# Prosecutorial discretion in international criminal justice

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# Part III

# Reflections on International Prosecutorial Discretion

# Chapter 8
# Prosecutorial Discretion in International Criminal Justice

## 1 Introduction

The previous five chapters have presented something of mixed bag of factors that prosecutors have considered when exercising their discretion. They have ranged from the very practical to the fundamentally aspirational. There is no natural, pre-existing reason why any of these factors are relevant to the making of any particular decision. Nothing about the selection of witnesses, for example, mandates prosecutors to consider whether the witness will be able to tell an emotive story. Similarly, nothing about the selection of charges mandates prosecutors to try and maximise the prospects of a conviction being obtained. Yet these factors *have* been considered. Individually, these many factors have acted as thematic windows through which to peer to understand the relationships prosecutors have conceptualised between themselves and others, and the roles they occupy within the context of these relationships. Each factor has therefore provided an insight into why prosecutors have understood them to be relevant when making choices.

This thesis began by standing back from the issue of prosecutorial discretion in international criminal justice and looked at the concept of discretion more broadly. It then zoomed in on the issue of prosecutorial discretion specifically. To conclude, this chapter again takes a step back and looks at the issue of prosecutorial discretion in international criminal justice through a wide-angle lens. It does two things.

First, it typologises the roles that have been discussed in this thesis

into three categories. It explains how prosecutorial discretion has been influenced by prosecutors adopting the roles of norm performers, builders, and guardians. It therefore encourages a conception of the prosecutorial role that goes beyond the 'agent of justice' or 'party to the proceedings' dichotomy borne out of a simplified understanding of the common and civil law divide. It advocates for a relational conception of the prosecutorial role which recognises that prosecutors adopt different roles in the context of their many relationships.

Second, it reflects on the importance of role identities in the exercise of prosecutorial discretion. It argues that the identification of prosecutorial roles, when supported by empirical evidence, can be used to map the relationships that exist between prosecutors and others in order to understand why decisions are made. It also encourages a conscious engagement within the college of prosecutors regarding the appropriateness of these roles. An open and transparent dialogue regarding what international prosecutors *do* would foster the crystallisation of discretionary practice around a common and recognised set of role identities. It would constrain decision-making by naming those roles which are inappropriate for prosecutors to adopt; and emancipate practitioners by encouraging them to embrace others. Role identities also encourage a rethinking of how discretion is controlled. This idea invites a multi-dimensional approach that encompasses both the formal mechanisms through which discretion has historically been controlled, and the practices of socialisation through which prosecutors internalise the roles identified in this thesis. Finally, this chapter reflects on the relevance of role identity to prosecutorial performance. It argues in favour of a hybrid model of performance that combines both quantitative and qualitative elements that blends *goal*-based performance indicators with *role*-based performance indicators.

## 2 Discretion and the Roles of the Prosecutor

The thirty-seven thematic windows discussed over the previous five chapters have demonstrated that international prosecutors do not have just one role, nor is it true that the roles they do have are stagnant. These windows evidence that prosecutors engage in the creative imagining-into-existence of relationships between themselves and other actors or concepts. Within the context of these relationships, they adopt different roles that influence the decisions that they make. These roles can be typologised into three cat-

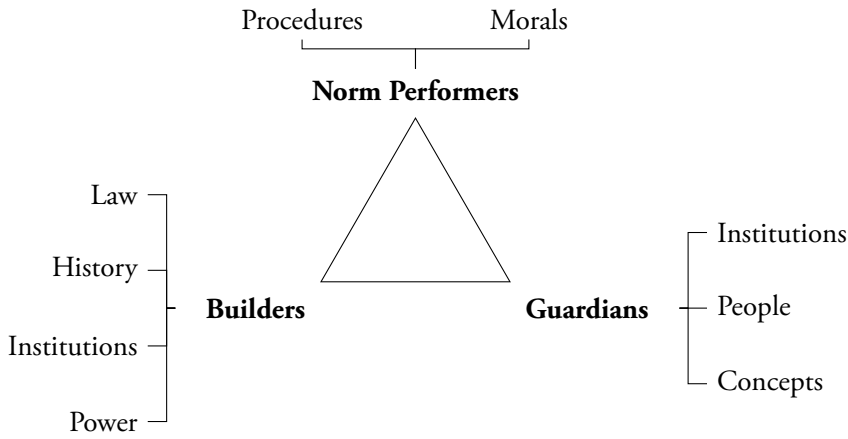


**Figure 8.1:** The three prosecutorial roles evidenced in decision-making, as well as the notions to which these roles are related.

egories: the prosecutor as a norm performer; the prosecutor as a builder; and the prosecutor as a guardian. These roles are illustrated in figure 8.1.

## 2.1 Prosecutors as norm performers

There is a long-standing link between justice processes and performances. In the opening pages of *Eichmann in Jerusalem*, Hannah Arendt famously observed that trials have comparable elements to plays.[1] The link is stronger than the mere comparison that both trials and performances demand audiences and performers. Performance explains the very function of justice processes. Shoshana Felman argued that "[t]he legal function of the court… is in its very *moral essence* a *dramatic* function: not only that of 'doing justice' but that of '*making justice seen*' in a larger moral and historically unique sense".[2] Performance allows law to serve higher purposes than

1 See, generally, Hannah Arendt, *Eichmann in Jerusalem: A report on the banality of evil* (Penguin, 1st ed, 2006), chapter 1 ('The House of Justice'). Arendt also claimed that that the trial of Eichmann never became a play, but rather a show, due to the minor position occupied by Eichmann during the proceedings (at 8-9).

2 Shoshana Felman, *The Juridical Unconscious: Trials and traumas in the twentieth century* (Harvard University Press, 1st ed, 2002), 162.

the outdated understanding that trials are forums merely concerned with the determination of guilt, such as catharsis or "attempting to make comprehensible the incomprehensible".[3] Performance also explains how justice processes obtain their authority. Julie Peters observed that performances in justice both serve to replay violence "mastered or managed… as rational authority" and make that authority "visual, palpable, [and] bodily" in the sense that it is "accessible to the senses".[4] She observed that law and performance are related in two respects. Law relies on performance to execute a function; but also to "represent and replay social conflict and violence, turning history into dramatic narrative, fictionalising social trauma, transforming it into the system of social representations, exchanges, surrogacies that make up the law".[5] In other words, law involves both *methexis* and *mimesis*: it participates in reality, but it also imitates reality.

International criminal justice is no exception to the notion that law and performance walk hand-in-hand: it "is a form of social performance".[6] Kate Leader argued that international criminal justice relies on performance for authority and legitimacy.[7] In a similar way that Michel Foucault argued that the performance of punishment is required in order to maintain the authority of the state,[8] international criminal justice needs to be seen in order to derive its power. Its power is derived from the spectacle of justice.

Prosecutorial discretion reveals that prosecutors have adopted the role of norm performers with regard to both procedural and moral norms. They "perform symbolic, narrative, educational, and transformative functions".[9] With regard to procedural norms, prosecutors have displayed elements of fairness and reasonableness; and with regard to moral norms, their decisions evidence that they have tried to affirm, project, and internalise standards of behaviour through such things as the publicity of evidence, the thematic

3 Susan Sontag, *Against Interpretation* (Farrar, Straus, and Giroux, 1st ed, 1967), 126 (in 'Reflections on *The Deputy*').

4 Julie Peters, 'Legal Performance Good and Bad' (2008) 4(2) *Law, Culture, and the Humanities* 179, 179-180.

5 Julie Peters, 'Legal Performance Good and Bad' (2008) 4(2) *Law, Culture, and the Humanities* 179, 184-185.

6 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 8.

7 Kate Leader, 'The Trial's the Thing: Performance and legitimacy in international criminal trials' (2018) 24(2) *Theoretical Criminology* 241.

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

9 Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 258.

selection of charges, or the pursuit of harsher sentences on appeal.[10] The publication of policy papers on sexual and gender-based violence, crimes against children, and the protection of cultural heritage similarly serve to draw attention and focus to particular issues.

Yet the notion of performance cuts deeper than these two areas. To fulfil many of their guardianship or builder roles, prosecutors need to be visible. This is the case with regard to 'human-facing' roles in which prosecutors are concerned with affecting the behaviours or beliefs of people. Prosecutors can only fulfil their roles as guardians over victims if they are *seen* to be providing them with validation, vindication, or redress. Prosecutors can only fulfil their roles as guardians over their court if their decisions *affect the confidence* of the public in the tribunal. They can only build or transform laws or morals if they are *visible*.

The previous chapters in this thesis have been predominantly derived from observing how prosecutors perform the actions of elucidation, explanation, and justification in the context of interviews concerning their decision-making. Yet this focus on the visible risks obscuring or glossing over the invisible elements of discretion. The danger is that by presenting the research contained in this thesis as formal knowledge or truth, it serves to produce "ignorance as a form of non-existence" of the unknown.[11] An engagement with silences and gaps helps to make visible ignorances and serve as a reminder that knowledge is always 'incomplete and inadequate'.[12]

There are four silences in the performance of elucidation, explanation, and justification that warrant further investigation. The first is the *silence of justification*. International prosecutorial discretion has historically been a 'black box'.[13] It occurs behind closed doors and out of public view. Specific decisions are rarely explained to audiences outside the prosecution office.

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10 This trilogy comes from Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 85-87.

11 See, on the subject of silence, Inês Barbosa de Oliveira, *Boaventura and Education* (Sense, 1st ed, 2017), 50.

12 Boaventura de Sousa Santos, 'Nuestra America: Reinventing a subaltern paradigm of recognition and redistribution' (2001) 18(2) *Theory, Culture, and Society* 185, 191. See also Boaventura de Sousa Santos, *The Rise of the Global Left: The World Social Forum and beyond* (Zed Books, 1st ed, 2006), 15-29 and Edilene Mendonça Bernardes and Carla Aparecida Arena Ventura, 'Sociology of Absences as a Theoretical Reference for Research in Psychiatric Nursing and in Mental Health' (2017) 26(4) *Texto Contexto Enfermagem* 1, 3-4.

13 This phrase is taken from Marc Miller and Ronald Wright, 'The Black Box' (2008) 94(1) *Iowa Law Review* 125.

While there has been a recent, and admirable, push by ICC prosecutors towards better informing the public about what purportedly guides decision-making through the release of policy documentation,[14] this does not represent a universal trend. Calls for prosecutors to be more transparent are regularly made. Anni Pues, for example, advocated in favour of a "principled approach [to procedural discretion] that is more transparent regarding individual decisions" concerning situation and case selection.[15] Birju Kotecha called for "situation-specific goals and priorities" to provide a "more transparent basis for the Office's explanation of its selection procedure's consistency".[16] Within the context of this research, problems with transparency were encountered. A 2018 application to access the 1995 'Goldstone Criteria' (concerning the selection of situations and cases)[17] for the purposes of researching this thesis was denied by MICT prosecutors on the basis that their disclosure "would undermine the Mechanism's free and independent decision-making process".[18] This was despite the request relating to a 23-year-old document that pertained to the work of a tribunal that no longer existed. In addition, two current MICT prosecutors declined requests to be interviewed—in almost identically worded emails—on the basis that a higher-ranked prosecutor was 'better placed' or 'in a better position' to "explain the practice in our office".[19] Another declined on the basis that a higher-ranked prosecutor was interviewed and "this was understood to be on behalf of others in the OTP".[20] Several ICC prosecutors were contacted directly and tentatively accepted invitations to be interviewed pending the approval of their Office. However, staff within the Office declined to make them available for interviews and instead provided access to three specific (though nonetheless high-ranked) prosecutors of their choosing.[21]

14 Barrie Sander, 'The Expressive Turn of International Criminal Justice: A field in search of meaning' (2019) 32(4) *Leiden Journal of International Law* 851, 859.

15 Anni Pues, *Prosecutorial Discretion at the International Criminal Court* (Hart, 1st ed, 2020), generally, but in particular 4, 51, and 86.

16 Birju Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) 18(1) *Journal of International Criminal Justice* 107, 138.

17 These are discussed on page 60.

18 The application was denied on the basis of article 10(3)(e) of the *Access Policy for the Records held by the Mechanism for International Criminal Tribunals*, MICT Doc MICT/17 (12 August 2016): Email from Najwa Nabti to Cale Davis, 7 September 2018.

19 Emails on file with the author.

20 The author was, however, not of the same understanding. Email on file with the author.

21 The author is thankful that these three prosecutors were made available for

It is only possible to speculate on the reasons for why prosecutors have been hesitant to embrace a more transparent attitude towards opening the 'black box' of prosecutorial decision-making. On the one hand, the reasons may be fundamentally pragmatic. Prosecutors may have denied access to documents or declined to be interviewed because of their workloads or the need to best accommodate interview requests from many researchers keen to gain an insight into their respective offices' workings. Writing with regard to preliminary examinations, Carsten Stahn suggested that transparency may also "curtail the flexibility of the OTP, trigger additional enquiry, or raise the expectations of affected communities" as well as "compromise access to victims or witnesses or complicate dialogue with states".[22] On the other hand, transparency may harm the legitimacy of the institution. Margaret de Guzman has claimed, contrary to the prevailing stream of thought, that transparency is not *always* conducive to the production of legitimacy and may actually erode it if it reveals goal fragmentation or incoherent processes.[23]

There may be another reason why prosecutors maintain the silence of justification: the silence contributes to public confidence in 'the prosecutor' and in international criminal justice as a field. Several scholars have highlighted how international criminal justice relies on a form of religious faith to produce a sense of commitment in its adherents.[24] Much of this faith is placed in 'the prosecutor' to make sensible and informed decisions. Prosecutors occupy an almost god-like position in the international criminal justice belief system. Breaking the silence of justification risks revealing prosecutors as non-omniscient humans. They can never be fully informed before they make a decision, nor can they completely predict the ramifications of their choices. As any human, they are fallible. The silence of

interviews, however it is important—in the interests of transparency—to note that *more* prosecutors had agreed to be interviewed, were not made available, and access was limited to prosecutors chosen by staff within the Office.

22 Carsten Stahn, 'Damned if You Do, Damned if You Don't: Challenges and critiques of ICC preliminary examinations' (2017) 15(3) *Journal of International Criminal Justice* 413, 430.

23 Margaret de Guzman, 'Choosing to Prosecute: Expressive selection at the International Criminal Court' (2011) 33 *Michigan Journal of International Law* 265, 298-299.

24 See Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13(3) *European Journal of International Law* 561, 593; David Koller, 'The Faith of the International Criminal Lawyer' (2008) 40(4) *International Law and Politics* 1019, 102; and Frédéric Mégret, 'The Anxieties of International Criminal Justice' (2016) 29(1) *Leiden Journal of International Law* 197, 220-221.

justification therefore helps to sustain the faith of believers in international criminal justice and allows 'the prosecutor' to be trusted to make the right decisions, and to deliver upon the believer whatever good they see international criminal justice as promising.

The second silence is the *silence of intuition*. The reality of decision-making, which must be stressed in case the previous chapters have suggested otherwise, is that not all decisions come about through the exercise of discretion. Not all decisions involve the application of *reason*. Keith Hawkins emphasised that "it is necessary to contemplate the possibility that many kinds of legal decisions may be made without being logically thought through, because they are made on impulse, or because they are made in conformity with 'normal'—often intellectually unexplored—ways of deciding matters".[25] Daniel Kahneman and Amos Tversky famously highlighted two tracks of cognition. On one level is the process of reasoning; and on the other is intuition.[26] Yet the role of intuition did not feature as prominently in the previous chapters as might have been anticipated. When prosecutors were asked about the factors that informed their decision-making, they were able to identify what they were and often were able to offer reasons as to why particular factors were relevant. Rarely was it the case that decisions were explained by reference to intuition. This silence may be attributable to various cases. It may simply be that intuition did not feature prominently in the decisions this thesis was concerned with. It may be that few people thought to speak about it. Yet it may also be that deciding something on intuition was seen as contrary to 'good' decision-making. Reasons distance the decision-maker from the decision, contributing to the illusion that the decision-maker themselves had minimal role to play in making the decision and maintaining the lie that decision-making is always a carefully-considered and purely rational affair.

The third silence is the *silence of the organisation*. More research can be done on the organisational aspects that affect prosecutorial decision-making. The presence and effect of symbolic economies within prosecution offices, and how these economies affect decision-making, is one such area that invites exploration.[27] Others include the role of vertical and horizontal

25 Keith Hawkins, 'On Legal Decision-Making' (1986) 43(4) *Washington and Lee Law Review* 1161, 1174.

26 Daniel Kahneman, 'Maps of Bounded Rationality: Psychology for behavioural economics' (2003) 93(5) *The American Economic Review* 1449, 1450.

27 See, for an example of a study that investigated this issue within a rural Californian police bureau, Brian Lande and Laura Mangels, 'The Value of the Arrest: The

organisational dynamics between people, specifically the role of leadership and 'office politics', and the effect of performance indicators or the understanding of 'what counts' in the act of exercising discretion.[28] In addition to other features, such as hiring practices, office morale, routines, and training programmes, the silence of how organisations affect international prosecutorial discretion is an area ripe for investigation.[29]

The final silence is the *silence of the unknown unknowns*. There are, undoubtedly, many other features that may or may not have affected decision-making or the information contained in the previous chapters. Prosecutors may or may not have lied. Staff within prosecution offices may or may not have ensured that those prosecutors who were made available for interviews were able to give the 'party line' and thus minimised the prospect of other prosecutors revealing potentially damaging information. They may or may not have retrospectively created justifications or explanations for their discretion which were not engaged with at the time that they were making decisions. In other words, there may be many other aspects of decision-making that we do not know we do not know and cannot speculate about. The only way to unmask these 'unknown unknowns' is by researchers exposing themselves to the practice of discretion and contributing to the 'thicker' understanding of international criminal law.[30]

## 2.2 Prosecutors as builders

In addition to their role as norm performers, prosecutors have also acted as builders when exercising their discretion. This is with respect to four issues: the law, history, institutions, and power.

The idea that prosecutors play a role in constructing and transforming jurisprudence is not difficult to understand, nor controversial. Prosecutors have assumed the role of builders of the law when they have selected novel charges and when they sought to use appeals to develop jurisprudence. Their decisions have made notable contributions to the law surrounding sexual and gender-based violence, terrorism, and the protection

symbolic economy of policing' (2017) 58(1) *European Journal of Sociology* 73.

28 See, for example, Evelyn Brodkin, 'Policy Work: Street-level organisations under new management' (2011) 21(2) *Journal of Public Administration Research and Theory* i253.

29 See, for a sample of organisational features and their effect on decision-making, Martha Feldman, 'Social Limits to Discretion: An organisational perspective' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 163.

30 This concept is taken from Kieran McEvoy, 'Beyond Legalism: Towards a thicker understanding of transitional justice' (2007) 34(4) *Journal of Law and Society* 411.

of vulnerable people during armed conflicts.

Second, prosecutors have adopted the role of history builders. They have used the trial process to transform social facts into legal facts and remove the scope for contested histories. Prosecutors have used representational charging practices to create a record of events. Guilty pleas have been understood as a method through which historical denialism or revisionism can be mitigated through a defendant confessing to their conduct. The selection of witnesses, too, is an act of historical authorship through which factual accuracy is prioritised over other forms of truth. Some prosecutors selected witnesses in part because they were able to capture the emotions of the judges and tell a compelling and believable story. Others selected witnesses on whether they could give testimony in open session, to lend weight to the ultimate findings of the tribunal. Further, their role as history builders is demonstrated in that they have embraced trials as adversarial battles to be resolved through contests of truth, which reinforces the limits on the histories that they can produce.

Third, prosecutors have acted as institution builders. Their decisions demonstrate that they have assumed a role in the structural transformation of justice institutions. In some cases, this role has been explicit. If a defendant was arrested after being indicted, for example, this was seen as a way to defend against the prospect of proceedings which looked like *in absentia* trials. This role has also appeared in more subtle ways. With regard to negotiated outcomes, prosecutors adopted the role of institution builders by transforming the respective roles of themselves and judges in connection with the right to arbitrate on a defendant's (or potential defendant's) guilt. Finally, by selecting evidence that complies with the narrative forms adopted in paradigmatic trial proceedings, prosecutors have affirmed the existing nature and purpose of international criminal courts and mitigated the possibility for them to become forums through which less-traditional forms of evidence can be led.

The final, and perhaps the most interesting way that prosecutors have demonstrated their role as builders, is that their decisions appear to have been motivated by concerns for obtaining power, maintaining relationships of power and dominance, or transforming those relationships. First, prosecutors have been concerned with their own power. Many of the factors that prosecutors have considered when making various decisions can be attributed to a desire to enhance their own standing and reputation by adding to their symbolic capital. Successful investigations, for instance, demonstrate that a prosecutor's power is not illusory by redistributing power be-

tween the alleged offender and the prosecutor and validating the efforts of state representatives to create an international criminal justice system. Representational charging is similarly a practice concerned with building a prosecutor's own power, by invoking feelings of vindication, validation, and redress in victims which, in turn, reflects positively on a prosecutor's work. Second, prosecutorial discretion has been used to build the power of the court. Prosecutors have seen power being produced in two ways. On the one hand, power is exogenous. It is granted to the court by external actors and derived from the recognition of symbolic capital by others. For example, symbolic capital has been understood as being produced through the outward displays of capacity and capability. Arrests are one way in which symbolic capital has been produced, in the hope that the court gaining custody over an individual would prove to state party representatives and the community at large that the court was capable of fulfilling its mandate. In another sense, power has been understood as endogenous and coming from within the court itself. It is capable of internal production independent of the will of outsiders. The discretion of some prosecutors, for example, appears to have been influenced by an expansionist vision of a court's legitimate authority. The use of creative charging policies, for example, has served to expand the categories of crimes a court has jurisdiction over and thus broaden the sphere of a court's influence with regard to the conduct that it is capable of reacting to.

Prosecutorial discretion therefore appears to have been influenced by prosecutors adopting the role of builders. This identity appears to have informed discretionary conduct which serves to construct law, institutions, history, and power.

## 2.3 Prosecutors as guardians

The previous chapters evidence that many exercises of prosecutorial discretion have been shaped by prosecutors adopting a guardianship role with respect to institutions, people, and concepts. First, prosecutors have acted as guardians over courts. This is most evident in their concern for their tribunal's financial viability. This has caused prosecutors to try and demonstrate the relevance, efficiency, and value for money of their court by issuing indictments and obtaining convictions through the use of plea negotiations. Prosecutors have also been attuned to whether their court is respected by the public at large, and have issued indictments, filed charges that they believe meet public expectations, and attempted to lead as much evidence as

practicable in open court in order to maintain public faith and ensure that the institution maintains the confidence of society that it is functioning as intended. They have tried to give judges trials so the court is not abandoned by its judiciary. Finally, they have been conscious of the importance of not overwhelming their tribunal with matters that are more complicated than court staff can handle. Prosecutors brought small cases early in the existence of several tribunals to ensure procedures and rules were in place for when complicated matters entered the list, and have pursued a fewer number of situations to mitigate the prospect of acquittals which would, in their view, reflect poorly on the institution. Finally, some prosecutors were also alive to the prospect that their tribunals served as institutional guinea pigs, and were aware that their conduct could help the emergence of a permanent international criminal court.

Prosecutors have also adopted the role of guardians over victims. This is event in two respects. On the one hand, they have engaged in proactive protection by expanding the class of people that can fall within the scope of 'victims' under international criminal law. This has been achieved by developing the law around sexual and gender-based violence, violence against children, the scope of civilian protection, and forced marriages through the use of the charging discretion. On the other hand, they have engaged in retroactive vindication, validation, or redress. Prosecutors have done this through the use of representational charging practices. They have split indictments to maximise the prospects of at least some victims receiving vindication and redress in the event the defendant dies before all charges are finalised. They have been concerned with managing the expectations of affected communities by not producing indictments which suggest the defendant will be found guilty on a large number of counts. They have tried to aid reconciliation by concluding plea agreements, while also being aware that these agreements might be demeaning and dilute the suffering that they have endured.

Prosecutors have also acted as guardians over themselves. Prosecutors have been concerned with how they are perceived by other people. They have tried to select situations and cases that portray them as independent and impartial, rather than biased and politicised. They have tried to avoid being seen as immoral, lacking compassion, or inhumane by pursing cases where the defendant might be sick. They have tried to avoid acquittals at trial by concluding plea negotiations to maintain their social capital. They have been worried about not being seen as fair and trustworthy by defence counsel, and they will be seen as reckless if they start withdrawing charges

in favour of pleas. Prosecutors have also been concerned about how they see themselves, and the importance of being satisfied that they have done a good job, been able to match conduct to a specific crime, or feel as though they have fulfilled what in their mind is the role of the prosecutor. Prosecutors have been concerned about their effectiveness. They have been alive to the risk that they will not be able to run complex trials, or annoy judges and make their professional lives more difficult and more uncomfortable. Finally, prosecutors have been concerned about their futures, and have been attuned to the damage that a failure to close a tribunal in-line with the expectations of state party representatives could have on their professional and personal reputations.

There are other actors or concepts that prosecutors have adopted a guardianship role over, too. For example, they have been aware that giving evidence can be a traumatic experience and have considered the tension between those witnesses they need to call to prove their case, and the harm that those witnesses might experience in the process. The concept of 'the law' has also been treated with care in the knowledge that creative charging or legal arguments could harm the consistency and coherency of international jurisprudence. Finally, prosecutors have tried to protect and respect the 'spirit' of the international prosecutor, in the knowledge that their actions will have ramifications for future prosecutors and the reputation of the Office and its staff.

The above examples demonstrate how prosecutorial discretion has been informed by prosecutors adopting a protective role over institutions, people, and concepts. This guardianship role reveals the existence of an underlying emotional vulnerability. There is now a recognised connection between reasoning and emotions that draws upon research done in the fields of economics and psychology. While emotions may once have been seen as a threat to lucid reasoning and signified "evil, danger, and threat of disorder", there is increasing recognition that emotions are an indelible component of cognition and understanding.[31] Raymond Dolan observed that "[e]motion exerts a powerful influence on reason".[32] In the context of law, Kathryn Abrams and Hila Keren have argued that emotions focus a decision-maker's attention on particular aspects of a case and allow decision-makers to em-

31 Martha Minow and Elizabeth Spelman, 'Passion for Justice' (1988) 10(1) *Cardozo Law Review* 37, 41.

32 Raymond Dolan, 'Emotion, Cognition, and Behaviour' (2002) 298(5596) *Science* 1191, 1191.

pathise with the perspectives of parties.[33] Emily Kidd White observed that emotions also affect how decision-makers interpret 'evaluative legal concepts', such as dignity and cruelty.[34] Emotions are an inseparable part of the "cognitive process that inform and trigger the making of decisions".[35]

The emotional vulnerability evidenced by prosecutors adopting the role of guardians is arguably that to fear. Andrea Bianchi and Anne Saab claimed that fear plays a role in shaping how society views issues (such as climate change and health crises) and informs how law is deployed in response to perceived threats.[36] In the context of international prosecutors, fear appears to have shaped their identity. A guardianship role can only arise in response to a perceived threat or risk. To be a guardian is to protect something or someone that is incapable of acting in its or their own best interests. If prosecutors have adopted protective roles over institutions, people, and concepts, it is because they have feared the realisation of an alternative future in which these institutions, people, or concepts will be worse off than they are at the moment of consideration. If an ICTY prosecutor in 1994 factored into their decision-making about the selection of cases the fact that Antonio Cassesse was "ready to either resign as a judge or just to give up the process as being unachievable",[37] it is likely because they were fearful of the danger posed to the court if the "chief architect of modern international criminal justice"[38] abandoned the very institution he helped to establish. If another wanted to expand the scope of the law to encompass broader protections for people subjected to sexual and gender-based crimes, it may have been because they were fearful that people would continue to commit disgusting violations of human dignity. Fear has, in part, shaped how prosecutors see the world and their role within it and appears to have affected their decision-making.

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33 Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions?' (2010) 94(6) *Minnesota Law Review* 1997, 2004.

34 See Emily Kidd White, 'Till Human Voices Wake Us: The role of emotions in the adjudication of dignity claims' (2014) 3(3) *Journal of Law, Religion, and State* 201.

35 Andrea Bianchi and Anne Saab, 'Fear and International Law-Making: An exploratory inquiry' (2019) 32(3) *Leiden Journal of International Law* 351, 351, 354.

36 Andrea Bianchi and Anne Saab, 'Fear and International Law-Making: An exploratory inquiry' (2019) 32(3) *Leiden Journal of International Law* 351.

37 Interview with P4. This issue is discussed on page 99.

38 Marlise Simons, 'Antonio Cassese, War Crimes Law Expert, Dies at 74', *New York Times* (online), 23 October 2011 <https://www.nytimes.com/2011/10/24/world/europe/antonio-cassese-noted-italian-jurist-dies-at-74.html>.

## 2.4 Towards a relational understanding of the prosecutorial role

The prosecutorial role is often conceptualised through the lens of the 'agents of justice' and 'party to the proceedings' dichotomy. This dichotomy highlights that prosecutors are both expected to be impartial and partial. They were created through a fusion of the common and civil traditions. They are pulled in two directions, on the one hand expected to be searching for the truth and on the other vigorously pursing their prosecutions. The dichotomy has been used to explain and critique the prosecutorial role in both domestic[39] and international systems.[40] International criminal judges have also interpreted the prosecutorial role though this lens and grappled with the extent to which prosecutors should be one or the other. In one judgment, Antonio Cassese wrote that the Prosecutor "*is not, or not only,* a Party to adversarial proceedings" but was also obliged to "assist the Chamber to discover the truth in a judicial setting".[41] In another ICTR case, Mohamed Shahabuddeen observed that the Prosecutor "is not required to be neutral in a case; she *is a party*", but "while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel 'ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice' ".[42]

More recently, it has been argued that prosecutors occupy a third, diplomatic role.[43] Prosecutors themselves have claimed this role. Carla del Ponte recalled that her time as Prosecutor of the ICTY was largely spent trying to put political pressure on states to comply with their obligations to cooper-

39 David Sklansky, 'The Problems with Prosecutors' (2018) 87(1) *Annual Review of Criminology* 451, 466.

40 See, for example, Kai Ambos, 'International criminal procedure: "adversarial", "inquisitorial" or mixed?' (2003) 3(1) *International Criminal Law Review* 1, 9; Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 1st ed, 2019), 281.

41 See *Prosecutor v Zoran Kupreskić et al (Decision on communications between parties and their witnesses)* (ICTY, Trial Chamber, IT-95-16-T, 21 September 1998), (i). Emphasis added.

42 *Jean-Bosco Barayagwiza v The Prosecutor (Decision (Prosecutor's request for review or reconsideration))* (ICTR, Appeals Chamber, ICTR-97-19-AR72, 31 March 2000) (Separate Opinion of Judge Shahabuddeen), [68]. Emphasis added.

43 See *Prosecutor v Issa Hassan Sesay (Decision on complaint pursuant to article 32 of the Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone)* (SCSL, President, SCSL-04-15-CCC32, 20 February 2006), [29].

ate.[44] David Crane estimated that 70% of his job was diplomacy.[45] Luis Moreno Ocampo developed the Jurisdiction, Complementarity, and Cooperation Division within his office to "undertake diplomacy" out of the recognition that cooperation required him to form diplomatic alliances.[46] Scholars have referred to the ICC Prosecutor as an "international diplomat as well as an officer of the court",[47] and recognised that their role requires "a great deal of diplomatic savvy".[48]

Despite its prevalence, the 'agents of justice' and 'party to the proceedings' dichotomy does not provide a means of conceptualising the broad range of roles that international prosecutors occupy. Nor does the role of the prosecutor as a diplomat. This is because these conceptualisations arise out of a popular conception of international justice in which a prosecutor's role is grounded in a fusion of the civil and common law traditions but requires them to maintain the support of states. This trinity of roles essentially adapts fundamental domestic prosecution models to the international environment without recognising that prosecutors have a richer network of context-specific relationships to other institutions, people, and concepts beyond defendants and states. For example, the 'agents of justice' and 'party to the proceedings' dichotomy is fixated on the obligations that prosecutors owe (or do not owe) to a defendant within the context of the determination of their guilt within a criminal trial. In other words, it recognises only one relationship (between the prosecutor and the defendant) in one context (the trial). The role of the 'diplomat' similarly only accounts for one relationship to states. Neither of these conceptions accommodate, for example, the role of the prosecutor as an agent of moral transformation. This role does not fit into the typology of the prosecutor as an 'agent of justice', a 'party', or a 'diplomat'. While this trinity of roles is not *inaccurate*, it does encourage

44 Carla Del Ponte, *Madame Prosecutor: A memoir* (Other Press, 1st ed, 2008), 42.

45 Darren Hawkins and Chad Losee, 'States and International Courts: The Politics of Prosecution in Sierra Leone' (2014) 13(1) *Journal of Human Rights* 48, 58.

46 Luis Moreno Ocampo, 'Keynote by ICC Chief Prosecutor' (Speech delivered at Colloquium of Prosecutors of International Criminal Tribunals on 'The Challenges of International Criminal Justice', Arusha, 25 November 2004), 31: "Diplomatic alliances must be established, even while one maintains independence as a prosecutor".

47 Benjamin Schiff, 'Diplomacy and the International Criminal Court' in Andrew Cooper, Jorge Heine, and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford University Press, 1st ed, 2013) 745, 751.

48 Jenia Turner, 'Accountability of International Prosecutors' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 1st ed, 2015) 382, 385.

a *narrow* understanding of what prosecutors do that is not reflective of the more nuanced reality of prosecutorial relationships and roles.

A relational understanding of the prosecutorial role, in contrast, takes as its departure point the assumption that prosecutors have numerous relationships. The first step in applying a relational understanding is to identify the contexts in which prosecutors operate (for example, selecting charges, selecting witnesses, or negotiating outcomes). The second step is to identify the subjects of the relationships which arise within these contexts. The final step is to observe the roles that prosecutors occupy within these relationships. A relational understanding of the prosecutorial role therefore invites us to move beyond an understanding of prosecutors as *only* conducting trials while trying to maintain the support of states. In doing so, it foregrounds the numerous roles that prosecutors occupy and provides a nuanced account of the role of prosecutors within international criminal justice.

## 3 Why are Roles Important?

The above discussion has demonstrated how prosecutorial discretion has been influenced through prosecutors adopting the role of norm performers, builders, and guardians. Prosecutorial discretion should be understood as an action not only through which decisions are made under the influence of these roles, but also as an action which serves to develop and maintain the roles themselves. But what is the relevance of these roles for the future of discretionary conduct? This section advances four arguments to support the claim that role identities are relevant to the study and practice of prosecutorial discretion.

### 3.1 Roles help us to understand decision-making

The first reason why roles are important to the study and practice of prosecutorial discretion is that they enrich our collective understanding of why decisions are made. The three roles identified above provide a starting point from which it becomes possible to map the relationships that exist between prosecutors and other actors or concepts. The original research contained in the preceding chapters has demonstrated that prosecutorial discretion is rarely as uncomplicated as resulting merely in the making of a decision. Instead, the decision itself is often motivated by a desire to protect something, to build something, and/or to perform something. The process of

discovering what this *something* or who this *someone* is, by interrogating the factors that have informed the making of a decision, permits a more nuanced conception of discretion that lays bare the motivations for discretionary conduct and demonstrates the underlying policy objectives and goals that inform the reasoning that goes into making decisions.

## 3.2 Roles invite a conscious engagement with their appropriateness

The second reason why roles are important to prosecutorial discretion is that they encourage a conscious engagement with the appropriateness of these roles. There are two problems related to roles. The first problem, experienced by international criminal justice and international criminal courts, is role overload. Mirjan Damaška famously claimed that international criminal law is metaphorically carrying the rock of Atlas, but its courts were not bodies of "titanic strength" capable of living up to all the expectations that had been dumped upon them.[49] Frédéric Mégret speculated that these expectations may even be "unreasonable and crushing".[50] Moreover, these roles sometimes pull actors in different directions, creating unresolvable tensions between various macro goals for which no hierarchy can be established.[51] These tensions and frictions have resulted in a significant body of scholarship which collectively argues the need for actors within the field to manage expectations and cautiously define the ways through which the success or legacy of international courts will be measured.[52] Marieke de Hoon, for example, called for a 'serious critique' of what international criminal law is capable of achieving and argued that the expectations placed on the field needed to be adjusted down to a "realistically achievable level".[53] The question about what roles international criminal justice should collectively pursue has also led to some scholars critically reflecting about even whether

49 Mirjan Damaška, 'What's the Point of International Criminal Justice?' (2008) 83(1) *Chicago-Kent Law Review* 329, 331.

50 Frédéric Mégret, 'The Anxieties of International Criminal Justice' (2016) 29(1) *Leiden Journal of International Law* 197, 216.

51 Mark Klamberg, 'What are the Objectives of International Criminal Procedure? Reflections on the fragmentation of a legal regime' (2010) 79(2) *Nordic Journal of International Law* 279.

52 Frédéric Mégret, 'The Anxieties of International Criminal Justice' (2016) 29(1) *Leiden Journal of International Law* 197, 217.

53 Marieke de Hoon, 'The Future of the International Criminal Court: On critique, legalism and strengthening the ICC's legitimacy' (2017) 17(4) *International Criminal Law Review* 591.

accepted practices are capable even of achieving arguably the most widely-accepted goals. Kate Cronin-Furman, for instance, criticised the extent to which the collective obsession on prosecuting those 'most responsible' could ever result in international criminal justice achieving the holy grail of deterrence.[54]

The problems of role overload is not completely a mere structural affair that is attributable entirely to the system being produced without a coherent vision as to why and without a cognisable engagement with how the inevitable doubts about purpose are to be resolved. Institutional actors are themselves partially to blame. On page 214, for example, it was claimed that there is only minimal consistency between prosecution appeal briefs on matters of sentence where prosecutors have attempted to explain the broader purpose that sentencing serves. Elsewhere, this author has argued that the prolific number of references to 'justice' in public communications produced by staff at the Office of the Prosecutor risks creating "misconceptions in the community about the [ICC] OTP's goals, aspirations, and capabilities".[55] Similarly, Birju Kotecha argued that staff of the ICC OTP may have fostered unrealistic expectations through the use of rhetoric and "triumphalist tones".[56] Luke Moffett argued the Trust Fund for Victims, too, unreasonably 'bloated' expectations about what the ICC can achieve by positing that reparations proceedings might be able to produce distributive justice and social inequality.[57]

The second problem, concerned with international criminal prosecutors, is role gravitation. The existential anxiety about what international criminal law should actually do poses a very real problem for international prosecutors because they have historically been recognised as the people who have the greatest control over whether international criminal tribunals succeed in their roles. The responsibility over whether the court or international criminal justice fulfils the roles that have been envisaged gravitates

54 Kate Cronin-Furman, 'Managing Expectations: International criminal trials and the prospects for deterrence of mass atrocity' (2013) 7(3) *International Journal of Transitional Justice* 434.

55 Cale Davis, 'Doing "Justice" at the Office of the Prosecutor: Portrayals of a cultural value' in Julie Fraser and Brianne McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar, 1st ed, 2020) 209, 221-222.

56 Birju Kotecha, 'The Art of Rhetoric: Perceptions of the International Criminal Court and legalism' (2018) 31 *Leiden Journal of International Law* 939, 962.

57 Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond rhetoric and The Hague' (2015) 13 *Journal of International Criminal Justice* 281, 295.

towards prosecutors. Luc Reydams and Jed Odermatt claimed that "[t]he mandate of an international tribunal is in the first place the mandate of its prosecutor", and Marieke Wierda and Anthony Triolo have similarly argued that the prosecutor's mandate "is the *raison d'être* of the tribunal in question".[58] Other have deployed the now-popular metaphor that prosecutors are a court's "engine room" to stress that the success or failure of a tribunal is dependent on the decisions that prosecutors make.[59] Elsewhere, they have been called the "gatekeepers" of international criminal justice to emphasise their control over the field.[60] Prosecutors are therefore confronted not only with the problem that the macro goals of their court are vague and contentious, but also with the more pragmatic issue that they have been charged with ensuring their courts meet whatever those goals are. They face a classic pressure cooker scenario, where they have been given extreme responsibility to achieve *something*, but there is no coherent idea about what that something *is*.

There may be some ways around the problems of role overload and role gravitation. The first step is to recognise that there may be some value in conceptually severing the roles of the prosecutor from the roles of the court (though, at least in an institutional sense, they will be connected) or the roles of international criminal justice. On a discursive level, one way that this could be achieved is by refraining from talking about prosecutors through metaphors that suggest they are responsible for the success, failure, and functioning of courts. Another way could be through embracing the agency of other actors—particularly defence counsel, judges, and registry staff—as equals in the operation of courts and the progressive development of international criminal justice. They all have different roles to play and

58 Luc Reydams and Jed Odermatt, 'Mandates' in Luc Reydams, Jan Wouters and Cedric Ryngaert, *International Prosecutors* (Oxford University Press, 1st ed, 2012) 81, 81; Marieke Wierda and Anthony Triolo, 'Resources' in Luc Reydams, Jan Wouters and Cedric Ryngaert, *International Prosecutors* (Oxford University Press, 1st ed, 2012) 113, 114.

59 Birju Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) 18(1) *Journal of International Criminal Justice* 107, 107. See also Damien Rogers, *Law, Politics, and the Limits of Prosecuting Mass Atrocity* (Palgrave Macmillan, 1st ed, 2018), 4; and Carsten Stahn, *Justice as Message: Expressivist foundations of international criminal justice* (Oxford University Press, 1st ed, 2020), 274.

60 Lovisa Bådagård and Mark Klamberg, 'The Gatekeeper of the ICC: Prosecutorial strategies for selecting situations and cases at the International Criminal Court' (2017) 48(5) *Georgetown Journal of International Law* 639; Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, 1st ed, 2019), 281.

in their own ways can serve as norm performers, builders, and guardians. The value of such a 'conceptual disbanding' would be to allow prosecutors to shape a role independent from that of other actors and granting them a mandate in their own right and allow them to shed roles that serve to confuse decision-making or policy formulation. As an example, prosecutors could reject that they have a role in fostering rehabilitation and redistribute this role to the judiciary; or claim that they should not be guardians over the social capital of their institution and instead argue that the registry and the judiciary should be primarily concerned with encouraging the development of a court's exogenous power.

It is clearly a matter of subjective opinion whether it is appropriate for a prosecutor (or a court) to strive for any given objective. That can never change. People are liable to have differing views on what other people should be doing. Yet this does not deny the possibility for internal consistency to emerge within a college of professionals regarding the roles that they collectively should be fulfilling (or, at least, consistency in action). The second step involved in reversing the problem of role overload and role gravitation is the encouragement of an open and honest discussion within the prosecutorial college regarding the roles that it is appropriate or inappropriate for prosecutors to adopt. This internal dialogue could result in two advantageous scenarios. On the one hand, prosecutorial decision-making could be simplified through constraint. For example, if prosecutors decided that it was not appropriate to concern themselves with building the court's credibility, this could have tangible impact on their decision to select witnesses who could give evidence in open court. If prosecutors decided that it was not their role to protect their court from threats of non-cooperation, this could have an affect on any number of decisions where the outcome could help or hinder cooperation between the court or its organs and outsiders. On the other hand, prosecutorial decision-making could emancipated. By labelling roles as appropriate, prosecutors give themselves the authority to embrace that role and act within it. If prosecutors embraced a role as an agent of moral change, more charges might be laid or more appeal grounds filed to draw attention to undesirable conduct.

## 3.3 Roles highlight how discretion can be controlled

Another reason why roles are important to prosecutorial discretion is that they highlight how discretion can be controlled. Definitionally, discretion and control are two closely-related concepts. As argued in chapter 2, the

legal paradigm conceptualises discretion as a space for free choice walled off by a boundary of restrictions. The definition of discretion adopted in this thesis—the act of reaching a reasoned decision about the appropriate course of action to pursue—similarly draws attention to the ways in which reasoning is affected. The two concepts are closely related in practice, too. There is both an external and an internal desire to control decision-making. Externally, it has often been the case that where people enjoy decision-making authority, those that grant them the authority try in some ways to control the decisions that are made. The historical debates around the power of the ICC prosecutor to commence *proprio motu* investigations is an example, which resulted in a process under article 15 of the *Rome Statute* through which all requests for a *proprio motu* investigation needed to be authorised by three judges sitting as the pre-trial chamber. More recently, the Independent Experts Report of September 2020 called for the Prosecutor to focus on a "narrower range of situations, and limit their interventions to the extent possible" while also adopting "a higher threshold for the gravity of the crimes alleged to have been perpetrated".[61]

There is also the internal desire for constraint. One ICC prosecutor remarked that "any good Chief Prosecutor will want to have his or her hands tied" and that "[c]ertainly, our Chief Prosecutor [Fatou Bensouda] wants that".[62] They also remarked that "you want to make sure that you limit your own discretion".[63] Another prosecutor explained that the *Policy Paper on the Interests of Justice* was designed to "prevent the institution from going down the path of considering those issues for which it's not qualified".[64] Yet another ICC prosecutor recalled that "I tried to reduce as much as possible my discretion" because in a large prosecution office—they believed—reducing discretion was "the only way to survive".[65] As of April 2021, the ICC Prosecutor has published draft or finalised policy papers or guidelines on no less than ten different issues ranging from situation completion to proceedings on the admission of guilt, to the selection of situations and cases, to children and sexual and gender-based crimes.

The desire evident here for prosecutors to tie their own hands may have

61 Anna Bednarek et al, *Independent Expert Review of the International Criminal Court and the Rome Statute System*, ICC Assembly of States Parties, ICC Doc ICC-ASP/19/16 (30 September 2020), annex 1, [54].

62 Interview with P26.

63 Interview with P26.

64 Interview with P24.

65 Interview with P1.

several origins. It may arise from a sense of self-doubt under which prosecutors worry they will not be able to make the right decision in the absence of guidance. It may be attributable to a fear that prosecutors will confirm the long-standing suspicions that they are politically motivated that have marred the institution since its creation, alienating states and contributing to the institution's decline. Prosecutors have invested years of work into emphasising that politics do not factor into their discretionary conduct and decisions are based only on objective circumstances. Written normative standards are perhaps a way of ensuring this perception does not unravel. To place ideas in writing is to give them a legitimacy and authority they lack in speech. To found decisions on reasoned interpretations of texts is to disguise what are otherwise "naked exercises of power".[66] The practice of formulating guidelines and policy documents pays homage to the 'cult of the text' by refusing to concede the existence of a prosecutor's creative capacity by separating the decision maker from the decision.[67] It may also be merely human nature. Jan Klabbers has observed that the creation of rules is sometimes merely a "kneejerk deontological reflex" that kicks in when decision makers are afforded the power to make discretionary decisions.[68] The attempts at constraining discretion are, perhaps, evidence of the human tendency to delimit, regulate, and curtail the scope of people to exercise unfettered expert judgement.

What is important to remember, however, is that beyond the creation of rules, policy papers, guidelines, and diplomatic nudging, discretion is also controlled through a decision-maker's socialisation. Socialisation is "the process by which persons acquire the knowledge, skills, and dispositions that make them more or less able members of society".[69] Through socialisation, individuals "learn how to act,… what to believe, and who to become".[70] While socialisation occurs in numerous ways, arguably the most relevant form for the purposes of controlling discretion is professional

66 Pierre Bourdieu, 'The Force of Law: Toward a sociology of the judicial field' (1987) 38(5) *Hastings Law Journal* 814, 818.

67 Pierre Bourdieu, 'The Force of Law: Toward a sociology of the judicial field' (1987) 38(5) *Hastings Law Journal* 814, 851.

68 Jan Klabbers, 'The Virtues of Expertise' in Monika Ambrus et al, *The Role of Experts in International and European Decision-Making Processes: Advisors, decision makers, or irrelevant actors?* (Cambridge University Press, 1st ed, 2014) 82, 90.

69 Orville Brim and Stanton Wheeler, *Socialisation after Childhood: Two essays* (Wiley, 1st ed, 1966), 3.

70 Joslyn Brenton, 'Socialisation' in Kathleen Korgen (ed), *The Cambridge Handbook of Sociology* (Cambridge University Press, 1st ed, 2017) vol 1, 197, 198.

socialisation. Professional socialisation refers to "the processes by which people selectively acquire the values and attitudes, the interests, skills, and knowledge—in short, the culture—current in the groups of which they are, or seek to become, a member", embodying within them "a more or less consistent set of dispositions which govern [their] behaviour in a wide variety of professional (and extraprofessional) situations".[71] Professional socialisation internalises within group members particular values, attitudes, identities, expectations, and norms.[72] These processes of socialisation—be they pre-socialisation, professional socialisation, or otherwise—affect how choices are made. As argued in chapter 2, section 2.2, and claimed by Émile Durkheim and Pierre Bourdieu, people are the products of their own history. What they think, how they reason, and their horizons of appropriate or possible conduct are determined in part by their lived experiences. Carl Schneider argued that discretion is inevitably affected by how a decision-maker has been socialised and trained, and observed that "[d]ecision-makers… do not live and work in a vacuum; they are inevitably products of their environment and their environment is, to some extent, an environment of shared social norms".[73]

More attention therefore needs to be given to how international prosecutors are professionally socialised, in order to understand the processes through which they internalise the roles of norm performer, builder, and guardian that appear to have informed how they have made the decisions discussed in the preceding chapters. For example, if the role of the guardian is informed by fear (as argued in section 2.3), an inquiry into professional socialisation could reveal how those feelings of fear are instilled and how prosecutors are taught to be fearful. More pragmatically, it may also be

71 Robert Merton, George Reader, and Patricia Kendall, *The Student-Physician: Introductory studies in the sociology of medial education* (Harvard University Press, 1st ed, 1957), 287, quoted in Shari Miller, 'A Conceptual Framework for the Professional Socialisation of Social Workers' (2010) 20(7) *Journal of Human Behaviour in the Social Environment* 924, 927.

72 See K McGowan and Lorraine Hart, 'Still Different After All These Years: Gender differences in professional identity formation' (1990) 21(2) *Professional Psychology: Research and Practice* 118, citing Douglas Hall, 'Careers and Socialisation' (1987) 13(2) *Journal of Management* 301; Gabriella Pusztai and Cintia Csók, 'Ambivalence of Professional Socialisation in Social and Educational Professions' (2020) 9(8) *Social Sciences* 147; and Joslyn Brenton, 'Socialisation' in Kathleen Korgen (ed), *The Cambridge Handbook of Sociology* (Cambridge University Press, 1st ed, 2017) vol 1, 197, 198, 200-201.

73 Carl Schneider, 'Discretion and Rules' in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1st ed, 1992) 47, 80.

beneficial to develop socialisation programmes designed to actively inculcate prosecutors with the roles it is appropriate for them to adopt with the view towards coordinating decision-making towards the fulfilment of particular objectives. Despite the increasing professionalisation of international criminal justice—evidenced by the number of practitioners turning notoriously unstable and precarious temporary positions into professional careers[74] and the recent opening of the Association of Defence Counsel Practicing before the International Criminal Tribunals to ICC practitioners[75]—there has never been a pan-institutional formal college of international prosecutors dedicated to the training and education of, or advocacy on behalf of, its members. Perhaps the closest thing to such a body is the International Association of Prosecutors, however it does not have active programmes for international criminal prosecutors and mainly acts as a notice board for events held elsewhere. The last post on its 'Forum for International Criminal Justice' was made in 2018. While the window of opportunity for a collective college of prosecutors has probably now closed (the STL is effectively dead after having run out of cash; the MICT has only a handful of prosecutions it is winding up; and the ECCC is closing in the near future), this does not mitigate the importance of role inculcation through professional socialisation to informing decision-making practices. If prosecutors and external actors want guidance on how their discretion should be exercised, a good starting point would be to provide them with guidance about what their roles are and what they are not.

## 3.4 Roles invite an holistic conception of performance

The final way that an understanding of roles can be translated into practice is that they open the door to an holistic and tailored conception of prosecutorial performance. There has been a recent surge in interest concerning how to measure the performance of international courts. In 2014, the ICC Assembly of States Parties encouraged the ICC to develop key performance indicators through which the work of the court could be measured.[76] For

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

75 *Decision recognising the name change of the 'Association of Defence Counsel Practicing Before the ICTY' to 'Association of Defence Counsel Practicing Before the International Courts and Tribunals'* (MICT, MICT-12-01, 16 June 2017).

76 *Strengthening the International Criminal Court and the Assembly of States Parties*, ICC Assembly of States Parties, ICC Doc ICC-ASP/13/Res.5 (17 December 2014), annex 1, 7(b).

her part in contributing towards this project, the ICC Prosecutor's 2016-2018 *Strategic Plan* outlined 14 key indicators of prosecutorial performance across four broad areas. One of these areas was 'prosecutorial effectiveness', a concept which would be assessed purely numerically on the basis of the number of arrest warrants, the number of people who had charges confirmed against them, the number of people convicted, and the counts granted or charged at each stage of the trial process.[77] When the Prosecutor amended the performance indicators in the 2019-2021 *Strategic Plan*, the method through which prosecutorial results would be measured remained numeric, and would be assessed in terms of the number of people presented and convicted.[78]

The recent focus on performance indicators has also drawn attention to their limits. There are many aspects of performance that are simply unmeasurable.[79] From the perspective of prosecutorial discretion, perhaps the biggest problem is that the performance indicators used within the Office fail to reflect the diverse roles that prosecutors occupy. A prosecutor's 'performance' relates to more than the number of people or charges they shuffle through the court system.

An awareness of prosecutorial roles provides the opportunity to reconceptualise how the performance of prosecutors is assessed. The roles that prosecutors have occupied when making decisions—as norm performers, builders, and guardians—should be reflected in how their performance is assessed. What is needed is not just a *goal*-based approach to performance that focuses on the extent to which prosecutorial conduct aligns with set benchmarks, but rather one that is supplemented by a *role*-based approach to performance that is founded on a recognition of contributions that prosecutors make to the roles that they deem it is appropriate for them to occupy. In other words, the purely quantitative model of performance should be transformed into a hybrid model that combines both quantitative and

77 Office of the Prosecutor, 'Strategic Plan, 2016-2018' (International Criminal Court Office of the Prosecutor, November 2015), 37-38.

78 Office of the Prosecutor, 'Strategic Plan, 2019-2021' (International Criminal Court Office of the Prosecutor, 17 July 2019), [63].

79 See Open Society Justice Initiative, 'Establishing Performance Indicators for the International Criminal Court' (Briefing Paper, November 2015), 2; Carsten Stahn, 'Is ICC Justice Measurable? Re-thinking means and methods of assessing the Court's practice' on *ICC Forum* (February 2018) <https://iccforum.com/performance>; and Birju Kotecha, 'The ICC: What counts as a success?' on *Justice in Conflict* (13 September 2013) <https://justiceinconflict.org/2013/09/13/the-icc-what-counts-as-a-success/>.

qualitative elements. These qualitative elements could take the form of mere *recognition* of the ways through which members of a prosecution office have performed the roles that they deem are appropriate for them to perform. For example, a role-based approach to performance may recognise that, within a review cycle, prosecutors contributed to the writing of history; or to the transformation of morals; or to the expansion of a court's scope of legitimate authority through advancing novel legal arguments concerning the applicability of crimes.

## 4 Conclusion

This thesis has embraced the call for a 'thicker' understanding of the law that gives regard to the role of individuals within the international criminal justice system. It has zoomed in on the practices of discretion and reflected on the "actions, motivations, consequences, philosophical assumptions, or power relations which inform legal actors and shape legal institutions".[80] By drawing upon empirical, original interviews with the people who *exercised* or *exercise* prosecutorial discretion, it has sought to break down the common misconception that 'the prosecutor' is a 'super person' and demonstrate, instead, that prosecutorial discretion is exercised by many different people who are each trying to reason about what are appropriate courses of action to pursue. It has shown, by peering through a series of thematic windows related to the most important decisions prosecutors have regarded themselves as making, the importance of role identity in shaping discretion. It has revealed that prosecutors are norm performers, builders, and guardians. Finally, it has argued that a relational understanding of the prosecutorial role can help us understand why decisions are made, constrain or emancipate prosecutors when they made choices, invite awareness of the socialisation processes through which these roles are internalised, and provide a more holistic conception of prosecutorial performance. Finally, if there is one thing that this thesis has aimed to convey, it is this: prosecutors are, like you, humans.

80 Kieran McEvoy, 'Beyond Legalism: Towards a thicker understanding of transitional justice' (2007) 34(4) *Journal of Law and Society* 411, 413.