Prosecutorial discretion in international criminal justice

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Chapter 7
Appealing

> [W]hat the heck are these judges going to do for the next six months if I don't send them this appeal?
>
> Interview with P9

1 Introduction

The decision of whether or not to appeal is the last major choice that prosecutors can make in an international criminal proceedings. It can also be a very important one. Appeals are the last chance for prosecutors to receive favourable decisions. Appeals jurisprudence will be scoured over by scholars and practitioners hoping to clarify the state of the law. The decision to appeal can have significant consequences for a defendant's liberties. Yet there has been no explanation for why international prosecutors appeal. What informs how prosecutors exercise a discretion that can have such significant consequences for the outcomes of prosecutions? For this first time, this chapter answers this question. By peering through a set of thematic windows that emerged from original interviews with current and former senior prosecutors, it uncovers the hidden motivations and assumptions that have informed how the discretion to appeal has been exercised.

To do so, this chapter is structured as follows. First, it places the appeal discretion within its legal framework in section 2. Second, it illustrates the practice of the appeal discretion in section 3 by drawing on an empirical, quantitative study of prosecutorial appellate practice. It reveals the types of prosecution appeals and their success rate. Third, it looks through six

thematic windows to identify the stakeholders prosecutors relate to when exercising their discretion and the roles they adopt with respect to these stakeholders. Unlike the previous chapters concerning prosecutorial decisions, the decisions to appeal do not appear to have been motivated by functional considerations. As such, section 4 deals with the normative consideration of the need for appropriate sentences, developing the law, and protecting the integrity of the law. Section 5 then turns to the strategic considerations of communicating disagreement and garnering the support of external actors, providing work to judges, and responding to the interests of the victims. This chapter concludes by arguing that these factors appear to be motivated by prosecutors assuming the role of norm performers, builders, and guardians.

2 The Legal Framework

There is very little statutory or case law that concerns a prosecutor's discretion to commence an appeal. At the ICTY, ICTR, SCSL, and ICC, prosecutors could and can appeal on the basis of a factual error or a legal error. The ICC and SCSL *Statutes* also permit prosecutors to appeal on the basis of procedural errors; and the ICC additionally allows appeals to be raised against sentences. The tests that the prosecutors needed and need to meet in order to succeed on appeal are slightly different between each court. The ICTY, ICTR, and SCSL required prosecutors to demonstrate that a factual error had occasioned a miscarriage of justice and a legal error had invalidated the decision.[1] The SCSL *Statute* did not specify a standard that prosecutors needed to meet in order to succeed on a basis of an alleged procedural error, although Appeals Chamber judges established that they would succeed if they resulted in a miscarriage of justice or "affected the fairness of the trial".[2] At the ICC, prosecutors will succeed on legal, factual, or procedural grounds if they demonstrate that the error resulted in an unfair proceeding "that affected the reliability of the decision or sentence" or if the decision was "materially affected" by the error.[3] In addition, an ap-

1 *Statute of the International Criminal Tribunal for the Former Yugoslavia* (September 2009), art 25; *Statute of the International Criminal Tribunal for Rwanda* (31 January 2010), art 24; *Statute of the Special Court for Sierra Leone*, art 20.

2 *Prosecutor v Moinina Fofana and Allieu Kondewa (Appeals Judgment)* (SCSL, Appeals Chamber, SCSL-04-14-A, 28 May 2008), [35].

3 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 83(2).

peal against sentence will succeed if prosecutors can demonstrate that the sentence was "disproportionate to the crime".[4]

While the drafters of the ICTY and the ICTR *Statutes* neglected to include a clear mandate for parties to appeal sentences, Appeals Chamber judges provided a mechanism through which the sentencing discretion of the trial judges *as such* could be challenged on appeal. In *Prosecutor v Duško Tadić*, the Appeals Chamber judges were invited by the Defendant to overturn his 20-year sentence on the basis that "the Trial Chamber failed to adequately consider his personal circumstances" (among other things).[5] The judges observed that there was "no discernible error in the exercise of discretion" that would allow the sentence to be disturbed, and in doing so opened the door for parties to challenge the exercise of discretion as such.[6] The next year in *Prosecutor v Zejnil Delalić et al*, the Appeals Chamber judges had the opportunity to expand on the meaning of this phrase and remarked that a sentencing decision could be disturbed if it could be shown the Trial Chamber judges made a discernible error and "ventured outside [their] discretionary framework in imposing [a] sentence".[7] This was later described in *Prosecutor v Stanislav Galić* as being akin to taking a decision "from the wrong shelf".[8] This quasi-ground was relied upon by prosecutors both independently and in explicit conjunction with the statutory grounds.[9]

In addition, ICTY and ICTR Appeals Chamber judges were warm to the idea of receiving grounds that merely invited them to make declarations on law, rather than upset the trial judgment in any way. The first time prosecutors filed some of these grounds was in June 1997. ICTY pros-

4 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 83(3).

5 *Prosecutor v Duško Tadić (Judgment in Sentencing Appeals)* (ICTY, Appeals Chamber, IT-94-1-A, 26 January 2000), [22].

6 *Prosecutor v Duško Tadić (Judgment in Sentencing Appeals)* (ICTY, Appeals Chamber, IT-94-1-A, 26 January 2000), [22].

7 *Prosecutor v Zejnil Delalić et al (Appeals Judgment)* (ICTY, Appeals Chamber, IT-96-21-A, 20 February 2001), [725].

8 *Prosecutor v Stanislav Galić (Appeals Judgment)* (ICTY, Appeals Chamber, IT-98-29-A, 30 November 2006), [455].

9 See, for example, *Prosecutor v Zlatko Aleksovski (Prosecution's Appeal Brief)* (ICTY, Appeals Chamber, IT-95-14/1-A, 24 September 1999), [4.8]; *Prosecutor v Vidoje Blagojević and Dragan Jokić (Prosecution's Appeal Brief)* (ICTY, Trial Chamber, IT-02-60-A, 9 May 2005), [6.1]-[6.62]; *Prosecutor v Vlastimir Đorđević (Notice of filing public redacted version of Prosecution appeal brief)* (ICTY, Trial Chamber, IT-05-87/1-A, 17 August 2011), [59].

ecutors raised three grounds in *Prosecutor v Duško Tadić* that asked the Appeals Chamber judges to clarify whether prosecutors needed to prove beyond reasonable doubt that an accused knew of the widespread and systematic nature of crimes against humanity; whether discriminatory intent is an element of all crimes against humanity; and whether Trial Chamber judges could order the Defence to produce prior witness statements.[10] The Appeals Chamber judges agreed to engage with these questions—despite them being irrelevant to the outcome of the trial—on the basis that they were matters of "general significance for the Tribunal's jurisprudence" and "of importance and worthy of an expression of opinion by the Appeals Chamber".[11] The ICTY and ICTR Appeals Chamber judges subsequently engaged with these 'clarifying' grounds in *Prosecutor v Jean-Paul Akayesu*[12] and *Prosecutor v Sylvestre Gacumbitsi*;[13] however denied to address them in *Prosecutor v Naser Orić*[14] and *Prosecutor v Enver Hadžihasanović and Amir Kubura*.[15] The SCSL Appeals Chamber judges, too, exercised their "discretion" to consider one of these grounds "as guidance to the Trial Chamber".[16] Suffice to say, however, that the practice of prosecutors raising appeal grounds merely to clarify the law is not widespread. Only 5% of all appeal grounds ever filed by prosecutors seek to do nothing more than receive authority from Appeals Chamber judges on a point of law (in other words, 10 grounds out of 219).[17]

10 *Prosecutor v Duško Tadić (Notice of Appeal)* (ICTY, Appeals Chamber, IT-94-1-A, 6 June 1997), [3]-[5].

11 *Prosecutor v Duško Tadić (Appeals Judgment)* (ICTY, Appeals Chamber, IT-94-1-A, 15 July 1999), see [247], [281], [315]-[316].

12 *Prosecutor v Jean-Paul Akayesu (Appeals Judgment)* (ICTR, Appeals Chamber, ICTR-96-4-A, 23 November 2001), 127-143.

13 *Prosecutor v Sylvestre Gacumbitsi (Appeals Judgment)* (ICTR, Appeals Chamber, ICTR-2001-64, 7 July 2006), [147]-[157].

14 *Prosecutor v Naser Orić (Appeals Judgment)* (ICTY, Appeals Chamber, IT-03-68-A, 3 July 2008), [175]-[179].

15 *Prosecutor v Enver Hadžihasanović and Amir Kubura (Appeals Judgment)* (ICTY, Appeals Chamber, IT-01-47-A, 22 April 2008).

16 *Prosecutor v Moinina Fofana and Allieu Kondewa (Appeals Judgment)* (SCSL, Appeals Chamber, SCSL-04-14-A, 28 May 2008), [451].

17 Cale Davis, *International Criminal Law Prosecution Appeals Briefs Database* (DOI 10.17026/dans-xwq-ka6y, 2020) version 1 <https://easy.dans.knaw.nl/ui/datasets/id/easy-dataset:213874>.

Court	Convicted	Appealed Against	As %	Acquitted	Appealed Against	As %	Total Appealed
ICTY	97	51	53%	14	9	64%	60
ICTR	63	26	41%	10	3	30%	29
SCSL	9	9	100%	0	0	NA	9
ICC	5	2	40%	3	3	100%	9
All	174	88	51%	27	15	56%	103

Table 7.1: The likelihood that an individual who received a conviction or was wholly acquitted would be subjected to a prosecution appeal. Cale Davis, *International Criminal Law Prosecution Sentencing Recommendation Statistics* (DOI 10.17026/dans-xd5-hyuz, 2019) version 1.

3 Appeals Statistics

Prosecutors have raised post-trial judgment appeal grounds against a total of 103 individual defendants.[18] Roughly half of all individuals who had been convicted or acquitted were subjected to a prosecution appeal. Table 7.1 reveals the number of individuals who prosecutors appealed again at each of the four courts. It shows that—while on the whole—the likelihood of prosecutors appealing against an individual who was convicted or acquitted is roughly equal, the practice within each prosecution office varied significantly. At the ICC, for instance, prosecutors appealed against all individuals who were acquitted; but at the ICTR, they merely appealed against 30%. With regard to convicted individuals, similar differences are apparent. SCSL prosecutors had a perfect record when it came to getting convictions, yet prosecutors pursued appeals against every convict. ICTY, ICTR, and ICC prosecutors, however, were less likely to appeal in the event of a conviction.

As outlined in section 2, there are four primary grounds on which prosecutors can appeal: a legal error, a factual error, a procedural error, and an error in sentencing. Table 7.2 shows legal errors have and are clearly the most common ground relied on by prosecutors on appeal, outnumbering

18 Two datasets are relied upon for the statistics in this section: Cale Davis, *International Criminal Law Prosecution Appeals Briefs Database* (DOI 10.17026/dans-xwq-ka6y, 2020) version 1 <https://easy.dans.knaw.nl/ui/datasets/id/easy-dataset:213874>, and Cale Davis, *International Criminal Law Prosecution Sentencing Recommendation Statistics* (DOI 10.17026/dans-xd5-hyuz, 2019) version 1 <https://easy.dans.knaw.nl/ui/datasets/id/easy-dataset:213875>.

Court	Legal Error	Factual Error	Procedural Error	Sentencing Error
ICTY	53%	33%	NA	14%
ICTR	57%	35%	NA	8%
SCSL	45%	40%	15%	0%
ICC	50%	19%	19%	13%
All	53%	34%	3%	10%

Table 7.2: The errors alleged in post-judgment prosecution appeal grounds. Cale Davis, *International Criminal Law Prosecution Appeals Briefs Database* (DOI 10.17026/dans-xwq-ka6y, 2020) version 1.

factual errors by almost 20%. In their notices and briefs, however, prosecutors regularly characterise their chosen grounds under more than one legal avenue. 48% of all grounds that prosecutors have filed are a combination of two or more legal characterisations.

In terms of whether prosecutors have been successful on appeal, the numbers again demonstrate a mix of outcomes. In most cases, or 52%, prosecutors have succeeded or partially succeeded on at least one of the grounds of appeal that they raised. If success is determined by the number of grounds of appeal granted or partially granted on appeal as a percentage of grounds pressed on appeal (excluding those still pending, those that the judges decided they did not need to address, or those that were terminated or withdrawn), the picture is less rosy: prosecutors have only succeeded or partially succeeded on 35% of grounds. In fact, at all courts, prosecutors have been far less successful on appeal than they have been successful or partially successful. In table 7.3, it is revealed that prosecutors at all courts have had notably less success on appeal than failures. ICC prosecutors have never succeeded—either wholly or in part—with a post-judgment appeal ground. Of all the prosecution offices, ICTY prosecutors had the best appeal track record, having some success in 46% of the grounds they pursued.

But why have these appeals been pursued in the first place? And what influenced prosecutors' decisions to invest time, effort, and resources in a process that has to date resulted in such a miserable success rate? The following two sections explore six thematic windows into the possible motivations and assumptions that may answer these questions.

Court	Granted	Partially Granted	Dismissed	Sum of Grounds
ICTY	35%	11%	55%	110
ICTR	14%	10%	76%	80
SCSL	26%	9%	65%	23
ICC	0%	0%	100%	6
All	25%	10%	65%	219

Table 7.3: The judicial outcome of prosecution appeal grounds. Cale Davis, *International Criminal Law Prosecution Appeals Briefs Database* (DOI 10.17026/dans-xwq-ka6y, 2020) version 1.

4 Normative Considerations

4.1 A 'need' for appropriate sentences

Prosecutors have acted as performers of moral norms in the exercise of their discretion whether to appeal. As mentioned in section 3, 10% of all appeal grounds raised on appeal challenged directly how the Trial Chamber judges exercised their sentencing discretion. While prosecutors only succeeded or partially succeeded in challenging sentences in 12 out of 41 cases where a sentence was challenged (or 29%), 53% of all cases prosecutors took on appeal sought a higher sentence for the defendant. One prosecutor described that an appeal was a "chance to make law and to show that… this kind of conduct, even if it may only be complicity… needs to be represented by a more substantial sentence".[19]

The arguments prosecutors have raised in appeal briefs on grounds concerning sentences at the ICTY, SCSL, and ICC[20] reveal that "this kind of conduct" is a broad church of considerations. This is not surprising, given the scope that Trial Chamber judges have to take into account an endless number of factors in arriving at an appropriate sentence.[21] Prosecutors have,

19 Interview with P9.

20 The ICTR has been excluded for the purposes of the analysis that follows in this section due to the large number of appeal briefs that remain under seal.

21 See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (September 2009), art 24(2); *Statute of the Special Court for Sierra Leone*, art 19(2); *Statute of the International Criminal Tribunal for Rwanda* (31 January 2010), art 23(2);

for example, justified their claims for higher sentences by reference to a defendant's premeditation; mode through which they committed the offences; rank and level of authority; knowledge and intent; and attempts to block the arrival of help. They have argued that a defendant's education and training should be counted against them. They have emphasised the vulnerability of the victims; their number; whether they were terrorised; the 'inherent gravity' of the defendant's offences; the geographic and temporal spread of the crimes; and their systematic nature.

On the other side of the coin, prosecutors have been dismissive of some factors relied upon in mitigation. In what reads almost like a roll-call of arguments raised by defendants in the hope of receiving a lighter penalty, prosecutors have criticised sentences being reduced on the basis that a defendant was not an active participant in the offending. They have rejected the importance of a defendant's moral character; expressions of sympathy for the victims; concerns about the conduct they were engaging in; the attempts they made at remediation; their age; medical conditions; submissive character; intelligence; training; lack of training; lack of criminal record; good conduct in detention; and withdrawal from public life. They have even downplayed the significance of a defendant's cooperation with investigators and prosecutors, and the fact they voluntary surrendered.

But what is the "need" that sentence appeals meet? While it is true that nearly all sentencing appeal briefs do attempt to justify the value of sentencing, it is also true that there is only minimal consistency between them. For example, out of 42 sentencing appeal briefs,[22] 11 explicitly refer to the deterrent value of sentences. This is the most prominent justification, though it appears only in just over a quarter of all appeal briefs. The remaining three-quarters take different approaches. 8 briefs justify the need to appeal by reference to the need for retribution and punishment. 4 stress that higher sentences are needed to stigmatise the defendant's conduct or express the international community's *existing* non-tolerance of the crime. 2 emphasise that sentences help in rehabilitation, building peace, delivering 'justice to the victims', or maintaining the general public's confidence in the administration of justice and the efficacy of the court. Finally, there have been solitary references to reconciliation, acknowledging the harm that victims have suffered, and *developing* a non-tolerance of the crime.

International Criminal Court, *Rules of Procedure and Evidence* (2002), r 145(1)(b).

22 The reader is reminded that the ICTR is excluded from this analysis because of the large number of appeal briefs that remain under seal.

Thus, while it is evident that international prosecutors have turned their minds to why it is worth investing time, effort, and resources into appealing sentences, little by way of a coherent justification has emerged since the first sentencing appeal brief was filed in June 1997.[23] There are many reasons, though several stand out as they challenge popular understandings of the purpose and efficacy of international criminal justice.

The first is the emphasis that prosecutors have placed on the deterrent value of sentences. Prosecutors have justified sentence appeals on the basis that higher sentences reduce the prevalence of criminal conduct. But this justification is unsupported and unconvincing. Indeed, the link between international criminal justice and deterrence is tenuous at best. It is difficult to measure and suffers from a lack of empirical evidence. Jennifer Schense, concluding a comprehensive study of the deterrent effect of international criminal courts initiated by the International Nuremberg Principles Academy,[24] observed that "[i]t is… problematic to attempt to measure or correlate deterrence with the work of international criminal courts", and that "[a]t best, it is possible to document parallel events, either a decrease or increase in violence, but there are too many actors and too many variables to find a direct or even indirect effect conclusively".[25] Barrie Sander identified a number of challenges that limit the deterrent effect of sentences, including the limited probability of sentences being imposed against those who engage in criminal conduct, the time between offending and the imposition of a sentence, and the fact that the logic of deterrence is premised on "ill-fitting" assumptions about "perpetrator rationality and prudence".[26]

The second is that prosecutors have asserted the expressive power of sentences. They have argued that sentences not only *maintain* existing normative opposition to the prosecuted conduct, but also *transform* existing norms towards stigmatisation and non-tolerance. The expressive potential

23 *Prosecutor v Duško Tadić (Notice of Appeal)* (ICTY, Appeals Chamber, IT-94-1-A, 6 June 1997).

24 The Academy is "dedicated to the advancement of international criminal law": *International Nuremberg Principles Academy* <https://www.nurembergacademy.org>.

25 Jennifer Schense, 'Conclusion: Findings and recommendations' in Jennifer Schense and Linda Carter (eds), *Two Steps Forward, One Step Back: The deterrence effect of international criminal tribunals* (International Nuremberg Principles Academy, 1st ed, 2016) 333, 337.

26 Barrie Sander, 'Justifying International Criminal Punishment: A critical perspective' in Morten Bergsmo and Emiliano Buis (eds), *Philosophical Foundations of International Criminal Law: Foundational concepts* (Torkel Opsahl Academic ePublisher, 1st ed, 2019) 167, 181-192.

of sentencing (indeed all aspects of criminal justice) is not a new discovery,[27] though expressivist theories have recently gained increasing acceptance as compelling justifications for the role of international criminal law.[28] These theories emphasise that punishment "carries symbolic relevance" through its messages about retribution, prevention, and restoration.[29] What is interesting here, however, is that prosecutors have so warmly embraced their role as architects of public morality as a justification for sentencing appeals. Appeals are more than just vehicles through which general deterrence can be realised and condign punishment meted out. Prosecutors have seen them as a means though which an imagined, future, collective morality can be realised. The justification for sentencing appeals rests strongly on hopes and aspirations.

Finally, the single sentencing appeal that relied (in part) on maintaining the general public's confidence in the administration of justice and the efficacy of the court demonstrates that sentence appeals can also serve a court's interest. In the 2001 *Prosecutor v Zejnil Delalić et al* Appeals Judgment, the Chamber held that it was important the Court impose consistent and fair punishments so as not to erode public confidence in the administration of justice.[30] Later that year, in their Appeal Brief in *Prosecutor v Dario Kordić and Mario Čerkez*, prosecutors relied on this argument in support of their claim that Kordić's sentence should be increased from 25 years to somewhere in the realm of the 45 years that was given—in what they argued was a comparable case—to Tihomir Blaškić.[31] Consistent sentencing, they ar-

27 In 1893, Émile Durkheim argued that the "real function" of punishment is "to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour": Émile Durkheim, *The Division of Labour in Society* (W D Halls, Free Press, 2nd ed, 2014) [trans of: *De la division du travail social*], 83.

28 See, for example, Barrie Sander, 'The Expressive Turn of International Criminal Justice: A field in search of meaning' (2019) 32(4) *Leiden Journal of International Law* 851; Mirjan Damaška, 'What's the Point of International Criminal Justice?' (2008) 83(1) *Chicago-Kent Law Review* 329; Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020); Margaret de Guzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2011) 33 *Michigan Journal of International Law* 265; and many others.

29 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 324, 328.

30 *Prosecutor v Zejnil Delalić et al (Appeals Judgment)* (ICTY, Appeals Chamber, IT-96-21-A, 20 February 2001, [756].

31 *Prosecutor v Tihomir Blaškić (Judgment)* (ICTY, Trial Chamber, IT-95-14-T, 3 March 2000, 270. It should be noted that on 29 July 2004, Blaškić's sentence was

gued, is necessary to maintain public confidence in the administration of justice. What is remarkable about this justification (putting aside questions of whether the argument is correct) is that it is is entirely introspective. It demonstrates that prosecutors saw that public confidence in the ICTY *itself* was a reason warranting the commencement of an appeal. In doing so, they transformed appeals from serving external interests to personal ones and adopted the role of guardians of the ICTY's integrity.

4.2 Developing the law

The second factor that international prosecutors have considered in the exercise of their discretion whether to appeal is whether the appeal can be used to develop the corpus of international criminal law.

In the mid 1990s, when the ICTY and the ICTR were still in their formative stages, there was little by way of authority for clear pronouncements on procedural and substantive points of law. "I think in the early days", reflected one prosecutor, "lots of it was totally unchartered".[32] Another recalled that "a lot of the substantive international criminal law, as well as the procedural law, was still quite undeveloped".[33] The idea that the Appeals Chamber judges could be used to remove this ambiguity appears to have influenced some prosecutors in their discretion to appeal. "[W]hat happens at the appeal level can be very important in terms of the evolution of international criminal law", one prosecutor observed.[34] Another believed that "a lot more things would have been appealed simply because there was no authoritative case law on it… [a]nd so it became necessary to get those authorities", adding that "in the early days, one of the considerations was simply getting international criminal case law on things that were important points of law".[35] Moreover, they explained, "[i]f [a] point is decided adversely to the Prosecution, … particularly if it's a point that's likely to come up in future cases, it can be seen that this is a point on which it would be useful to have Appeals Chamber-level authority".[36]

For one former SCSL prosecutor, the desire to get authority from Appeals Chamber judges even outweighed the expediency, convenience, and

overturned on appeal and he was resentenced to a term of imprisonment of 9 years (to run from that day).

32 Interview with P18.

33 Interview with P15.

34 Interview with P14.

35 Interview with P15.

36 Interview with P15.

financial benefit that would have come from simply not appealing at all. They recalled that after the Trial Chamber judges delivered their judgment in one trial, they were approached by a member of the defence team who proposed that the defence would not appeal "on any of the substance or any of the substantive things that happened" if prosecutors did not appeal the sentence, and they could "close this one down right here and now".[37] This could well have been financially sensible. The SCSL was never a tribunal to be flushed with cash: in 2007, the Tribunal's President noted the "grave and imminent concern" of the SCSL running out of money,[38] and in 2009 the then-Chief Prosecutor Stephen Rapp publicly expressed "real anxiety" that Charles Taylor would be released from custody prior to the Trial Chamber judges publishing their judgment because finding funds was "not easy".[39] In this context, the prosecutor's response to the defence's offer is remarkable. "[W]ell", they said, "if I were in the United States I'd probably agree to that, because I'd have a bunch of other cases to fight the same issues out".[40] But this was not the United States, and there was not a bunch of other cases in the pipeline dealing with the same issues. The appeal therefore went ahead, demonstrating a striking degree of opportunism (bearing in mind, of course, that *all* SCSL indictees were convicted at trial). Even when confronted with a defence offer to simply put an end to proceedings—which would undoubtedly have saved significant resources—the prosecutor saw that the opportunity to develop the law needed to be taken.

Prosecutors also appear to have been influenced by a desire to develop what might be termed a 'principled' body of law that pays homage to their personal beliefs about what international criminal law should aim to achieve. As one prosecutor vaguely remarked, "I suppose our basic aim is to ensure that justice is done".[41] Several spoke of the desire to launch appeals with the hope of advancing the scope of protection for vulnerable persons. One prosecutor recalled that they thought that several arguments accepted by

37 Interview with P9.

38 United Nations Security Council, 'Special Court for Sierra Leone faces funding crisis, as Charles Taylor trial gets under way, Security Council told today in briefing by Court's senior officials' (Press Release, SC/9037, 8 June 2007) <https://www.un.org/press/en/2007/sc9037.doc.htm>.

39 Constance Johnson, 'Liberia; Sierra Leone: Financial shortfall may lead to Taylor's release', *Global Legal Monitor* (online), 5 March 2009 <https://www.loc.gov/law/foreign-news/article/liberia-sierra-leone-financial-shortfall-may-lead-to-taylors-release/>.

40 Interview with P9.

41 Interview with P14.

judges were "wrong" because the interpretation "left a protection gap".[42] As an example, they recalled that ICTY and ICTR jurisprudence was not clear with respect to whether "victims of crimes against humanity have to be civilians"—a reference to whether a 'civilian population' that was the subject of an attack had to completely consist of civilians. "[I]t was felt that wasn't right", they explained.[43] Similarly, in the *Ntaganda* case, one prosecutor described that "we thought that girl child soldiers in [Ntaganda's] ranks were a victim group that needed protection. We needed to make the point that he was responsible for what happened to them and the kind of cruel, sexual exploitation that was occurring with these particular child soldiers was something that was deserving of attention".[44] They explained that the decision of the Appeals Chamber judges—though on a Defence appeal—"has now allowed us in other cases… to seek to protect such vulnerable populations".[45]

Still, international criminal courtrooms are spaces in which humans need to professionally interact—often for long periods of time; and often in relation to tedious (and at times boring) legal or evidentiary matters. As argued by James Eisenstein and Herbert Jacob, courts have a permanence to them and people will often need to work with each other again.[46] The attractiveness of an argument cannot be completely divorced from the person making it. This was evidenced by one prosecutor, who observed that some prosecutors would try to develop the law in such a way that the judges became annoyed. "There's no point making an argument that's rubbish", they pointed out, explaining that these arguments were pointless and irritated the judges they were trying to convince.[47] "But I think in some situations those arguments were being made", they continued, explaining that some prosecutors "… were taking every point under the sun because there was

42 Interview with P18.

43 Interview with P18.

44 Interview with P14.

45 Interview with P14. The matter was resolved in *The Prosecutor v Bosco Ntaganda (Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9")* (ICC, Appeals Chamber, ICC-01/04-02/06 OA5, 15 June 2017).

46 James Eisenstein and Herbert Jacob, *Felony Justice: An organisational analysis of criminal courts* (Little, Brown and Company, 1st ed, 1977), 20, quoted in David Neubauer, 'The Dynamics of Courthouse Justice: A critical review of the literature' (1979) 5(1) *Justice System Journal* 70, 71.

47 Interview with P18.

enthusiasm for developing the law".[48]

The desire to develop the law appears to have stemmed (at least in part) from an underlying guardian-ward relationship between prosecutors and imagined, future victims. This relationship demonstrates the panoptic tendencies of prosecutorial appeals. Successful prosecutorial appeals have served to expand prosecutorial authority with respect to more classes of people. Appeals allow prosecutors to increase the number of people who are entitled to claim victim status and who can be successfully prosecuted. Just as Michel Foucault described how the division of social life into smaller parts allows for its administration and control,[49] the progressive development of the law draws more people into the orbit of international criminal justice. The identification of new classes of victims and defendants allows prosecutors to claim authority over their situation and demonstrate that international criminal law is relevant to their position. Appeals allow prosecutors to identify new classes of victims and defendants, and in doing so, allow them to exercise their power with respect to them.

There is also a notable relationship to future law-users embodied in the desire to develop the law. The desire is based on two presumptions. First, that the law as it stands is undeveloped, incomplete, or inappropriate. Second, that there is a benefit that comes from acting on the first presumption—specifically, that the same or comparable issues will once again arise in future situations and those who will need to deal with them will benefit from the work of previous prosecutors in clarifying rights, obligations, and matters of procedure. Appeals therefore represent an attempt by prosecutors to exercise constructive control over the direction of the law for the benefit of these future law-users by giving them greater clarity and equipping them with the tools they need to navigate the situations they are confronted with.

The desire to develop the law may also be attributable to a prosecutor's socialisation into the college of prosecutors. Group members seek to socialise in order to increase the predictability of their interactions, develop good relations with existing group members, have meaningful exchanges with them, and develop an identity as being a member of the group.[50] In order to do so, new group members inform themselves about the group's "poli-

48 Interview with P18.

49 See, generally, Michel Foucault, *Discipline and Punish: The birth of the prison* (Penguin, 1st ed, 1991).

50 Georgina Chao, 'Organisational Socialisation: Background, basics, and a blueprint for adjustment at work' in Steve Kozlowski (ed), *The Oxford Handbook of Organisational Psychology* (Oxford University Press, 1st ed, 2012) 579, 584-586.

cies and logistics, the general role expectations and behavioural norms", and other things, while partially suspending their critical thinking about the paradigm they are entering.[51] It is thus possible that if any given prosecutor understands the archetypical prosecutor to be someone who 'develops the law' (for whatever reason), their intention to do the same may in part be attributable to their socialisation into the prosecutorial college. The motivation to appeal may be driven by an exogenous forces, but fuelled internally by the four motivators that drive the socialisation of individuals into groups or organisations.

The value of appeals in filling legal gaps also served the ancillary purpose of allowing prosecutors to realise their imagined future institutional landscape and play a critical role in overcoming the challenges facing this realisation. One prosecutor, reflecting on their time at the ICTR, saw international criminal law as fragile and vulnerable. They were cognisant that the ad hoc tribunals were something of an experiment and liable to failure, and were thus mindful that part of the appeals process involved demonstrating "you can do it. You can establish a Court, bring justice in situations, sometimes even while crimes are being committed".[52] The prosecutor explained that because institutions have failed, run aground, and not succeeded, "if you don't show that you can make it work, it's not going to happen again" because the whole enterprise was merely a "flash in the pan" and "like the League of Nations or something. It wasn't going to be able to stop anybody from doing anything".[53] There is an undercurrent of anxiety here that reflects the gravity of the responsibility the prosecutor was feeling. Having been entrusted to play a role in bringing to life the idea of an international criminal court, and thus with international criminal law, they owed a responsibility not only to those who believed that international criminal justice was possible to achieve but also those who may benefit from its existence in the future.

For one ICTY prosecutor, the possibility of the ICC coming into existence was also playing on their mind. "[T]here was a consciousness", they described, "that… an ICC may follow".[54] They were alive to the reality that the jurisprudence produced by the ICTY was relied on by other tri-

51 Blake Ashforth and Fred Mael, 'Social Identity Theory and the Organisation' (1989) 14(1) *Academy of Management Review* 20, 26; Blake Ashforth, 'Climate Formation: Issues and extensions' (1985) 10(4) *Academy of Management Review* 837, 840.

52 Interview with P9.

53 Interview with P9.

54 Interview with P15.

bunals.[55] However, they explained, "it wasn't officially part of the function of the ICTY and therefore not officially part of everyone's thinking as they're going about the work that we have to bear in mind [there] is going to be a permanent international criminal court one day"; and no one ever said that "we should exercise our prosecutorial discretion in this way because one day there will be an ICC".[56] The prosecutor doubted that the emergence of the ICC "was of direct relevance to the way things were done at the ICTY at the time".[57]

Yet this consciousness does demonstrate something about the role prosecutors occupy in international criminal law. The prosecutor was aware that the field is not made up of silos, in which the ramifications of a prosecutor's work are not experienced beyond the court in which they work. To the contrary, prosecutors are part of a multi-institutional epistemic community whose members draw upon, and are influenced by, the work of their peers in other courts. What is interesting is that while the prosecutor was very much aware of this role, they strongly rejected the idea that this awareness influenced their work. In other words, while being aware that their decisions would affect the work of prosecutors in other courts, they did not see any responsibility towards their peers or any other institution. On the basis of how prosecutors spoke about the relationship between appeals and developing the law, one is left with the impression that while some were enthusiastic about the prospect of building a lasting legal system that spanned across multiple institutions, prosecutors may also have have been unwilling to actively engage with the issues of how their appeals affected imagined or existing institutions, or their peers within them.

4.3 Protecting the integrity of the law

Prosecutors have also deployed their discretion to appeal in order to 'protect' the integrity of the law. The discretion to appeal is a check on judicial discretion. It is a remedial tool through which prosecutors have attempted to correct exercises of judicial discretion that they see as straying too far from the outcomes required by law. This remedial function is a markedly different from the purpose described in section 4.2. Instead of discretion being deployed constructively—to fill a normative void; protect imagined communities; or share the burden of responsibility for its development—the

55 Interview with P15.
56 Interview with P15.
57 Interview with P15.

notion of repair is restorative. The purpose of discretion is on reverting law to the past, rather than advancing it into the future. It is used to stagnate the development of new norms that have been advanced by lower chambers.

Several examples illustrate this. One ICTR prosecutor described that the "critical" consideration for them was simply whether there was "an appealable error" that had "prospects of success". [58] Similarly, another described that during their time at the ICTY, they were "much more focussed upon realistic grounds" rather than trying to develop the law, and it was only "… [o]ccasionally there were areas where there was an underdevelopment in the law and we didn't really know what the answer was".[59] While one ICC prosecutor regarded that it was "a bit pretentious" to refer to themselves as "*le garant de l'égalité*", or the guarantor of equality, they nevertheless considered that "the integrity of the proceedings is part of our business" even though the chief responsibility lay with the judges.[60] If an issue appeared that affected the integrity of the proceedings, they matter-of-factly elaborated, "I think everyone will tell you we have a duty to raise that issue".[61]

Not everyone had the same view—at least, not in such black-and-white terms. One prosecutor mentioned a significant caveat: if they were going to appeal on the basis of an error, that error had to have affected the *outcome* of the proceedings (rather than its presence merely affecting the decision's integrity). "It's no good just finding all kinds of errors if they don't actually have an impact upon the outcome… the final decision in relation to guilt or innocence", they explained.[62] "[S]ometimes you would spot errors that you think 'oh, that wasn't right, that wasn't right, that wasn't right' ", they continued, "[but] if it didn't really affect the integrity of the judgment overall it's not something we would seek to appeal".[63]

58 Interview with P26.
59 Interview with P18.
60 Interview with P26.
61 Interview with P26.
62 Interview with P18.
63 Interview with P18.

5 Strategic Considerations

5.1 Communicating disagreement and garnering the support of external actors

Decisions to appeal may also have been made to communicate that a Prosecutor disagreed with a decision in order to ensure the support of external actors. One prosecutor believed that Carla Del Ponte "thought that sometimes you have to appeal *only* to send a clear message to the communities that are affected or lay down the marker that you disagree with a decision".[64] This view was supported by another prosecutor, who upon hearing this recollection remarked that they had "heard that said many times by her in different ways", going on to bitingly remark that "[i]t was a political process to her, it was not a professional process. It was purely and utterly political".[65] Obviously, these recollections should not be read literally: no prosecutors would ever appeal if they *agreed* with a decision. The point these prosecutors appear to have been making, however, is that Del Ponte placed significant importance on the communicative potential of commencing an appeal to deliver messages to affected communities.

There is some evidence from Del Ponte herself that she placed great importance on the communicative power of appeal proceedings. In her memoirs, for example, she lamented the decision of the ICTR Appeals Chamber judges to release Jean-Bosco Barayagwiza on the basis of the prosecutors' significant delay in prosecuting his case (among other things). The judges decided to dismiss the indictment against Barayagwiza 'with prejudice', effectively barring prosecutors from ever prosecuting him with respect to the conduct they had originally alleged.[66] While she was "disturbed that Barayagwiza would escape justice", Del Ponte recalled that she was "*more concerned*" that the "Rwandan government would retaliate against the [ICTR] itself by permanently refusing to cooperate with its work".[67] As such, prosecutors filed a motion for reconsideration in the hope that the Appeals Chamber judges would reverse their earlier decision. In her argument,

64 Interview with P26. Emphasis added.

65 Interview with P29.

66 *Prosecutor v Jean-Bosco Barayagwiza (Decision [against the 'Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nullify the Arrest and Provisional Detention of the Suspect'])* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 3 November 1999), [113].

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

Del Ponte expressly stated that the Rwandan authorities would "no longer be 'involved in any matter' " if Barayagwiza was to escape trial.[68] This, as it turned out, was not without good foundation. The Attorney-General of Rwanda, appearing in-person as amicus counsel, "openly threatened the non-cooperation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review".[69]

Ultimately, Del Ponte's request for reconsideration was successful.[70] The judges decided that prosecutors were not barred from prosecuting Barayagwiza, and Rwandan authorities did not stop cooperating with the ICTR. Whether Del Ponte would have succeeded in maintaining Rwanda's cooperation in the event that the request for reconsideration was *unsuccessful* is, of course, a matter of speculation. At the least, Del Ponte's request for reconsideration certainly did not harm the relationship. Paul Kagame, who by that time had become the Rwandan president, "thanked the prosecution for *contesting* the Appeals Chamber's decision to release Barayagwiza".[71] While this request for reconsideration is not *strictly* an appeal proceeding, it does serve as evidence to support the two prosecutors' recollections that some appeals may well have been commenced in order to *communicate* to an affected community that the Prosecutor disagreed with what judges had decided and to garner the support of external actors.

Del Ponte's concern for using the appeal process as a means of communicating a message and disagreement to external parties for the purpose of obtaining their support is indicative of her being engaged in two power struggles. The first of these was against the judges for control over Rwanda's cooperation with the ICTR. Prosecutors needed to demonstrate to the Rwandan authorities that they shared their concerns that Barayagwiza would not be prosecuted. By placing significant emphasis on the message that came from *commencing* the appeal, as opposed to the *outcome* of the appeal, Del Ponte had committed an act of symbolic violence both against

68 *Jean-Bosco Barayagwiza v The Prosecutor (Decision [on the] Prosecutor's Request for Review or Reconsideration)* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 31 March 2000), [24].

69 *Jean-Bosco Barayagwiza v The Prosecutor (Decision [on the] Prosecutor's Request for Review or Reconsideration)* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 31 March 2000), [34].

70 *Prosecutor v Jean-Bosco Barayagwiza (Decision [on the] Prosecutor's Request for Review or Reconsideration)* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 31 March 2000).

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

the judges and the judicial process more broadly. Her actions sought to strip the judges and the judgments of their authority and reposition the Prosecutor as the central source of influence over external actors. Regardless of whether or not the Appeals Chamber judges granted the prosecutors' request for reconsideration, Del Ponte's action in filing the application served to dilute the importance of the Appeals Chamber judges' ultimate decision with respect to whether the Rwandan authorities maintained a good relationship with the Prosecutor.

The second of these was a struggle for the Prosecutor's own identity. Accompanying the Rwandan authorities' threat of non-cooperation was an implicit challenge to the Del Ponte's (adopted) role as the guardian of the ICTR's integrity and functional viability. If Del Ponte took action and challenged the Appeals Chamber judges' decision to bar the Prosecutor from pursing Barayagwiza, she would able to re-assert the Prosecutor's authority as an effective guardian of a court whose judges appeared to be self-inflicting mortal wounds; but if she stood idly by, she would need to live with the fact that she alone had the opportunity to save the ICTR from falling into obscurity, but failed. Thus, while Del Ponte pleaded to the Appeals Chamber judges "… not to allow… Barayagwiza… to decide on the fate of this tribunal",[72] the fate of the Tribunal lay more in her hands than the Defendant's.

The idea that appeals could be used merely to show disagreement was, however, not warmly received by other prosecutors. One ICC prosecutor remarked that it was not the ICC Prosecutor's practice to commence appeals only to show that they were doing something—"we are a legal office", they remarked, "… you shouldn't bring an appeal that you think has zero chances of success only because you want to put down your foot".[73] If there was no clear error, they argued, bringing an appeal would not be an appropriate use of discretion and would be "frivolous litigation".[74] However, they added, in borderline cases where prosecutors identified factors that were not considered at first instance might be tipped in favour of an appeal if there were also "serious policy or operational considerations" and the "costs of not appealing are huge".[75] But, they went on, "[w]hat I don't think this Office will do is bring a hollow appeal only for the purposes of saying 'well, we

72 Carla Del Ponte, *Madame Prosecutor: A memoir* (Other Press, 1st ed, 2008), eBook.
73 Interview with P26.
74 Interview with P26.
75 Interview with P26.

have appealed' ".[76] Contrary to Del Ponte, this prosecutor's position does not seek to upset the traditional hierarchy that sees prosecutorial filings as subordinate in influence to judgments, and therefore rejects the idea that the Prosecutor can serve as a guardian of the Court's functional viability by using appeals to garner the support of external actors.

5.2 Providing work to judges

One of the more peculiar factors that one prosecutor regarded when determining whether to appeal was whether the judges in the Appeals Chamber had any work to keep themselves occupied with. Simply put, appeals would give them something to do. As discussed previously in section 4.2, at the conclusion of sentencing in the *Prosecutor v Moinina Fofana and Allieu Kondewa* trial,[77] prosecutors were concerned that the sentences (respectively 6 years for Fofana and 8 years for Kondewa) were inappropriate and fell far short of the 30 years that they had recommended for both accused.[78] The sentences were, in the words of one SCSL prosecutor, "outrageous".[79] As such, prosecutors were of the opinion that they needed to appeal. At the same time, Kondewa's defence team had their own concerns about the law and the facts the Trial Chamber judges relied on to reach their decision that Kondewa was guilty.

After the sentence was delivered, one prosecutor recalled that they were approached by one of Kondewa's lawyers who proposed a truce: the defence would not appeal if the prosecutors did not appeal, and together they could "close this one down right here and now".[80] But the prosecutor rejected this invitation. In addition to seeing an appeal as an opportunity to develop the law, one prosecutor wondered "what the heck are these judges going to do for the next six months if I don't send them this appeal?".[81] When asked if this was indeed a factor they considered in the determination of whether to appeal (and thus being given the chance to retract a statement that might

76 Interview with P26.

77 This is also called the *CDF case*. *Prosecutor v Moinina Fofana and Allieu Kondewa (Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa)* (SCSL, Trial Chamber, SCSL-04-14-T, 9 October 2007).

78 *Prosecutor v Moinina Fofana and Allieu Kondewa (Prosecution sentencing submission pursuant to Rule 100(A) of the Rules of Procedure and Evidence)* (SCSL, Trial Chamber, SCSL-04-14-T, 924 August 2007), [183].

79 Interview with P9.

80 Interview with P9.

81 Interview with P9.

have taken liberty with the truth), the prosecutor confirmed that "[y]eah, no, I said it aloud to them" and then named the Defence lawyer who they said it to.[82] A desire to provide work to the appeals judges was a factor that informed their decision to appeal Kondewa's sentence.

The remarkableness of this revelation is only mitigated somewhat by the fact that this is not the only time concerns about judges' workloads had informed a prosecutor's discretion. It will be recalled that in chapter 3, on page 99, Richard Goldstone described the "huge potential for frustration" when judges did not have trials in the early days of the ICTY,[83] and another prosecutor's recollection that "[t]he judges were on our back, and we were feeling the frustration and the pressure".[84] There are, therefore, three independent confirmations that the workloads of judges were playing on the minds of prosecutors when exercising deciding on situations and cases and whether to appeal.

When a prosecutor's decision to appeal is influenced by the amount of work currently before the Appeals Chamber judges, this reveals two different features of their role identity and belief system. With respect to their role, the prosecutor in the above story about Kondewa saw that they had a responsibility to provide the judges with work. Who this responsibility was owed to is not clear. It may have been towards the judges as people and motivated by a desire to provide them with a task and thus allow them to meaningfully fulfil their role. It may have been towards the Court's funders, to demonstrate that the Court was functioning and money was being well-spent. Or it may have been towards themselves, stemming from the belief that judges need to be working. Regardless of who the prosecutor believed they were responsible to, it is clear that their understanding that judges need to be working stems from an underlying belief that the value of the appeals judges was a function of the amount of work they were engaged in, as opposed to their output. In other words, the prosecutor's discretion

82 Interview with P9.

83 Richard Goldstone, 'A View from the Prosecution' (2004) 2(2) *Journal of International Criminal Justice* 380, 381. See also Goldstone's recollection that judges "were beside themselves with frustration and even anger" (Richard Goldstone, 'The International Criminal Tribunals for the Former Yugoslavia and Rwanda' in David Crane, Leila Sadat, and Michael Scharf (eds), *The Founders* (Cambridge University Press, 1st ed, 2018) 55, 58), and that one judge was "embarrassed" because "he couldn't go to his club in his home town because his friends laughed at him" as he was a judge on a United Nations salary without any cases (Richard Goldstone in *Against All Odds* (Sense TV, 2003) <https://www.sensecentar.org/node/1984>.

84 Interview with P4.

to commence the appeal was informed by a belief that the value (or the product) of the appeal was that it would result in work—the appeal provided the judges with work, for the sake of having work. The belief appears to be that judicial activity is to be preferred over idleness, regardless of what the result of the activity is.

5.3 Responding to the interests of the victims

Perhaps the most remarkable feature of the discretion to appeal is how few prosecutors spoke about the role of victims in their considerations whether to appeal—and those who did, did so in response to a question or a statement. One prosecutor observed that if the Trial Chamber judges found against prosecutors on a matter of fact that they believed was affected by a legal error, it was important "from a victim perspective as well that that be tested at appellate level".[85] Another prosecutor said that "it might be that some victims technically fell out of the judgment", and wondered "will those victims' families ultimately be distressed about that? Maybe they will, maybe they won't", they answered, before adding "[b]ut the defendant's still convicted, and that's really what they're concerned about. That was the goal: to ensure that the defendant's convicted and/or remains convicted".[86] "[O]f course you're conscious of the victims", they observed, explaining that "… [i]t's very important to have them very clearly in mind".[87]

When contrasted with the level of detail that prosecutors went into in describing the role of victims in situation and charge selection, the discussion of the role of victims in the discretion to appeal is comparatively limited and superficial. Victims' interests appear to play a far limited role in the discretion to appeal. This is despite two important realities: first, the decision to appeal—just like the filing of an indictment—is the commencement of a legal proceeding; and second, the decision to appeal can have a material impact on whether the defendant is ultimately acquitted or convicted. In terms of whether the defendant is convicted or acquitted for the harms that they have caused or allegedly caused, the decision to appeal is identical to the decision to charge. So why do the victims feature much less prominently in the considerations to commence this form of proceeding as opposed to the decision to commence a trial? There are several possible explanations.

85 Interview with P15.
86 Interview with P18.
87 Interview with P18.

First, appeals might be seen as less important when it comes to the protection of victims' interests. The reason for this concerns less what appeals achieve, but what they do not when juxtaposed with a conception of trials that emphasises particular core features. If a trial is seen as the forum in which victims emerge to tell their stories; receive the cathartic benefits that flow from confronting their alleged malefactors; build an historical record; transfix spectating populations as they are regaled with emotional and tragic tales; and embody the thrill and challenge of seeing the Prosecutor build a case with the hope the verdict of 'guilty' is pinned on the defendant *for the first time* and for all the world to see, appeals lack all of these features. The interests of the victims may already have been served, or the appeal proceeding may not be a forum in which they can be served any longer.

Second, appeals clearly serve different purposes. While the language of charging is clearly tied to notions of bringing *defendants* to justice and justice to *victims*, the language of appeals is more concerned with the creation and protection of the *law*. Victims and defendants are reduced to the vehicles through which the opportunity to engage in this construction and protection arise. In this sense, appeals may be conceptualised as having less to do with the doing of justice to any particular party, but more to do with ensuring the prosecutor fulfils their role as a guardian of the law's integrity and the builder of a corpus of law that can better protect future alleged victims and make it easier for future prosecutors to effectively prosecute their cases.

Finally, appeals see prosecutors confront a different opponent. In a trial, the prosecutor is opposed to the defendant. On appeal, they confront the defendant only physically in the courtroom and notionally on paper: when launching an appeal, the prosecutor's real opponents are the judges who made the impugned decision. The defendant is not responsible for the wrong that has caused the prosecutor to file the appeal. Moreover, the prosecutor, the Office, and the Prosecutor (as the symbolic and eternal body who is occupied by individuals) have now also joined the victims in their status as victims. The energy and thoughtfulness that prosecutors invested in parts of the trial resulted in nothing. Egos may have been hurt. Thus, the appeal transforms prosecutors into victims and judges into defendants (who can do nothing to defend themselves). It is perhaps unsurprising that the *real* victims (be they actual or alleged) may have been relegated to secondary importance and the appeal process is conceptualised as a battle in which they have only a symbolic role in.

6 Conclusion

This chapter has peered through six thematic windows that emerged from what prosecutors believed were important considerations when exercising their discretion to appeal. In looking through these windows, this chapter has demonstrated three core role identities that appear to have influenced how the discretion to appeal has been exercised.

The first is that prosecutors have adopted the role of moral *norm performers*. This is evidenced by the fact that they have commenced sentencing appeals, in part, to achieve deterrence, stigmatisation, promote rehabilitation, and encourage reconciliation. They have also adopted the role of procedural norm performers, by rejecting the idea that appeals should be used for anything other than correcting problematic legal errors and affirmed the norm that appeals should not be utilised for any other purpose.

Prosecutors have also acted as *builders*. They have been builders of the law, in the sense that they have sought to appeal in order to expand the corpus of jurisprudence on which they can rely to resolve legal problems. In two respects, they have also been builders of their respective courts. On the one hand, they have grappled for power within their institution for the right to affect the cooperation of external actors. On the other hand, they have used the appeal process to expand the category of victims and defendants under international criminal law, thereby serving to expand and cement the relevance of their court and themselves as prosecutors in international relations.

Finally, the most prominent role that is evidenced in decisions to appeal is that of the *guardian*. Prosecutors have acted as guardians over people, roles, institutions, and ideas. They have sought to defend these stakeholders against threats by recognising the dangers of decreasing state cooperation, falling public confidence, judicial inactivity, and judgments that impede the protective scope of the law. Yet they have also adopted a constructive role and sought to build the capabilities of other prosecutors and future law users by clarifying and expanding the corpus of international criminal law. At the same time, the prosecutor's role as a guardian is marked by the notable insignificance of the victims. The protection of the victims appears to be a collateral concern that is served primarily through the protection of the Court, judges, the law, other prosecutors, future law users, and themselves.

Decisions to appeal therefore appear to have been informed by prosecutors adopting three core roles. This chapter has demonstrated that the decision to appeal is influenced by far more than a mere desire to obtain

convictions or increase sentences. Instead, it has demonstrated that—like all other discretionary choices—the forces that have influenced the decision to appeal reflect the complex web of prosecutorial relationships and how individual prosecutors understand their place within it.