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Prosecutorial discretion in international criminal justice

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Summary

This thesis is concerned with identifying what international prosecutors have considered when exercising discretion, and why.

Discretion—or the act of reaching a reasoned conclusion about the appropriate course of action to pursue—is the basis of all legal practice. Law has no life independent of people. The choices people make give the law its form. Yet international criminal law scholarship has largely ignored the role that people play in the law's development and implementation. While there have been some recent, notable efforts to shake off the shroud of mystery that surrounds the practice of international criminal justice, scholarship still remains dominated by formalist literature which fails to adequately consider the relationship between law and practice.

This thesis is a rejection of the formalist trend, and highlights how the development and implementation of international criminal justice is entirely contingent upon the practices of individuals. In particular, it focuses on the practice of prosecutorial discretion. International prosecutors have the sole authority to prosecute allegations of what are colloquially called 'the most serious crimes of concern to the international community' in international criminal courts. They must decide which situations and cases to pursue; what charges they will lay; whether to negotiate an outcome with an actual or potential defendant; who will be called as a witness; and whether to appeal. Every time a prosecutor makes one of these choices, they contribute to the development and implementation of international criminal justice in their own large or small way. But what have they considered when making these decisions, and why?

This is the first study to draw upon first-hand interviews with current and former senior prosecutors, and other primary data, to answer these questions. It illustrates the variety of functional, normative, and strategic considerations that have influenced choices that international prosecutors

have made. In doing so, it cracks open what has historically been a ‘black box’ and reveals what has actually shaped prosecutorial decision-making. More importantly, given that there is no natural or pre-existing relevance of any consideration to any choice, this thesis argues that these considerations have become relevant by prosecutors adopting roles as moral and procedural norm performers, builders (of law, history, institutions, and power), and guardians (over institutions, people, and concepts).

The link between role identity and discretion is important for several reasons. Most obviously, it helps to explain why decisions are made and invites a more nuanced understanding of decision-making that accommodates the motivations and assumptions that underpin discretion. It also encourages a conscious engagement with whether it is appropriate for prosecutors to be adopting these roles in the first place; and foregrounds the importance of professional socialisation in how decision-making is controlled. On an operational level, an awareness of prosecutorial roles may also be useful in assessing prosecutorial performance by encouraging a more holistic role-based conception of performance that can supplement the paradigmatic goal-based one.

Without a more concerted effort to explore the practice of international criminal justice—or, for that matter, any area of law—scholarship remains destined to keep law and the practice of it at arms length from each other. That ignores the reality that the two are intrinsically linked. This thesis embraces the call for greater attention to be given to how the development and implementation of international criminal justice is shaped by individual practices, and highlights that, ultimately, the law cannot be properly understood without exploring the ways in which people make the decisions that transform it from an abstract set of ideas and notions into practical action.