence through witnesses who will give evidence *in camera*, one ICC prosecutor with ICTY experience remarked, "it gives room to people who want to say 'look,… how could this be proven? Look at the judgment… half of it's hidden' ".[111] This would serve to reject and alienate the validating public, diminishing the court's already weak grasp on the monopolies it enjoys.

Rule 92*bis* and *ter*—under which witness statements are tendered without the need for the witness to be examined in chief—put prosecutors in a difficult position if they want to rely on the spectacle of evidence. Even though the tendered statements will be public and available through the online judicial records databases, they may never be read; abandoned and forgotten, inaccessible to anyone not familiar with the intricacies and complexities of how to use the search function. The lacklustre image of a statement being tendered is far less powerful than the spectacle of a witness holding an audience captive with the story of the harm they allege to have

107 Interview with P23.

108 Nigel Eltringham, 'Spectators to the Spectacle of Law: The formation of a "validating public" at the International Criminal Tribunal for Rwanda' (2012) 77(3) *Ethnos* 425, 433. See also, generally, Michel Foucault, *Discipline and Punish: The birth of the prison* (Penguin, 1st ed, 1991) regarding the notion that publicity and spectacle serves to reinforce the sovereign's supreme legitimate authority over punishment, which Eltringham builds on in his article.

109 Interview with P28.

110 Interview with P20.

111 Interview with P20.

suffered. To reduce lived, human experiences to combinations of glyphs set in 12pt Times New Roman printed on flaccid, lifeless sheets of A4 copy paper is to strip them of the intonation, pace, physical expression, gestures, and humanity afforded by the oral evidence experience. The spectacle presented to the validating public is not one that entices viewing, alienating the very audience the court relies on for the maintenance of its authority. To counter this, one prosecutor took to reading out a brief summary of evidence they intended to tender not for the benefit of the judges, but "for the audience to know why [this] witness [is] being called".[112] While this method cannot be held to be a true replacement for oral witness testimony, it nevertheless provides the validating public with something slightly more interesting and informative than the alternative.

The second reason why prosecutors have preferred witnesses who are capable of giving their evidence in public is due to the 'expressive' contribution of witness testimony to bringing about broader changes in society. "[W]e had an interest in letting people know that we were trying to present what had happened", remarked one prosecutor.[113] If the society is to move forward with an understanding of what had occurred in a conflict, another prosecutor observed, this is "going to be harder if the best evidence is all hidden": "if the best evidence which might be insider evidence or very sensitive documents are not portrayed, then it does look like there may be just a hole and the judges saying 'trust us'… is not as good".[114] Similarly, another prosecutor remarked that "the witness you should call should also be somebody that if… in a Serb perpetrator case, that Serbs watching it could say 'god, this witness can't be lying. I mean, this has got the ring of truth about it' ".[115] As such, they later continued, "it was preferable that they would give evidence openly" so that "anybody watching could realise what went on".[116] The giving of public testimony—"having the truth come out in the broad sense"—therefore "hopefully lead[s] to peace and reconciliation and deterrence and hopefully the avoidance of future crimes".[117]

Finally, the third reason that prosecutors have preferred witnesses who

112 Interview with P28.

113 Interview with P17.

114 Interview with P20.

115 Interview with P23.

116 Interview with P23. The interview subject initially denied that it was a relevant consideration in the selection of witnesses that the witnesses should give evidence in open court, but later reconsidered their answer and agreed "that was a consideration at the time".

117 Interview with P20.

can give evidence in open session is that the image of a witness giving evidence in public may unearth additional evidence that the prosecution was previously unaware of. One prosecutor believed that there was always the possibility that other potential witnesses had gone unnoticed by investigators; deterred from approaching the OTP by having heard stories of witnesses being treated poorly or cross-examined by the defendant.[118] "[I]n the back of my mind", they said, "… it was like maybe I'll encourage somebody else who's been reluctant, they're still hanging out there, they don't know whether they want to testify".[119]

The importance of public evidence therefore appears to have been driven by prosecutors adopting two roles. First, they have been institution builders. Public evidence reinforces the strength of the court through the creation of a validating public. By selecting witnesses who can tell their stories in open session, prosecutors have ensured that the reasons behind judicial decisions are transparent and credible. Second, they have been performers of moral norms. Open testimony serves a didactic function in that it allows the public to be informed about what prosecutors submit was behaviour that offended standards of morality, and offers the opportunity for the public to see human stories of the effects of reprehensible conduct.

6 Strategic Considerations

6.1 Emotions and storytelling

In the context of victim witnesses, being able to give valuable evidence in a reliable and credible manner are not the only factors that have been considered relevant by prosecutors in exercising their discretion to select witnesses. Testimony consists of not just *what* a witness says, but also *how* they say it. As such, prosecutors have considered the emotional effect of a witness's evidence and their storytelling abilities when deciding whether they should be called.

The emotions displayed by a witness while they give evidence are likely to influence how the listener assesses the witness's credibility. Studies, many concerning evidence of rape, have shown that this principle applies in a variety of situations both inside and outside the courtroom.[120] While it remains

118 Interview with P17.

119 Interview with P17.

120 For example, see Ellen Wessel et al, 'Credibility of the Emotional Witness: A Study of Ratings by Court Judges' (2006) 30 *Law and Human Behaviour* 221;

remarkably difficult for listeners to correctly discern whether emotionally-charged evidence is credible or untrustworthy,[121] there is little doubt that emotional evidence is more likely to be seen as accurate and believable.

Judges are certainly not immune from these effects. The image of judicial officers as somehow above emotion and human frailty has long been regarded as "aesthetically pleasing but inaccurate"[122] or "naïve and uninformed".[123] Some have claimed that it is actually desirable that judges let their emotions influence their decision making, with Gabrielle Appleby and Suzanne Le Mire arguing that "their humanity allows them to determine credibility of witnesses and resolve difficult questions of fact and law".[124] In other words, just as what the witness says will affect the verdict, so too will the emotions they display while they are in the witness box.

Prosecutors have been attuned to how emotional witnesses will be (and the emotional effect of their evidence) when deciding who will be called. One prosecutor, for instance, described the feeling among colleagues at the ICTY that the judges "[didn't] want to hear any more crying witnesses" adding that "[i]t makes them uncomfortable".[125] "[J]udges are human beings like everybody else", remarked another.[126] "[L]istening to somebody describe the, you know, the death of their whole family and the lot, was incredibly powerful", they observed.[127]

In a remarkably self-aware reflection on how they selected witnesses, a prosecutor suggested that they harboured some reservations regarding the manner in which witnesses were identified. The prosecutor hinted that they were unsettled by the need to prioritise those witnesses who were par-

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Aldert Vrij and Agneta Fischer, 'The Expression of Emotions in Simulated Rape Interviews' (1995) 4 *International Review of Victimology* 64; Gier Kaufmann et al, 'The Importance of Being Earnest: Displayed emotions and witness credibility' (2003) 17 *Applied Cognitive Psychology* 21; and Ronald Riggio, Joan Tucker, and Barbara Throckmorton, 'Social Skills and Deception Ability' (1988) 13(4) *Personality and Social Psychology Bulletin* 568.

121 Bella DePaulo et al, 'Cues to Deception' (2003) 129(1) *Psychological Bulletin* 74, 106.

122 Joel Grossman, 'Social Backgrounds and Judicial Decision-Making' (1966) 79(8) *Harvard Law Review* 1551, 1551. Grossman was writing with respect to the judiciary in the United States, but there is no reason the principle does not translate to the international criminal law judiciary.

123 Gregory Sisk, 'Judges Are Human, Too' (2000) 83 *Judicature* 178.

124 Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a system that enhances institutional integrity' (2014) 38(1) *Melbourne University Law Review* 1, 2.

125 Interview with P17.

126 Interview with P23.

127 Interview with P23.

ticularly good at telling their emotional stories. By drawing an analogy to a 1950s American television show that has been described as stirring up "schadenfreudic pleasures"[128] in middle-class viewers taking comfort in the misfortune of working-class American housewives,[129] the prosecutor suggested that they were uncomfortable selecting witnesses who had the most gut-wrenching and heart-rending tales:

> Like, you want to talk about the massacres here or the tortures in this camp or the rapes in this village. You made a selection based partly on personality, in terms of 'this is a witness who has a tear-jerker, [an] incredible story to tell. Tells it well. Is sympathetic. Moving. And will represent the picture. I can't call all thirteen people—the judge won't let me—but this one tells the story the best'. And it's—*it feels kind of sick in a way*. That, you know, in America we used to have a TV show back in the fifties called *Queen for a Day*. People, homeless people or other people, would come in and tell their story; the audience would applaud; and the one who got the applause for the most pitiful story won a dishwasher and five hundred dollars, or something like that. It was a bizarre thing. *It's kind of what this felt like sometimes*. We were sort of putting on the most tear-jerking story we [could].[130]

Beyond the emotional appearance and effect of a witness's evidence, whether evidence assists the prosecution in proving its case is going to depend in part on the witness's skill in presenting it. In the same way that those people who can give the broadest range of evidence have been prioritised as witnesses (as discussed in section 4.1), so to have those that can present their evidence as a good oral story. This is due in a large part to the inability of international prosecutors to present all witnesses at trial due to time or resource constraints, necessitating the prioritisation of witnesses who can convey their evidence in a compelling narrative. As one prosecutor explained, "[i]nternationally you have to choose the evidence which best

128 Amber Watts, 'Queen for a Day: Remaking consumer culture, one woman at a time' in Dana Heller (ed), *The Great American Makeover: Television, history, nation* (Palgrave Macmillan, 2006) 141, 147.

129 Georganne Scheiner, 'Would you like to be Queen for a day? Finding a working class voice in American television of the 1950s' (2003) 23(4) *Historical Journal of Film, Radio and Television* 375, 377.

130 Interview with P17. Emphasis added.

represents the criminality. And if someone can tell the story better, yeah, you would choose that person".[131]

Prosecutors have identified several traits that characterise a potential witness as a 'good storyteller'. One prosecutor, with experience at the ICC and the ICTY, agreed that it was important when exercising the discretion of selecting witnesses to call "articulate, smart witnesses who can tell the story".[132] The reason for this, they explained, is that "these trials last for years" and "can be very dry".[133] Therefore, they posited, "every now and then, everybody in the room needs a sort of reality check of why we're here and what this is about", so the gravity and the harm of the alleged offending does not get forgotten.[134] Another prosecutor described that it was important to liaise with the investigators who initially interviewed the potential witness to determine whether "they're going to be convincing", and whether "they're going to be able to answer a question without digressing three pages of transcript into issues that aren't relevant" while still covering "all the salient points".[135] Characteristics of good storytellers therefore seem to include the ability to focus their evidence; present it articulately; convey a sense of the gravity of harm they have suffered to those in the courtroom; and be intelligent enough to realise—and act upon—the purpose of their courtroom examination.

Two points emerge from the above discussion. The first is that the selection of witnesses based on their storytelling ability—the ability to respond directly to questions, the ability to answer succinctly, the ability to tell a narrative through the question-and-answer format of witness examination—is an act of institutional reinforcement. Trials prioritise narratives. Narrative structures inform both what facts are and how they are perceived.[136] The selection of witnesses based on whether they match the paradigmatic format of trial narratives reinforces the types of truths that trials can produce. It also limits the frame of the trial to the story that the prosecutor wants to tell. Witness experiences are rejected if they do not align with the paradigm of courtroom testimony. This demonstrates the power that prosecutors have

131 Interview with P21.
132 Interview with P20.
133 Interview with P20.
134 Interview with P20.
135 Interview with P23.
136 Lisa Griffin, 'Narrative, Truth, and Trial' (2013) 101 *Georgetown Law Journal* 281, 287. See also Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33(4) *Stanford Law Review* 591.

over the facts that are produced in a courtroom, how they are perceived, and reinforces the inability of trials to produce complex accounts of history.

The second point is that the prosecutor is a performer of moral norms. They are not simply agents through which facts are presented in the hope that the judges will be able to adjudicate history devoid of emotion. Emotion, or *pathos*, is one of the three pillars of rhetorical persuasion.[137] The selection of witnesses based on the emotional impact of their stories demonstrates the importance prosecutors place the acceptance of stories to promote deterrence and moral transformation.

The act of giving evidence at trial has been observed to have positive effects on the emotional states of witnesses. In their 2017 study—run with the assistance of the ICTY—King and Meernik found that witnesses reported "significantly lower levels of negative affect states following testimony",[138] suggesting that the act of evidence-giving had cathartic benefits for witnesses. Similar results were found at the ICC.[139] Stover also found that 79 ICTY witnesses (equating to 90% of participants in his study) expressed that it was their "moral duty" to give evidence,[140] suggesting that the fulfilment of this 'duty' would have a positive effect on the witness's emotional state. Both findings align with one prosecutor's recollection that some witnesses in the *Lukić* trial "were delighted they'd had the opportunity to come and testify" about being raped and "that their voices had been heard", *even though* the allegations were used merely to rebut the Defence's alibi evidence and formed no part of the indictment.[141] Those witnesses, the prosecutor recalled, "didn't need an individual conviction"—the act of giving evidence (and seeing the defendant convicted for murder) was rewarding enough.[142] Another prosecutor considered that "there's a very important

137 The other two being *logos* and *ethos*. See Birju Kotecha, 'The Art of Rhetoric: Perceptions of the International Criminal Court and legalism' (2018) 31 *Leiden Journal of International Law* 939, 945-946; Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 105-106.

138 Kimi King and James Meernik, *The Witness Experience: Testimony at the ICTY and its impact* (Cambridge University Press, 1st ed, 2017), 129-130.

139 Human Rights Law Centre, 'Bearing Witness at the International Criminal Court: An interview survey of 109 witnesses' (University of California Berkeley School of Law, June 2014) <https://www.law.berkeley.edu/files/HRC/Bearing-Witness_FINAL(3).pdf>, 50.

140 Eric Stover, *The Witnesses: War crimes and the promise of justice in The Hague* (University of Pennsylvania Press, 1st ed, 2005), 76.

141 Interview with P18.

142 Interview with P18.

restorative benefit to a witness standing up in open court, [and] confronting the people that were responsible for the crimes against them".[143]

In what one prosecutor described as one of their "most satisfying experiences as a Prosecutor", emotions, storytelling, and the cathartic effects of evidence-giving were all on display in their decision to call as a witness a woman from a small village.[144] She could give evidence that Serbian soldiers and police raided her village early in the morning, separated the woman and children from the men, and killed her husband and son.[145] "So we're calling her as a witness because that's a good story. You know, for us. About that village", the prosecutor said.[146] In evidence-in-chief, "she was so terrified and upset. I had to ask her to speak up, and she had her hair down. And she was shrunk in her chair", the prosecutor explained, slouching in their chair to demonstrate the timidness that had come over them.[147] But then she was cross-examined by a Defence lawyer, who conducted the cross "in the fashion of he was attacking her".[148] The prosecutor continued:

> And then it was like a steel rod went up her back. And she sat up straight. And she's, 'your man came to my village and killed my son and my father!' Bah bah bah! It was great. I'm getting, you know, emotional just remembering it. And I went and saw her in the witness room afterwards and she was like, and her psychologist, and it was yes! This was what, it was a catharsis for her. You know. Because she'd been helpless during that time, but when she was in the courtroom and they did that, she was in charge. She got to point her finger at, you know, [the defendants]. And say that was your guys. It was great. I'm still excited about it.[149]

Yet international prosecutors do not generally appear to regard *facilitating* the act of storytelling (for reasons unrelated to the prosecutor's role of establishing the charges) as a relevant factor in exercising the discretion of which witnesses to call at trial. In response to a question about whether they thought facilitating storytelling to let a witness have 'their day in court' was

143 Interview with P8.
144 Interview with P17.
145 Interview with P17.
146 Interview with P17.
147 Interview with P17.
148 Interview with P17.
149 Interview with P17.

relevant to the selection of witnesses to give oral evidence, one prosecutor bluntly responded "[n]o, I don't".[150] Another emphasised that the trial was an adversarial process: "Prosecutor versus Accused X".[151] As such, they explained, while some jurisdictions such as the ECCC, ICC, or STL allow for the participation of victims so they they can present their views, "[t]hat's not something a prosecutor considers".[152] Similarly, Alan Tieger and Milbert Shin have confirmed that the decision of which witnesses to call is ultimately driven by evidential considerations, and those who "most want to be heard may thus be bypassed".[153] This is consistent with one ICTY prosecutor's recollection about a number of witnesses who insisted that they wanted to come and testify but were superfluous to the prosecution's requirements. "We had a couple of those", they remembered, "[a]nd there were a couple of times where we said, 'it's great, I appreciate that you want to do this, but the judges have… put limitations on the, in terms of the number of witnesses, the number of hours, etcetera. We already have some evidence in on that and I'm sorry, we won't be calling you in this case' ".[154]

Another ICTR prosecutor offered a slightly different perspective. They rejected the proposition that providing someone with the opportunity to tell their story for cathartic purposes was a relevant consideration in identifying who should be called to give oral evidence. "That's not the role, in my view, or the purpose of the international tribunals", they explained.[155] "I agree entirely", they continued, "that [trials] can have that effect and I do think it is important that witnesses have the opportunity to give that information".[156] In this respect, the prosecutor explained that the act of storytelling can be achieved through the person giving their evidence to *investigators*, rejecting the idea that oral examination-in-chief was the appropriate means through which any emotional benefit should be obtained. "There is a difference", the prosecutor went on, "between… giving the witness the opportunity to say that to an investigator and leading the evidence".[157] "I came from more of a background where I saw the tribunals as

150 Interview with P19.
151 Interview with P21.
152 Interview with P21.
153 Alan Tieger and Milbert Shin, 'Plea Agreements in the ICTY: Purpose, effects, and propriety' (2005) 3(3) *Journal of International Criminal Justice* 666, 675.
154 Interview with P17.
155 Interview with P25.
156 Interview with P25.
157 Interview with P25.

courts", they added, "… and my role was to put the evidence forward in support of the charges that had been brought".[158] The prosecutor explained that while they had "no difficulty in listening to witnesses and hearing them tell their story" and that "hopefully I was able to show empathy" towards them, "in terms of the evidence that I led at the trials, I tried to focus primarily on what evidence would be [led], which would support the charges".[159]

Yet the same prosecutor who rejected the idea that the prosecution should present witnesses superfluous to prosecutorial requirements because they want to have their day in court *did* still see an important role for storytelling with respect to *how* selected witnesses gave their evidence. Under rules 92*bis* and *ter* of the ICTY's *Rules of Procedure and Evidence*, parties had the power to tender transcripts and statements of witnesses in lieu of requiring the witnesses to give evidence in court. The prosecutor expressed a strong preference that witnesses should give oral evidence. "It was hard for all of us to listen to… these stories of what one human being can do to another", they recalled, "[b]ut we thought it was important to tell those stories".[160] When asked why, they empathetically explained that "if I were a victim, I would want to tell my story".[161] The prosecutor appeared to express dismay at the operation of the law contained in what are now rules 92*bis* and *ter*. Unlike those prosecutors who regarded the trial as an inappropriate forum for facilitating storytelling for cathartic reasons, or who considered they could be achieved through other means, the prosecutor recalled the disappointment felt by some witnesses who were not examined in-chief. Reflecting on parts of the *Milošević* trial, the prosecutor described:

> So they would bring in some farmer from this small village where these terrible things happened. And the judges had decided they wanted to speed the trial up. So they told the Prosecution, 'you've got his witness statement, you can put in his written statement with all the details. We don't need to hear him testify about that. So… you'll have a written statement from him that you're going to tender into evidence. You call the witness. You ask him his name, where are you from, etcetera. You ask him if that statement, has he read it, is it true. Yes. And then you admit the statement. Then we don't

158 Interview with P25.
159 Interview with P25.
160 Interview with P17.
161 Interview with P17.

> have to spend two hours of listening to the details'.
>
> And then that witness gets cross-examined by Slobodan Milošević, who doesn't ask him a single fucking question about the torture or the massacre in his village. He says, 'did you hear about what the Croats did to the Serbs in such and such a village? Oh, you didn't know about that?' Etcetera etcetera.
>
> And the witness went home, or would tell the victim witness representative, 'Prosecutor, I don't understand. I came in here to tell my story. I didn't even get to tell it'. You know, 'the Prosecutor read out a two-paragraph summary of my story. And then that bastard asked me questions about stuff I don't know anything about'.
>
> Very unsatisfactory experience for those witnesses.[162]

The prosecutor's disappointment—and anger—at the operation of what is now Rules 92*bis* and *ter* (and the judges' use of it) is palpable. The prosecutor's implicit suggestion appears to be that oral evidence is preferable for the primary reason that it gives the witness the opportunity to tell their story. Considerations concerning proof are marginalised—perhaps because it is difficult to determine whether judges afford different weights to oral and written evidence.[163] In any event, the prosecutor's emphatic embrace of oral storytelling as preferable to the provision of written evidence is at odds with those who rejected the need to facilitate storytelling as relevant to their discretion.

Generally speaking, the above discussion emphasises once again that prosecutors have acted as institution builders by reinforcing the importance of a particular type of narrative structure in international criminal trials. Further, the importance prosecutors have placed on emotions and storytelling ability reinforces the claim made elsewhere in this chapters that the selection of witnesses is informed by prosecutors adopting the role of norm performers. Witness testimony, particularly gripping witness testimony, makes harm visible and affirms the importance of certain moral values.

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162 Interview with P17.

163 Yvonne McDermott, 'The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A socio-legal analysis' (2013) 26(4) *Leiden Journal of International Law* 971, 987.

7 Conclusion

In conclusion, this chapter has demonstrated that the factors that inform prosecutors when they are deciding which witnesses to call have fulfilled functional, normative, and strategic goals. It has also argued that these decisions have been motivated by prosecutors adopting three role identities.

Two of these identities are particularly prominent. The first is the role of the prosecutor as a *norm performer*. The selection of witnesses based on their ability to tell a compelling and emotional story, as well as the importance of witness testimony being public, serves to affirm particular moral norms by illustrating the effects of these norms being transgressed. Trials serve as forums in which prosecutors can play a didactic role in educating the public about historical events and contributing to deterrence through the witnesses they select to give evidence.

The second is that the selection of witnesses appears to be driven by prosecutors adopting the role of institution *builders*. This is evidenced by the fact that witness selection decisions appear to have been heavily influenced by prosecutors affirming the importance of paradigmatic legal evidence and implicitly silencing other forms of truth-telling. They have therefore served to transpose the domestic conception of trials to international courts, as embodied in the prioritisation of narrative structures and particular forms of evidence.

Finally, prosecutors have acted as *guardians* over victims. They have done so by not calling witnesses who would be exposed to risk or traumatised by the experience of giving evidence. However, this role is in tension with the role of the prosecutor as a legal institution builder in which they serve to reinforce the traditional role of the prosecutor in criminal law proceedings. They have also, to some degree, acted as guardians over their own self-interest by listening to, and taking into account, suggestions of the judges regarding the length of witness lists and the types of evidence that they wish to hear. This is because these choices reaffirm a prosecutor's reasonableness, which is arguably one of the most important aspects of social capital in the legal profession.

Witness selection is therefore informed by more than the mere need to prove the prosecutor's case. Who prosecutors choose to put in the witness box is contingent upon the way they act as norm performers, builders, and guardians, and the factors these roles subsequently lead them to considering when exercising discretion.