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**The International Criminal Court's Office
of the Prosecutor and Reconciliation**

Birju Kotecha

Doctor of Philosophy

2018

The International Criminal Court's Office of the Prosecutor and Reconciliation

Birju Kotecha

A thesis submitted in partial fulfilment of the
requirements of the University of Northumbria
at Newcastle for the degree of Doctor of
Philosophy

Research undertaken in the School of Law in
the Faculty of Business and Law

September 2018

Abstract

Reconciliation is one of the most contested notions in transitional justice scholarship. Unsurprisingly, the contribution of international criminal justice to reconciliation has been the subject of considerable debate. Empirical evidence suggests there are reasons to be sceptical, but, international prosecutors have displayed little restraint in claiming that prosecutions can—and indeed do—contribute to reconciliation. The Rome Statute of the International Criminal Court, and the potential to gain legitimacy in divided societies suggest that the Court should be concerned by its effect on reconciliation. In this context, this study asks, how can the International Criminal Court’s Office of the Prosecutor (OTP) effectively contribute to reconciliation? The study focuses on the OTP’s most essential activity—its procedure of selecting situations and cases. Using a goal-based methodology, the study explains that the OTP requires the Court to be perceived as legitimate in affected communities. The Court’s perceived legitimacy is shaped by complex factors but, nonetheless, the OTP can take modest but crucial steps, towards improving perceptions. In this regard, I argue that the OTP’s effectiveness is limited by a lack of procedural justice—that account of justice that refers to perceptions about the fairness of procedure(s). In addition, I consider two further ways in which the OTP’s effectiveness is limited vis-à-vis the Court’s perceived legitimacy in affected communities. Penultimately, the study analyses selection rhetoric and argues that its existing reliance on legalism (i.e. rule-following) is unlikely to inspire such legitimacy. Finally, the study assesses the use of performance indicators, and explains that existing indicators do not adequately measure prosecution effectiveness in terms of perceived legitimacy. The study makes several recommendations that aim to boost the OTP’s effectiveness. Lastly, I conclude by reflecting on the broad implications of the study’s findings for the Court and its impact in those affected communities that are, ultimately, its *raison d’être*.

Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved. Approval has been sought and granted by the University Ethics Committee on 13th December 2013.

I declare that the Word Count of this Thesis is 78, 900 words

Name: B. Kotecha

Signature:

Date: 17th September 2018

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Abbreviations

Amnesty International	AI
Central African Republic	CAR
Crown Prosecution Service	CPS
Democratic Republic of Congo	DRC
European Court of Human Rights	EctHR
Extraordinary Chambers in the Courts of Cambodia	ECCC
Human Rights Watch	HRW
International Institute for Democracy and Electoral Assistance	IDEA
International Criminal Court	ICC/ 'Court'
International Criminal Tribunal for the former Yugoslavia	ICTY
International Criminal Tribunal for Rwanda	ICTR
Lord's Resistance Army	LRA
North Atlantic Treaty Organisation	NATO
Office of the Prosecutor at the International Criminal Court	OTP/ 'Office'
Pre-Trial Chamber at the International Criminal Court	PTC
Rome Statute of the International Criminal Court	'ICCSt'/ 'Rome Statute'
Truth and Reconciliation Commission	TRC
United Nations	UN
United Nations General Assembly	UNGA
United Nations Security Council	UNSC
Vienna Convention on the Law of Treaties	VCLT

JOURNALS

American Journal of International Law	<i>AJIL</i>
Cambridge Law Journal	<i>C.L.J.</i>
Chicago-Kent Law Review	<i>Chi-Kent L.Rev.</i>
Criminal Law Forum	<i>Crim.L.F.</i>
Criminal Law Review	<i>Crim LR</i>
Duke Journal of Comparative and International Law	<i>Duke J.Comp. & Int'l L</i>
European Journal of International Law	<i>EJIL</i>
Fordham Journal of International Law	<i>Fordham Int'l L.J.</i>
Georgetown Journal of International Law	<i>Geo. J. Int'l L</i>
George Washington International Law Review	<i>Geo. Wash. Intl L. Rev</i>
Journal of International Criminal Justice	<i>JICJ</i>
Harvard Human Rights Journal	<i>Harv.Hum.Rts.J.</i>
Harvard International Law Journal	<i>Harv.Int'l L.J.</i>
Human Rights Quarterly	<i>HRQ</i>
Human Rights Review	<i>HRR</i>
International and Comparative Law Quarterly	<i>ICLQ</i>
International Criminal Law Review	<i>Int.C.L.R.</i>
International Journal of Human Rights	<i>I.J.H.R</i>
International Journal of Transitional Justice	<i>IJTJ</i>
John Marshall Law Review	<i>J. Marshall L.Rev.</i>
Journal of Law and Society	<i>JLS</i>
Law and Contemporary Problems	<i>LCP</i>

Modern Law Review	<i>MLR</i>
Michigan Journal of International Law	<i>Mich.J.Int'l L.</i>
Netherlands Quarterly of Human Rights	<i>NQHR</i>
New York University Journal of International Law & Politics	<i>N.Y.U. J. Int'L L. & Pol</i>
Oxford Journal of Legal Studies	<i>OJLS</i>
Pennsylvania State Journal of Law & International Affairs	<i>Penn. St. J.L. & Int'l Aff.</i>
University of Chicago Law Review	<i>U Chi L Rev</i>
Vanderbilt Journal of Transnational Law	<i>Vanderbilt J.Transnat'l.L.</i>
Virginia Journal of International Law	<i>Va.J.Int'l L.</i>
Yale Journal of International Law	<i>Yale J.Int'l L.</i>

PUBLISHERS

Cambridge University Press	CUP
Edward Elgar Publishing	EEP
Harvard University Press	HUP
Martinus Nijhoff Publishers	MNP
Oxford University Press	OUP
University of Michigan Press	UMP
University of Chicago Press	UCP
University of Pennsylvania Press	UPP
United States Institute of Peace	USIP
Yale University Press	YUP

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INTERNATIONAL CRIMINAL COURT

Situation in the Central African Republic

1. *The Prosecutor v Jean-Pierre Bemba* (Judgment on the appeal of Jean-Pierre Bemba Gombo against Trial Chamber III Judgment Pursuant to Article 74 of the Statute) ICC 01-05-01-08 A (8 June 2018)
2. *The Prosecutor v Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 Pre-Trial Chamber I (15 June 2009).
3. *The Prosecutor v Bemba et al* (Decision pursuant to Article 61(7) (a) and (b) of the Rome Statute) ICC-01/05-01/13 Pre-Trial Chamber II (11 November 2014).
4. *The Prosecutor v Jean-Pierre Bemba Gombo* (Fourth Decision on Victims Participation) ICC-01/05-01/08-320 Pre-Trial Chamber III (12 December 2008)
5. *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Judgment Pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989 Trial Chamber VII (9 October 2016)

Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia

1. (Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation) ICC-01/13 Pre-Trial Chamber I (16 July 2015).

Situation in Côte d'Ivoire

1. (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Côte d'Ivoire) ICC-02/11 Pre-Trial Chamber III (3 October 2011)
2. *The Prosecutor v Laurent Gbagbo* (Decision on the Confirmation of Charges against Laurent Gbagbo) ICC-02/11-01/11-656 Pre-Trial Chamber I (12 June 2014).

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1. *The Prosecutor v Abdel Raheem Muhammad Hussein* (Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein) ICC-02/05-01/12 Pre-Trial Chamber I (1 March 2012).
2. *The Prosecutor v Baha Idriss Abu Garda* (Decision on the confirmation of Charges) ICC-02/05-02/09 Pre-Trial Chamber I (8 February 2010)
3. *The Prosecutor v Bahr Idriss Abu Garda* (Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges") ICC- 02/05-02/09 Pre-Trial Chamber I (23 April 2010).
4. *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (12 July 2010)

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1. (Decision on Applications for Participation in the Proceedings of VPRS-1, 2, 3, 4, 5, 6) ICC-01/04-101-EN-Corr Pre-Trial Chamber I (19 January 2006).
2. (Decision on the Prosecutor's Application for Warrants of Arrest Article 58) ICC-01/04-169 Appeals Chamber (13 July 2006).
3. (Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed) 4-5 ICC-01/04 Pre-Trial Chamber I (25 October 2010)
4. (Judgment on Victim Participation in the investigation stage of the proceedings....) ICC-01/04 Appeals Chamber (19 December 2008)
5. *The Prosecutor v Mathieu Ngudjolo Chui* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-02/12 Trial Chamber II (18 December 2012).
6. *The Prosecutor v Bosco Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda) ICC-01/04-02/06 Pre-Trial Chamber II (9 June 2014).
7. *The Prosecutor v Callixte Mbarushimana* (Decision on the Confirmation of Charges) ICC-01/04-01/10-465 Pre-Trial Chamber I (16 December 2011).
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17. *The Prosecutor v Thomas Lubanga Dyilo* (Judgment) ICC-01/04-01/06 Trial Chamber I (14 March 2012).

18. *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Prosecutor Response to Application for Leave to Appeal) ICC-01/04-01/07 Pre-Trial Chamber I (25 March 2008).
19. *The Prosecutor v Katanga and others*, (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case [under] Article 19 of the Statute) ICC-01/04-01/07 Trial Chamber II (16 June 2009).
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1. (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr, Pre-Trial Chamber II (31 March 2010).
2. (Decision on the Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims) ICC-01/09-01/11 Pre-Trial Chamber II (9 December 2011).
3. (Decision on the Victims' request for review of Prosecution's decision to cease active investigation) ICC-01/09 Pre-Trial Chamber II (5 November 2015)
4. *The Prosecutor v Ruto and others* (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-01/11-307 OA Appeals Chamber (30 August 2011).

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1. *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 Trial Chamber (27 September 2016).

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1. (Decision on Information and Outreach for the Victims of the Situation) ICC-01/18 Pre-Trial Chamber I (13 July 2018).

Situation in Uganda

1. *The Prosecutor v Joseph Kony and others* (Arrest Warrants Issued Under Seal) ICC-02/04-01/05 Pre-Trial Chamber II (13 October 2005).

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2. *Prosecutor v Barayagwiza* (Decision on Prosecutor's Request for Review or Reconsideration) ICTR-97-19-AR72 Appeals Chamber (31 March 2000).
3. *Prosecutor v Kambanda* (Sentencing Judgment) ICTR 97-23-S (4 September 1998)

4. *Prosecutor v Nindilimana*, (Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council) ICTR-2000-56-1 Trial Chamber (26 March 2004).
5. *Prosecutor v Ntakuritama* (Decision on the Prosecutor's motion to Join the Indictments) ICTR 96-10-1 Trial Chamber (22 February 2001).
6. *Prosecutor v Ntuyahaga* (Judgment) ICTR-98-40-T Trial Chamber (18 March 1999).
7. *Prosecutor v Rutangira* (Judgment) ICTR-95-3-T Trial Chamber III (14 March 2005)

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2. *Prosecutor v Banović* (Sentencing Judgment) IT-02-65/1-S Trial Chamber (28 October 2003).
3. *Prosecutor v Blaškić* (Judgment) IT-95-14-A Appeals Chamber (29 July 2004)
4. *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S Trial Chamber (7 December 2005)
5. *Prosecutor v Delalic and others (Čelebići case)* (Judgment) IT-96-21-A Appeals Chambers (20 February 2001).
6. *Prosecutor v Furundžija* IT-95-17/1-T Trial Chamber (10 December 1998)
7. *Prosecutor v Gotovina, Čermak and Markač* (Judgment) IT-06-90-T Trial Chamber (15 April 2011)
8. *Prosecutor v Gotovina and Markač IT-06-90-A* Appeals Chamber (16 November 2012).
9. *Prosecutor v Miroslav Deronjić* (Sentencing Judgement) ICTY-IT-O2-61-S Trial Chamber II (30 March 2004).
10. *Prosecutor v Jokić* (Sentencing Judgement) IT-01-42/1-S Trial Chamber (18 March 2004).
11. *Prosecutor v Krajisnik* (Judgment) IT-00-39-A Appeals Chamber (17 March 2009)
12. *Prosecutor v Krajišnik* (Decision of the President on Early Release) IT-00-39-ES (2 July 2013).
- Prosecutor v Milutinovic and others* (Judgment) IT-05-87-T (26 February 2009)
13. *Prosecutor v Nikolic* (Judgment on Sentencing Appeal) IT-94-2-A Appeals Chamber (4 February 2005).
14. *Prosecutor v Plavšić* (Sentencing Judgment) IT-00-39&40 1/S Trial Chamber (27 February 2003).
15. *Prosecutor v Šešelj* (Judgment) IT-03-67-T Trial Chamber III (31 March 2016)
16. *Prosecutor v Stanišić and Simatović* (Judgement) IT-O3-69-T Trial Chamber III (30 May 2013)
17. *Prosecutor v Stanišić and Simatović* (Judgement) IT-O3-69-A Appeals Chamber (9 December 2015)
18. *Prosecutor v Zaric* (Order of the Application of the President on the early release of Simo Zaric) IT-95-9 (21 January 2004).

INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS

1. *Prosecutor v Šešelj* (Judgment) MICT-16-99-A Appeals Chamber (11 April 2018)

EXTRAORDINARY CHAMBERS OF THE COURTS IN CAMBODIA

1. (Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith) 004/2/07-09-2009-ECCC-OCIJ The Co-Investigating Judges (11 August 2017).

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2. *Davidson v Scottish Ministers* [2004] UKHL 25.
3. *Day v Savadge* (1614) Hob 85; 80 ER 235.
4. *Gillies v Secretary of State for Works and Pensions* [2006] UKHL 2.
5. *Helow v Secretary of State for the Home Department* [2008] UKHL 62.
6. *Matadeen v Pointu* [1999] 1 AC 98.
7. *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577.
8. *Porter v Magill* [2001] UKHL 67.
9. *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 2) [1999] 1 All ER 577.
10. *R v DPP, ex p. C* [1995] 1 Cr App R 136.
11. *R (on the application of Joseph) v DPP* [2001] Crim LR 489.
12. *R (on the application of Peter Dennis) v DPP* [2006] EWHC 3211.
13. *R v DPP, ex p. Jones (Timothy)* [2000] Crim LR 858.
14. *R v DPP, ex p. Kebilene* [2000] 2 AC 326.
15. *R v DPP, ex p. Jones (Timothy)* [2000] Crim LR 858.
16. *R v Killick* [2011] EWCA Crim 1608.
17. *R v Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941 (CA).
18. *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531.
19. *R v Sussex Justices, Ex Parte McCarthy* [1924] 1 KB 256.
20. *Ridge v Baldwin* [1964] AC 40.
21. *Taylor v. Lawrence* [2002] EWCA Civ 90.

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1. *Boucher v. The Queen* [1955] S.C.R. 16.
2. *Johnson v Johnson* (2000) 201 CLR 488.
3. *Randall v. The Queen* [2002] UKPC 19.
4. *Wewaykum Indian Board v Canada* [2003] SCC 45, 66.
5. *Liteky v US* 127 L. Ed. 2d. 474.

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CROWN PROSECUTION SERVICE

- CPS, *The Code for Crown Prosecutors* (January 2013)
- CPS, *Victims Right to Review Guidance* (July 2016)
- CPS, *Victims Right to Review Conviction Rates* (30 November 2017)

EUROPEAN UNION

- EU Directive, 'Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime 2012/29/EU (25 October 2012)

INTERNATIONAL CRIMINAL COURT ASSEMBLY OF STATES PARTIES

- ASP, *Court's Revised Strategy in Relation to Victims* ICC-ASP 11/38 (5 November 2012)
- ASP, *Strategic Plan for Outreach of the International Criminal Court* ICC-ASP/5/12 (29 September 2006)
- ASP, *Report of the Court on the public information strategy 2011-2013*, ICC-ASP/9/29 (22 November 2010)
- ASP, *Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims* ICC-ASP/12/41 (11 October 2013)
- ASP, *Strengthening the International Criminal Court and Assembly of States Parties*, ICC-ASP/13/Res.5 (17 December 2014)
- ASP, *Report of the Court on the Basic Size of the Office of the Prosecutor* ICC-ASP 14/21 (18-26 November 2015)
- ASP, *Report of the Committee on Budget and Finance on the work of its twenty-seventh session*, ICC-ASP 15/5 (28 October 2016)
- ASP, *Proposed Programme Budget for 2017 of the International Criminal Court*, ICC-ASP 15/10 (17 August 2016)
- ASP, *Report of the Bureau on the arrears of State Parties*, ICC-ASP 15/28 (10 November 2016)

INTERNATIONAL CRIMINAL COURT

- ICC, *Integrated Strategy for External Relations, Public Information and Outreach* (18 April 2007)
- ICC, *Regulations of the Office of the Prosecutor* (23 April 2009)
- ICC, *Strategic Plan 2013-2017* (Interim Update July 2015)
- ICC, *Report on the Development of Performance Indicators for the International Criminal Court* (12 November 2015)
- ICC, *Second Court's Report on the Development of Performance Indicators for the International Criminal Court* (11 November 2016)
- ICC, *Third Court's Report on the Development of Performance Indicators for the International Criminal Court* (15 November 2017)

INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR

OTP, *Code of Conduct for the Office of the Prosecutor* (5 September 2013)
OTP, *Report on Preliminary Examination Activities 2014* (2 December 2014)
OTP, *Report on Preliminary Examination Activities 2015* (12 November 2015)
OTP, *Report on Preliminary Examination Activities 2016* (14 November 2016)
OTP, *Report on Preliminary Examination Activities 2017* (4 December 2017)
OTP, *Report on Prosecution Strategy* (14 September 2006)
OTP, *Situation in Colombia: Interim Report* (November 2012)
OTP, *Situation on Registered Vessels of Comoros, Greece and Comoros Article 53(1) Report* (6 November 2014)
OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016)
OTP, *Policy Paper on Preliminary Examinations* (November 2013)
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UNITED NATIONS SECURITY COUNCIL

UN Security Council Resolution 955 UN Doc S/RES/955 (9 November 1994)

UN Security Council Resolution 827 UN Doc S/RES/827 (25 May 1993)

UN Security Council Resolution 1970 UN Doc S/Res/1970 (26 February 2011)

UN Security Council Resolution 1593 UN Doc S/Res/1593 (31 March 2015)

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Introduction

The International Criminal Court's Office of the Prosecutor (OTP) is an entity that, today, is the 'engine-room' of international criminal justice. The OTP's investigations and prosecutions are pivotal to the Court's entire operation and help to determine its overall success. Indeed, the Court's effectiveness is rooted in the OTP's selection of cases; a decision that continues to generate the most trenchant criticism.¹ The Prosecutor is thus, the Court's most recognisable public face and her Office is on the front-line in contributing to the Court's goals. This study is about the OTP's contribution to one of those goals: reconciliation.

It has long been acknowledged that the contribution of criminal prosecutions to reconciliation is contested. To offer a sample of the debate, some observers argue a prosecution's emphasis on retribution is not compatible with reconciliation, and, rather than being a positive force, prosecutions end up '[making] it clear why people should hate each other.'² Indeed, for many commentators, prosecutions are inimical to reconciliation, with the latter having its roots in restorative justice; a paradigm that privileges apology and forgiveness, rather than retribution.³ On the other hand, there are those that argue that prosecutions provide justice, and when justice is both done and seen to be done, 'deep-seated resentments—key obstacles to reconciliation—are removed.'⁴ On this latter view, prosecutions establish individual criminal responsibility; an essential foundation for long-term reconciliation.⁵ In summary, opinion on whether prosecutions contribute to reconciliation remains firmly divided.

Nonetheless, and predictably, international criminal prosecutors regularly claim prosecutions can— *and do* — contribute to reconciliation. Historically, these claims have been motivated by the specific mandates of international criminal

¹ The literature is cited throughout the study. Nonetheless, for a general sample of criticism see, Celestine Ncekwube Ezennia, 'The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?' (2016) 16 *Int.C.L.R.*448; Alana Tiemessen, 'The International Criminal Court and the politics of prosecutions' (2014) 18 *I.J.H.R.* 444; Kirsten Ainley, 'The ICC on Trial' (2011) 24(3) *Cambridge Review of International Affairs* 309.

² Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Books 2006) 24. See also Mark J. Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2000) 22(1) *HRQ* 118, 125-129.

³ Martha Minow, 'Law, Forgiveness and Justice' (2015) 6 *California Law Review* 1615, 1631; Lucy Allais, 'Restorative Justice, Retributive Justice and the South African Truth and Reconciliation Commission' (2012) 39(4) *Philosophy and Public Affairs* 331, 332-9/

⁴ Kingsley C. Moghalu cited in Janine Natalya Clark, 'The Three R's: retributive justice, restorative justice, and reconciliation' (2008) 11(4) *Contemporary Justice Review* 331, 332.

⁵ *Ibid.*

tribunals. For instance, the mandate of the International Criminal Tribunal for Rwanda (ICTR) explicitly declared it would ‘contribute to the process of national reconciliation’⁶ and, similarly, one of the objectives of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was the achievement of reconciliation in the Balkans.⁷ Hence, and to offer only a small selection of claims, Carla Del Ponte (the former prosecutor of the ad-hoc tribunals) previously claimed her primary objective of justice, by implication, contribute to the process of reconciliation between peoples torn apart by the wars of the nineties.⁸ Her successor at the ICTR, Hassan Jallow, argued that reconciliation is ‘an important outcome of the prosecution process.’⁹ In addition, Serge Brammertz, the current ICTY Prosecutor declared that ‘to reconcile divided communities, accountability is essential’.¹⁰ Overall, international criminal prosecutors have established a recurring trend of rhetoric that asserts that prosecutions *do* contribute to reconciliation.

Today, the Prosecutor of the International Criminal Court, Fatou Bensouda, is no different. She has contended, for example, that ‘there cannot be true reconciliation ... unless the people who suffered are ... made to see that justice has been done for their suffering.’¹¹ These claims cannot be simply explained by reference to the Court’s mandate; there is no explicit mention of reconciliation in the Rome Statute. However, there were several references to reconciliation during the Statute’s negotiation; some delegates concluded that the Court’s concern for justice and peace would lead to reconciliation — others claimed it would be its ability to establish the truth.¹² On this account, the Prosecutor’s pursuit of justice— something

⁶ See UNSC Res 955 (9 November 1994) UN Doc S/RES/955 para 7.

⁷ Reconciliation was not explicitly stated in the ICTY’s mandate. See UNSC Res 827 (25 May 1993) UN Doc S/RES/827. However, as Janine Natalya Clark discusses, the idea that the ICTY intended to contribute to reconciliation emanated from several speeches given by former Presidents of the ICTY, in particular Theodor Meron, and previous ICTY Prosecutors. For example, former Prosecutor Carla Del Ponte claimed that ‘the tribunal was established as a measure to restore and maintain peace and promote reconciliation in the former Yugoslavia.’ See Carla Del Ponte, ‘The ICTY and the Legacy of the Past’ (Speech delivered at the NATO Parliamentary Assembly 26 October 2007) <<http://www.icty.org/en/press/address-tribunal-prosecutor-carla-del-ponte-nato-parliamentary-assembly-belgrade-icty-and>> accessed 31 July 2018. See Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014) 35-39.

⁸ Carla Del Ponte, ‘The Dividends of International Criminal Justice’ (Address at Goldman Sachs 6 October 2005) <http://www.icty.org/x/file/Press/PR_attachments/cdp-goldmansachs-050610-e.htm> accessed 31 July 2018.

⁹ Hassan. B. Jallow, ‘Prosecutorial Discretion and International Criminal Justice’ (2005) 3 *JICJ* 146, 154.

¹⁰ Serge Brammertz, ‘Statement 2016 Mostar Peace Connection Award’ (25 July 2016) <http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/160725_prosecutor_brammertz_mostar.pdf> accessed 31 July 2018.

¹¹ Fatou Bensouda, ‘The Reckoning: The Battle for the International Criminal Court’ *Public Broadcasting Service* (14 July 2009) <<http://www.pbs.org/pov/reckoning/interview-fatou-bensouda/>> accessed 31 July 2018.

¹² ‘Summary records of the plenary meetings and of the meetings of the Committee of the Whole’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June-17

that is fundamental to her duties under the Rome Statute — explains her declarations on reconciliation. However, beyond the rhetoric, there are fundamental reasons for the Prosecutor (and the Office she leads) to be concerned about reconciliation.

These reasons include, amongst others, the following. First, the OTP is obliged to contribute to the Court’s goals as determined by the Rome Statute. The Statute does not explicitly define these goals but, if one accepts that the Statute’s fundamental purpose is to deliver justice, then, one can identify that the Statute is concerned with both ‘transitional justice’ and ‘restorative justice’—categories that offer reconciliation its greatest expression.¹³ Second, given the significance of reconciliation (discussed later in the study), many audiences such as political actors, civil society and affected communities often expect that prosecutions *ought* to contribute to reconciliation and — if they do not — then their effectiveness or utility should be questioned.¹⁴ Leaving the desirability of such an expectation momentarily aside, there is little doubt that seeking to contribute to reconciliation offers the OTP potential to gain legitimacy in the Court’s most essential audiences. Finally, if it is demonstrated that the OTP can act in ways that are counter-productive to reconciliation then it has an equal obligation to consider how it can act in ways that are more conducive to achieving it. In summary, there is a strong normative foundation for the OTP to seek to contribute to reconciliation.

In this context, this study assesses the OTP’s contribution to reconciliation and, thereby recognises the Office’s establishment as an independent organ of the Court.¹⁵ The study is distinguishable from much of the literature that tends to be dominated by various accounts of ‘international criminal trials’,¹⁶ ‘international

July 1998) (2002) A/CONF.183/13 (Vol. II) (2002) http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf accessed 31 July 2018. For example, see comments by the Observer for the Lawyers Committee for Human Rights (‘The ICC ‘would strengthen peace by offering justice through law and would contribute to the process of reconciliation.’) at para 77 page 119 or the Observer for the Movimento Nacional de Direitos Humanos, (‘The Court would make a great contribution to the cause of peace and reconciliation of humanity because it would establish the truth and to bring reconciliation, individual responsibility had to be established’.) para. 117, p. 71.

¹³ See chapter 2.

¹⁴ On this see William A. Schabas, ‘Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court.’ (2004) 2(4) *JICJ* 1082. See also The Prosecutor’s intervention in Uganda provides an excellent example of such entanglements. For an overview see Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide* (CUP 2015) 150-277; Lucy Hovil, ‘Challenging International Justice: The Initial Years of the International Criminal Court’s Intervention in Uganda’ (2013) 2(1) *Stability: International Journal of Security and Development* Art. 3.

¹⁵ Art. 42(1) ICCst.

¹⁶ A criminal trial is a process that involves the formal examination of evidence before a judge and/or jury to determine the guilt of the accused. In the words of Hannah Arendt, these trials are intended to reflect on the law’s main business; to weigh the charges against the accused, render judgement and mete out any punishment. See

criminal law'¹⁷ and 'international criminal justice'¹⁸ — often cited in the abstract and with little distinction.¹⁹ By contrast, the study's specific focus on the OTP respects the differences between the entities that make up the Court, in terms of their particular functions, policies and the constituencies to whom they are most accountable.²⁰ In this manner, the study precludes an assessment of other constituent organs such as the Court's Registry, the Chambers and the Trust Fund for Victims, and their own potential contribution to reconciliation.²¹ Thus, generally omitted from this study is coverage of the Prosecutor's behaviour within the Court's chambers, either at pre-trial, trial or appeal stages. These are not the OTP's organisational activities, but rather, involve its participation within the separate judicial organ of the Court.²² Hence, the study offers a discrete specificity and theorisation on the OTP.

The study concentrates on the OTP's core pre-trial activity, namely, its procedure of selecting cases for prosecution. This analytical focus finds expression in the dictionary definitions of both 'prosecutorial' and 'prosecution': the issuing of formal legal proceedings against an accused individual for an alleged offence.²³ Indeed, McCoy defines a prosecution as encompassing the conduct of investigations

Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (First Published 1963) (Penguin 2006) 253.

¹⁷ International criminal law is generally understood to be the body of international rules designed to proscribe certain categories of conduct, and those rules designed to make individual persons that engage in such conduct criminally liable. See Antonio Cassese and others (eds.), *Cassese's International Criminal Law* (OUP 2013) 3.

¹⁸ The meaning of international criminal justice is contested. It has been described by Boas as the 'response of the international community ... to mass atrocity'. By contrast, Bassiouni understands international criminal justice in a systemic sense; a combination of international institutions such as the ICC working alongside national criminal justice working in a complementary fashion to maximise the enforcement of international criminal law. See, respectively, Gideon Boas, 'What is International Criminal Justice?' in Gideon Boas, William A. Schabas and Michael P. Scharf (eds.), *International Criminal Justice: Legitimacy and Coherence* (EEP 2012) 1; Mahmoud Cherif Bassiouni, 'The Philosophy and Policy of International Criminal Justice' in Lal Chand Vohrah and others (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 95-6.

¹⁹ On the importance of conceptual clarity see Jens Iverson, 'Transitional Justice, Just Post Bellum and International Criminal Law: Differentiating the Usage, History and Dynamics' (2013) *IJTJ* 7(3) 413, 414. On international criminal law's monopolising effect(s) that see it envelop other forms of justice, see Sarah Nouwen, 'Monopolising Global Justice: International Criminal Law as Challenge to Human Diversity' (2015) 13 *JICJ* 157.

²⁰ Nobuo Hayashi, Cecilia M. Bailliet and Joanna Nicholson, 'Introduction' in Nobuo Hayashi, Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (CUP 2017) 20.

²¹ For an introduction on the relationship between the ICC's Trust Fund and Reconciliation see, Jovanna Davidovic, 'The International Criminal Court, the Trust Fund for Victims and Victim Participation' in Larry May and Elizabeth Edenberg (eds.), *Just Post Bellum and Transitional Justice* (CUP 2013) 217.

²² See Art. 34(b) ICCst. which lists the judicial divisions as one of the organs of the ICC alongside the Presidency, the Office of the Prosecutor and the Registry.

²³ More specifically, the dictionary defines prosecutorial as 'relating' to the institution and conducting of legal proceedings against someone in respect of a criminal charge. The definition of prosecution refers merely to the institution and conduct of said proceedings. See Angus Stevenson (ed.), *Oxford Dictionary of English* (OUP 2010) 1426.

and the initiation of charges against an individual.²⁴ The study's narrow target of concern allows for precise attention to be paid to the OTP's most crucial procedure.

The study, nonetheless, acknowledges that reconciliation is a contested concept. It is highly context-dependent and there is no consensus as to its meaning or even what it actually looks like.²⁵ Nonetheless, and for reasons that will be fully discussed later, the study defines reconciliation as a societal process that includes the repair and restoration of people's relationships, and the rebuilding of trust between them.²⁶ This definition reflects the fact that reconciliation is a multi-layered concept that encompasses interpersonal, community and society-wide elements. The interpretation is also appropriate to reconciliation's context: divided societies that have endured either intergroup violence or identity-based crimes and that are now, typically, divided along ethnic, religious or political lines. In these societies the target audience for reconciliation are affected communities (comprised of victims and those most affected by the atrocities).²⁷ Reconciliation, should, ideally, occur when individuals in these affected communities encounter or interact with those they deem to be on the opposing 'side' of society's divisions.

The OTP's role in this process is based on its prosecutions offering justice and the truth about past crimes. Despite reservations about the type of justice and the quality of that truth, prosecutions are crucial: if members of affected communities see that justice has been done, and accept the declared truth of past crimes, then prosecutions are likely to (modestly) increase the prospects of individuals in affected communities reconciling.²⁸ However, those perceptions of justice and truth are strongly shaped by people's attachments to their own identities (especially that of ethnicity and religion) and these can make those perceptions intractable and resistant to being altered. The perceptions of justice and truth are often triggered by the selection of defendants for investigation and subsequent prosecution. Ultimately, these selections can damage perceptions of the Court's legitimacy in affected communities, resulting in justice being less likely to be seen to be done, and the truth, when declared, less likely to be accepted.

²⁴ Candace McCoy, 'Prosecution' in Michael Tonry (ed.), *The Oxford Handbook of Crime and Criminal Justice* (OUP 2011) 666.

²⁵ See Chapter 3.1.

²⁶ Ibid. The definition is borrowed from Clark, *supra* note 7, at 45.

²⁷ See Chapter 3.2

²⁸ ICC, *Strategic Plan 2013-2017* (Interim Update July 2015) (Judicial and Prosecutorial Goal 1.7) p. 6; ICC *ASP Strategic Plan for Outreach of the International Criminal Court* ICC-ASP/5/12 (29 September 2006) p. 3.

The Court's perceived legitimacy in affected communities is, in and of itself, of utmost significance.²⁹ Admittedly, legitimacy is a complex concept that has a dizzying number of manifestations.³⁰ In spite of it being 'notoriously slippery',³¹ most interpretations begin with the notion of 'justified authority',³² or, more specifically, a 'right to rule.'³³ From this foundation perceived legitimacy, (synonymous with sociological or Weberian legitimacy) is focused on audiences' subjective beliefs and their acceptance of the institution's right to rule.³⁴ It can be distinguished from normative or procedural accounts that centre on legality and compliance with objective criteria.³⁵ In divided societies (and their affected communities) boosting the Court's perceived legitimacy is complex; it can be shaped by objective factors such as the Court's operations but also, crucially, subjective factors, such as an individual's psychological dispositions and cognitive biases. Despite the significant hurdles, the achievement of perceived legitimacy should lead to an individual's acceptance that the Court's existence is justified and is deserving of their support even when particular decisions (such as a selection of a defendant) are deemed to be unfavourable.³⁶ In summary, the OTP's effectiveness in contributing to reconciliation is directly shaped by the Court's perceived legitimacy within affected communities.³⁷

More generally, the study's focus on the OTP generates significant insights that includes, but is not limited to, the following three examples. First, the OTP's

²⁹ See, indicatively, Sergey Vasilev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (CUP 2017) 66-92; Hitomi Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) 4(2) *Amsterdam Law Forum* 4; Stuart Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms.' (2012) 45 *Vanderbilt J.Transnat'l.L.* 405.

³⁰ *Ibid.* The literature on the legitimacy of international criminal law/courts is considerable. See also, indicatively, David Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds.), *Philosophy of International Law* (OUP 2010); Marlies Glasius, 'Do International Criminal Courts Require Democratic Legitimacy' (2012) 23(1) *EJIL* 43; Aaron Fichtelberg, 'Democratic Legitimacy and the International Criminal Court: A Liberal Defence' (2006) 4(4) *JICJ* 765

³¹ Harlan Grant Cohen and others, 'Legitimacy and International Courts—A Framework' in Nienke Grossman and others (eds.), *Legitimacy and International Courts* (CUP 2017) 3.

³² Daniel Bodansky cited in Margaret DeGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32(5) *Fordham Int'l L.J.* 1400, 1436.

³³ Nienke Grossman and others (eds.), *Legitimacy and International Courts* (CUP 2017) 3.

³⁴ See Hitoma Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) 4(2) *Amsterdam Law Forum* 3, 13; Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) *Ethics and International Affairs* 405.

³⁵ For an overview of the confusion encountered when speaking of legitimacy See Silje Aambø Langvatn and Theresa Squatrito, 'Conceptual and Measuring the Legitimacy of International Criminal Tribunals' in Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (CUP 2017) 41-44.

³⁶ Richard Fallon, quoted in Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) 32 *Mich.J.Int'l L.* 1, 12.

³⁷ The relationship also flows in the opposite direction; the OTP's effectiveness is likely to influence its perceived legitimacy.

prosecutions are obscured by a lack of clarity regarding the Court's goals.³⁸ The Rome Statute is the principal source for the Court's goals. These goals can interact, overlap and, at times, conflict with one another. Hence, and unsurprisingly, there is no agreed consensus about the Court's goals, priorities and ultimately the constituencies the Court should serve.³⁹ This dilemma finds expression in the words of former Prosecutor Luis Moreno-Ocampo who, during the initial period of his incumbency, stressed the need for clarity on the Court's role, scope and impact.⁴⁰ Nonetheless, achieving such clarity on these questions is — in reality — 'a gradual process and not merely the result of a flash of inspiration, and crucially, the OTP's own decisions can provide critical insights.'⁴¹ Thus, the present assessment of selection procedure can also shed light on the goals of the Rome Statute.⁴²

Second, the OTP's exercise of discretion in initiating investigations and/or prosecuting cases is unavoidably bound up in debates about reconciliation. Prosecution selectivity is a highly charged subject in divided societies. There is a standing risk that affected communities will perceive selections as biased, particularly when those indicted represent particular sides (i.e. their own) to a conflict.⁴³ For example, the ICTY's indictments were regularly perceived by Serbians as unfairly targeting them (and their leaders) and thus, many argue, have helped produce denial and hostility rather than generate reconciliation.⁴⁴ Similarly, the ICTR's failure to indict individuals from the Rwandan Patriotic Front for alleged atrocities committed during the Rwandan Genocide led to perceptions that the Tribunal was dispensing 'victor's justice' thus impeding its contribution to

³⁸ Margaret DeGuzmann, 'Choosing to Prosecute; Expressive Selection at the International Criminal Court' (2012) 33(2) *Mich.J.Int'l L.* 265, 276; Margaret deGuzman and William. A. Schabas, 'Initiation of Investigations and Selection of Cases' in Göran Sluiter and others (eds.), *International Criminal Procedure: Principles and Rules* (OUP 2013).

³⁹ *Ibid.*

⁴⁰ Luis Moreno-Ocampo, 'Statement at Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' (24 October 2005) p. 9.

⁴¹ Avril McDonald and Roelof Haveman, 'On the Exercise of Prosecutorial Discretion' in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5* (Torkel Opsahl 2017) 498.

⁴² See ICCSt Preamble para 5 ('Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes').

⁴³ See, for example, the perceptions of the decisions made by the former Director of Public Prosecutions of Northern Ireland, Barra McGrory QC. During his tenure, politicians of the Northern Ireland's Democratic Unionist Party expressed frequent criticisms of his decisions to prosecute former British soldiers during the Northern Ireland Troubles. See BBC News, 'Barra McGrory 'controversial', says Jeffrey Donaldson' (17 May 2017) <<http://www.bbc.co.uk/news/uk-northern-ireland-39946751>>accessed 31 July 2018; BBC News, 'Barra McGrory says critics have 'insulted him'' (26 January 2017) <<http://www.bbc.co.uk/news/uk-northern-ireland-38752683>>accessed 31 July 2018.

⁴⁴ For example, see James Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia' (2005) 43(3) *Journal of Peace Research* 271 and James Meernik, 'Victor's Justice or the Law? Judging and Punishing at the ICTY' (2003) 47(2) *Journal of Conflict Resolution* 140.

reconciliation.⁴⁵ Today, the OTP's prosecutorial selectivity can, at any one time, risk a similar set of perceptions, particularly in the Court's situations on the African continent: the *Situation in Côte d'Ivoire* is a notable example. Often in the midst of government-inspired attacks and hostile media coverage, the OTP is on the frontline in maintaining the Court's perceived legitimacy among affected communities.⁴⁶ In this regard, the present study is illuminating because it helps to identify how the Court's perceived legitimacy may be improved.

Finally, there is considerable expectation placed on international tribunals to contribute to reconciliation. This can be triggered by the rhetoric of prosecutors, but also emanates from other sources. These sources include the contemporaneous operation of non-punitive transitional justice strategies such as truth and reconciliation commissions.⁴⁷ These expectations can also be triggered by civil society, peace-building actors and even some victims' groups. Most frequently in this connection, political actors (perhaps for reasons of self-interest) have regularly argued that prosecutions must assist in the process of reconciliation. In the words of the former Serbian Foreign Minister the 'paramount question is how international criminal justice can help reconcile former adversaries in post-conflict, transitioning societies.'⁴⁸ The question being paramount, the study provides insight into how far anyone should expect the Court to contribute to reconciliation.

⁴⁵ Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst War Criminals and the Culture of Impunity* (Other Press 2008) 179; Lars Waldorf and Leslie Haskell, 'The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences' (2011) 34(1) *Hastings International and Comparative Law Review* 49, 50. See also Sara Kendall and Sarah Nouwen, 'Speaking of Legacy: Toward an ethos of modesty at the International Criminal Tribunal for Rwanda' (2016) 110(2) *AJIL* 212.

⁴⁶ Yvonne M. Dutton, 'Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge' (2017) 56 *Columbia Journal of Transnational Law* 71.

⁴⁷ On this see William A. Schabas, 'The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone' *HRQ* 1035, 1040-7; For a comprehensive discussion of the challenges in the contemporaneous operation of criminal tribunals and truth commissions see Alison Bisset, *Truth Commissions and Criminal Courts* (CUP 2014) 74-104.

⁴⁸ Vuk Jeremić, UNGA President's Address 'Opening of the Thematic Debate on 'The Role of International Criminal Justice in Reconciliation' (10 April 2013) <<http://www.un.org/en/ga/president/67/statements/statements/April/icj10042013.shtml>> accessed 31 July 2018.

Research Question and Aim

The study answers one central question: How can the OTP effectively contribute to reconciliation? This central question encompasses three enquiries. First, *can* the OTP contribute to reconciliation, second, can the OTP *effectively* contribute to reconciliation and, finally, *how* can the OTP effectively contribute to reconciliation. The study's aim is to provide the OTP with recommendations that will help to develop its contribution to reconciliation.

To clarify, the present research question is not an 'empirical' one, i.e. the research does not engage in empirical research methods.⁴⁹ However, the study does acknowledge existing empirical research on the contribution made by international criminal tribunals to reconciliation.⁵⁰ To date, the evidence has been pessimistic and warned against exaggerating expectations of international criminal justice or — in the words of Akhavan — adding 'normative fantasies on to this seeming panacea.'⁵¹ This study is, nonetheless, premised on the argument that 'playing down' aspirations and labelling them as unachievable simply foreshortens the prospects of international criminal justice.⁵² By contrast, so long as expectations are being generated, however ambitious, then it is incumbent on research to convey whether and how such a contribution can best be made. Nevertheless, this does not mean that attempts to manage those expectations should not be made, and nor does it mean that those expectations should therefore be generated. Instead, the present study offers a sober assessment with the premise of the research question being that there remains considerable uncertainty about whether 'complex judicial institutions are able ... to facilitate reconciliation.'⁵³ Hence, and to put it another way, the study begins from a middle ground and, in Drumbl's terms, seeks to cultivate the potential of prosecutions, but does so without romanticising their effects.⁵⁴

⁴⁹ To illustrate, the research question is not whether the OTP can effectively *achieve* reconciliation. The answer to such a question would require reliable and robust empirical methods.

⁵⁰ See indicatively, Eric Stover and Henry M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the aftermath of Mass Atrocity* (CUP 2004) and Clark, *supra* note 7, at 45. On the ICTY see the work of Marko Milanović, 'The Impact of the ICTY: An Anticipatory Post-mortem' (2016) 110(2) *AJIL* 233 and, 'Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences' (2016) 47 *Geo. J. Int'l L* 1321.

⁵¹ Payam Akhavan quoted in Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014) 206.

⁵² Mirjan R. Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chi-Kent L.Rev.* 329, 365.

⁵³ Clark, *supra* note 7, at 192.

⁵⁴ Mark. A. Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 10.

The research question limits the study's coverage. First, it is recognised that there has been significant debate in the transitional justice literature about whether prosecutions can contribute to reconciliation *at all*, particularly in comparison to other transitional justice mechanisms such as truth and reconciliation commissions, restorative justice strategies and — controversially — approaches diametrically opposed to prosecutions such as amnesties.⁵⁵ Indeed, the contribution of prosecutions is often contrasted to that of amnesties, a debate that finds greatest expression in the well-aired dilemma of 'peace versus justice'⁵⁶ and, in particular, whether amnesties best facilitate long-term reconciliation.⁵⁷ These debates will no doubt continue, but this study has a different starting point that is well articulated by Aiken. As he explains, research should not be fixated on relative assessments of institutions or strategies in the search for the ideal or 'better' contribution to reconciliation. Instead, the conversation should be 'about what institutions do rather than what they are', and concentrate on how those institutions can best fulfil their potential.⁵⁸ The study, therefore, does not argue that the OTP's efforts provide the only contribution to reconciliation, or — indeed — that it provides the best or greatest contribution. To reiterate, the study is exclusively concerned with how the OTP can effectively contribute to reconciliation.

⁵⁵ See for example, Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998) 9-24 and Charles Villa-Vicencio, 'Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet' (2000) 49 *Emory Law Journal* 205.

⁵⁶ For a recent and comprehensive discussion of the debate see Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (OUP 2016).

⁵⁷ Nevin T. Aiken, *Identity, Reconciliation and Transitional Justice: Overcoming Intractability in Divided Societies* (Routledge 2013) 25-6.

⁵⁸ *Ibid.*

Theoretical Framework

This study's theoretical framework is one of 'law in context' and, in particular, engages with socio-legal perspectives.⁵⁹ The framework is inspired by a 'law in action' philosophy that, in the view of Roscoe Pound, expresses an attempt 'to study the role of the law as a living force in society and [seek] to control this force for the social betterment.'⁶⁰ To put it simply, the study interprets law as an instrument that can either positively or adversely affect the everyday experiences of people's lives.⁶¹ The adoption of this framework is preferable for at least three reasons.

First, the framework retains respect for the OTP's legal and institutional establishment.⁶² The framework is used to ask how the OTP, *a priori*, contributes to a social phenomenon felt within affected communities.⁶³ This counters the criticism frequently made of 'law in context' frameworks; namely, that they leave law to be at 'the mercy of disciplines that do not conduct an-depth examination of the given legal phenomena.'⁶⁴ Thus, the framework respects the OTP as an independent and purposive actor, and the integrity of its legal processes and *then* seeks to assess its effectiveness, rather than proceeding with a normative or value-laden critique that would offer less insights on how the OTP can, — albeit incrementally, — develop.⁶⁵

Second, the framework is preferable because it permits varied theoretical and socio-legal perspectives. Put another way, the framework expresses the position that 'no single theory can capture the complexity of the ICC's political dimensions and

⁵⁹ For example, see the work of Roger Cottrell including; 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25(2) *JLS* 2 (1998) 171 and Roger Cottrell, 'Subverting Orthodoxy, Making Law Central: A View of Socio-legal Studies' (2002) 29(4) *JLS* 4 632.

⁶⁰ James. A. Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part 1)' (1961) 7 *Villanova Law Review* 1, 9 See also Roscoe A. Pound, 'The Need of a Sociological Jurisprudence' (1907) *The Green Bag* 607 <[http://www.minnesotalegalhistoryproject.org/assets/Pound-soc.%20juris.%20\(1907\).pdf](http://www.minnesotalegalhistoryproject.org/assets/Pound-soc.%20juris.%20(1907).pdf)> accessed 31 July 2018.

⁶¹ This is associated with the American legal realism movement and/or legal instrumentalism: see Elies Van Sliedregt, 'International Criminal Law: Over-studied and underachieving?' (2016) 29(1) *LJIL* 12 and for more on instrumentalism see Steven M. Quevedo, 'Formalist and Instrumentalist Legal Reasoning and Legal Theory' (1985) 73(1) *California Law Review* 119; Robert A. Kagan, 'What should socio-legal scholars do when there is too much law to study?' (1995) 22(1) *JLS* 140.

⁶² Barrie Sander, 'International Criminal Justice as Progress: From Faith to Critique' in Morten Bergsmo and others (eds.), *Historical Origins of International Criminal Law: Volume 4* (Torkel Opsahl 2015) 749, 749.

⁶³ Dov Jacobs, 'Sitting on the Wall, Looking in: Some Reflections on the Critique of International Criminal Law' (2015) 28 *LJIL* 1.

⁶⁴ Anja Matwijkiw, 'On the Philosophy of International Criminal Law' (2014) 14(4/5) *Int.C.L.R.* 669, 679.

⁶⁵ See generally, Michael N. Barnett and Martha Finnemore, 'The Politics, Power and Pathologies of International Organisations' (1999) 53(4) *International Organisation* 699, 726.

dynamics.’⁶⁶ This position is corroborated by Nouwen who advances that, as theory in international criminal law is ‘all over the place’, the study of the Court requires diverse theoretical perspectives.⁶⁷ By way of brief illustration, one theory that continues to (dogmatically) dominate lawyers’ understandings of the Court is legalism.⁶⁸ Shklar describes legalism as the ‘ethical attitude that holds moral conduct to be a matter of rule following and moral relationships to consist of duties and rights determined by rules.’⁶⁹ In the case of the present study, legalism would simply answer the research question by reference to the law and rules of the Rome Statute. However, legalism rests on a premise that assumes rules and legal procedures are devoid of political influence but, as the study explores later, politics gives rules (particularly those of the Court’s jurisdiction) its ‘rough content’ and driving force.⁷⁰ Thus, the study’s framework acknowledges the human and social dimensions to legal processes, and the inevitable value commitments and political considerations those processes may entail.⁷¹ In this spirit, one can concur with Bergsmo’s view that varied sociological perspectives provide the durable scrutiny of international criminal justice that, ultimately, improves its institutions.⁷²

Third, the framework reflects the increasing trend of inter-disciplinarity in research on international criminal law.⁷³ Historically, research has adopted international criminal law as the ‘dominant disciplinary frame’ within which there are established narratives about the importance of law — ‘from an internal point of view.’⁷⁴ More recently, research has matured and now, increasingly, recognises that international criminal law is a ‘porous disciplinary blend with competing and shifting content, values and goals.’⁷⁵ Thus, one can agree with Slidregt, that research in the field encompasses enquiry ‘at the intersection with other legal

⁶⁶ Steven C. Roach, ‘Introduction: Global Governance in Context’ in Steven C. Roach (ed.), *Governance Order, and the International Criminal Court* (OUP 2009) 11-2.

⁶⁷ Sarah Nouwen, ‘International Criminal Law: ‘Theory All Over the Place.’ in Anne Orford and others (eds.), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 738-62.

⁶⁸ See Samuel Moyn, ‘Judith Shklar on the Philosophy of International Criminal Law’ (2014) 14 (4/5) *Int.C.L.R.* 717, 717.

⁶⁹ Judith N. Shklar, *Legalism: Law, Morals and Political Trials* (HUP 1986) 111.

⁷⁰ Miro Cerar, ‘The relationship between law and politics’ (2009) 15(1) *Annual Survey of International & Comparative Law* 19, 20-21; See Chapter 5.4.

⁷¹ Sharyn L. Roach Anleu, *Law and Social Change* (Sage 2001) 7.

⁷² Morten Bergsmo, ‘Institutional History, Behaviour and Development’ in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5* (Torkel Opsahl 2017) 26-27.

⁷³ Michelle Leanne Burgis-Kasthala, ‘Introduction: How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship’ (2016) 17 *Int.C.L.R.* 227, 236-8.

⁷⁴ *Ibid.*

⁷⁵ Mahmoud Cherif. Bassiouni, ‘The discipline of international criminal law’ in Mahmoud. C Bassiouni, *International Criminal Law* (MNP 2008) 9.

disciplines and [is about] opening up to non-doctrinal approaches to international criminal law.’⁷⁶ In like manner, Boas argues that international criminal law does not provide all the answers and that interdisciplinary perspectives ‘enable different voices [to] contribute to the content and meaning of this complex topic [and] influence outcomes and processes.’⁷⁷ In adopting this view, this study’s ‘opening-up’ to other disciplines is intended to lead to a practice-orientated critique that can, hopefully, be internalised by the OTP’s prosecutors and policymakers.⁷⁸

In pursuit of such critique, this study adopts several non-legal and non-traditional perspectives. For example, the study uses criminological perspectives to explore the Court’s goals.⁷⁹ Socio-legal perspectives are used to complement the study’s interpretations of essential concepts including, for instance, that of reconciliation; an ‘essentially contested’ concept that attracts wide-ranging disciplinary interest from law, theology, philosophy, psychology, peace studies, political science, and community studies.⁸⁰ Similarly, the study engages with the multi-disciplinary field of transitional justice.⁸¹ This field, broadly speaking, encompasses, conflict resolution and social psychology perspectives that can illuminate the perceptions of victims at an individual and/or community-level.⁸² In chapter five, I apply public relations and literary perspectives to consider the persuasiveness of the OTP’s rhetoric in affected communities.⁸³ Finally, the study utilises public administration literature to assess the OTP’s performance measurement tools. In summary, a range of disciplines provides the comprehensiveness to the study’s framework and thereby suggest practical lessons

⁷⁶ Elies Van Sliedregt, ‘International Criminal Law: Over-studied and Underachieving?’ (2016) 29(1) *LJIL* 1, 12.

⁷⁷ Gideon Boas, ‘What is international criminal justice?’ in Gideon Boas, William A. Schabas and Michael P. Scharf (eds.), *International Criminal Justice: Legitimacy and Coherence* (EEP 2012) 3.

⁷⁸ On this point see Dov Jacobs, ‘Sitting on the Wall, looking in: Some Reflections on the Critique of International Criminal Law’ (2015) 28 *LJIL* 1, 10.

⁷⁹ Dawn L. Rothe and Christopher W. Mullins, ‘Beyond the Juristic Orientation of International Criminal Justice: The Relevance of Criminological Insight to International Criminal Law and its Control (2010) 10(1) *Int.C.L.R.* 97, 110; Paul Roberts and Nesam McMillan, ‘For Criminology in International Criminal Justice’ (2003) 1 *JICJ* 315, 330. See also Tom Buitelaar, ‘The ICC and the Prevention of Atrocities: Criminological Perspectives’ (2016) 17(3) *HRR* (2016) 285.

⁸⁰ W. B. Gallie, ‘Essentially contested concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167; See generally Audrey R. Chapman, ‘Approaches to Studying Reconciliation’ in Hugo Van Der Merwe, Victoria Baxter and Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace 2009) 147.

⁸¹ See Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015) 1. See also Cedric Ryngaert (ed.), *The Effectiveness of International Criminal Justice* (Intersentia 2009) 1 and more generally Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’ (2009) 3(1) *IJTJ* 5, 6-10.

⁸² Gideon Boas and Pascale Chifflet, *International Criminal Justice* (EEP 2017) 21.

⁸³ See Edward Bernays, *Crystallising Public Opinion* (1961) para. iii-iv; The Chartered Institute of Public Relations, ‘What is PR?’ <<https://www.cipr.co.uk/content/careers-advice/what-pr>> accessed 31 July 2018.

for the OTP, policy-makers and for the administration of international criminal justice in general.⁸⁴

⁸⁴ Christopher W. Mullins and Dawn L. Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' (2010) 10 *Int.C.L.R.* 771, 772; Paul Roberts and Nesam McMillan, 'For Criminology in International Criminal Justice' (2003) 1 *JICJ* 315, 328.

Methodology

The present study is desk-based and draws upon primary sources such as the Rome Statute, UN Security Council resolutions and case law from the ICC and the ad-hoc tribunals. In addition, the study draws on the OTP's policies and strategies. The research is complemented by scholarly literature that, as outlined in the section above, is found across a range of disciplines.

The study uses a goal-based methodology to address the research question. This method is particularly appropriate as it takes a rational assessment of organisational effectiveness.⁸⁵ A goal is defined as a desired aim, something to be achieved, or the target or object of a plan/effort.⁸⁶ Effectiveness is understood as the transforming of an output (i.e. the day-to-day service activities that an organization delivers or provides) into successful outcomes within target audiences.⁸⁷ Outcomes are the real-world consequences of a given output, including the short, medium and even long-term changes (typically in terms of attitudes, behaviours, conditions or perceptions) of those within target audiences.⁸⁸ Turning back, the study interprets the OTP's effectiveness — principally but not exclusively — in terms of whether its prosecutions (outputs) can produce outcome(s) that contribute to the goal of reconciliation.

By way of a brief illustration, schools are organisations that deliver educational qualifications, or, hospitals are bodies that provide treatments/operations — these are their outputs. The delivery of high-quality school qualifications can produce outcomes among the student body (e.g. to make students literate and numerate, or to develop their critical reasoning skills etc.),— and these outcomes contribute to a goal of well-informed and skilled citizens. Alternatively, successful hospital treatments or operations produce outcomes among seen patients (e.g. to make patients free from ill-health symptoms, physically mobile, or to help them self-

⁸⁵ Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 13-14.

⁸⁶ Angus Stevenson (ed.), *Oxford Dictionary of English* (OUP 2010) 740.

⁸⁷ *Ibid.* This definition accords with that of the dictionary, which outlines effectiveness as the degree to which something is successful in producing a desired result. See Angus Stevenson (ed.), *Oxford Dictionary of English* (OUP 2010) 740.

⁸⁸ Neil Carter and others, *How Organisations Measure Success: The Use of Performance Indicators in Government* (Routledge 1995) 35-38. The concept of 'impact' is often used interchangeably with 'outcome'. For a distinction between the two terms see Daniele Alesani, 'Results-Based Management', in Eduardo Missoni and Daniele Alesani (eds.), *Management of International Institutions and NGO's: Framework, Practices and Challenges* (Routledge 2013) 266-294, at 267.

manage pain etc.) — and these outcomes contribute to a goal of long-term health and well-being.⁸⁹

It is worth highlighting that the literature has tended to adopt a different interpretation of effectiveness. For example, literature on international tribunals has generally understood effectiveness in terms of a tribunal's 'ability to compel compliance with its judgements'.⁹⁰ The notion of 'effectiveness as compliance' targets a given state's compliance with Court judgements, e.g. through executing an arrest warrant or transferring individuals to the Court. However, effectiveness is not exhausted by state compliance with the tribunal's judgments. For instance, a high level of State compliance may be attributed to a range of unrelated causes that say little about organisational effectiveness. A high rate of compliance could even be the result of little behavioural change. Indeed, counter-intuitively, an organisation may be more effective if it produces a low rate of compliance, because behavioural change for a particular State may be particularly onerous.⁹¹ In other words, state compliance as a gauge of effectiveness is, at best, inconclusive.

The present interpretation of effectiveness is different because it distinguishes a tribunal actor, a chosen goal and an audience (i.e. environment) where the goal is to be achieved. The study specifically targets the OTP, the goal of reconciliation, and those affected communities in societies divided by ethnic, political or religious lines.⁹² It thus compensates for a weakness in the literature when discussing effectiveness — namely — omitting to ask: 'effective for what purpose?'⁹³ The study's interpretation of effectiveness is preferable because it is about having an external impact on societies and on those living within its communities.⁹⁴ This finds expression in Ramji- Nogales's interpretation of

⁸⁹ Christopher Pollitt and Sorin Dan, 'The Impacts of the New Public Management in Europe: A Meta-Analysis' (European Commission 14 December 2011) <http://www.cocops.eu/wp-content/uploads/2012/03/WP1_Deliverable1_Meta-analysis_Final.pdf> accessed 31 July 2018 at 11-12.

⁹⁰ See Laurence R. Helfer and Anne Marie-Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 290.

⁹¹ Compliance can be triggered by many possible causes, thus making the measurement of causal effect complex. See Laurence R. Helfer and Anne-Marie-Slaughter, 'Why States Create International Tribunals: A Response to Professor Yoo and Posner' (2005) 93 *California Law Review* 1, 19-20.

⁹² Literature on the goals of international criminal law and international criminal justice is vast. See for example; Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', 24 *HRQ* (2002) 573-639; Mirjan R. Damaška, 'What is the Point of International Criminal Justice', 83 *Chi-Kent L.Rev.* (2008) 329-368 and Shahram Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage in Consequentialist Aspirations', 3 *Penn. St. J.L. & Int'l Aff.* (2014) 30, 31-109.

⁹³ Helfer and Slaughter *supra* note 90, at 290.

⁹⁴ Laurence R Helfer, 'The Effectiveness of International Adjudicators' in Karen J. Alter and others (eds.), *Oxford Handbook of International Adjudication* (OUP 2014) 464-482.

effectiveness, one that is based on the shifting of social norms and the alteration of human behaviour.⁹⁵ Thus, and in general, the present interpretation of effectiveness centres on a differential behavioural change from a prevailing situation to one that is sought within affected communities.

This goal-based methodology is advantageous because it permits careful comparisons with other Courts. Admittedly, the Court exercises unique jurisdiction and the OTP's broad functions, especially pre-trial, are unique to that of its previous counterparts at the ICTY or ICTR.⁹⁶ That being said, as Shany argues, a goal-based methodology enables a more nuanced drawing of comparisons, particularly between courts in analogous contexts.⁹⁷ Chief among them, the ad-hoc tribunals both operated in response to identity-based crimes and intergroup atrocities. These crimes inevitably left affected communities in societies — in the Balkans and Rwanda respectively — that remain marked by ethnic/religious divisions. In this regard, the literature on these tribunals' effects on reconciliation illuminate the consequences of the OTP's interventions in similar situations.

Nonetheless, one should still acknowledge the limitations of a goal-based method.⁹⁸ First, it is often assumed that goals are always declared but certain goals can go unstated. These goals include those that are self-evident to an institution e.g. the prevailing belief that Courts should advance the goal of justice.⁹⁹ The study recognises that the Court's (and the OTP's) primary goal is to provide justice, but this does not undermine the present enquiry because it is clear that (prosecutorial) justice is the foundation for all of the Court's goals. In this regard, chapter two of the study uses this observation as a starting point to explore the OTP's selection goals.

Second and relatedly, the very act of establishing a goal obscures the fact that there may be little agreement as to its priority. The existence of multiple goals can often lead to them competing, lacking harmony, or pulling in opposite directions and this merely aggravates the lack of consensus.¹⁰⁰ The disagreement can be

⁹⁵ Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) 32(1) *Mich.J.Int'l L.* 1, 5.

⁹⁶ Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97(3) *AJIL* 510, 510.

⁹⁷ Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 53.

⁹⁸ *Ibid* 13-21.

⁹⁹ Shany argues that adherence to explicit goals lend greater legitimacy to their pursuit, but that it does not follow that the goal is necessarily more important than one that is not explicitly declared: *Ibid*. See also Thomas M. Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 52.

¹⁰⁰ Mirjan R. Damaška, 'What is the Point of International Criminal Justice?' (2008) 83(1) *Chi-Kent L.Rev.* 329, 331. See also Sigall Horowitz, Gilad Noam and Yuval Shany, 'The International Criminal Court' in Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014).

compounded by actors who expect differing goals to be achieved e.g. external actors (i.e. a member state, domestic political elites, victim communities, civil society, or conflict-affected population) or institutional actors (e.g. prosecutors or judges). The study recognises that the OTP (and the Court) has not prioritised the many goals it claims to pursue.¹⁰¹ In this regard, the study does not suggest a particular order of priority or make a normative claim that the goal of reconciliation necessarily ought to be prioritised ahead of others.

Third, the definition of specific goals is inevitably open to interpretation, and differing actors may adopt interpretations that are at wide variance from one another. The study acknowledges this, particularly as reconciliation is notoriously fuzzy, context-specific and closely related to competing concepts such as peace and forgiveness.¹⁰² Indeed, it is accepted that reconciliation is not simply a theoretical concern but is, and can only be, realised in a specific context and environment.¹⁰³ The study argues, nevertheless, that a lack of conceptual clarity lends itself to confusion and can prevent clear-thinking about where reconciliation is sought and the best strategies to go about achieving it. Chapter three's examination of the goal of reconciliation offers the OTP, amongst other things, much-needed clarity as to its precise meaning.

Fourth, even when those challenges have been overcome, measuring effectiveness towards those goals presents its own difficulties.¹⁰⁴ In many organisations, the concern for measurement precedes the establishment of goals and outcomes; there is often a pressing concern to establish goals and outcomes that are measurable, achievable, realistic (or relevant) and sufficiently time-orientated.¹⁰⁵ Measuring organisational effectiveness is complex; and chief among the problems is ensuring one can attribute an outcome to an organisation's activities—labelled as the problem of 'performance ownership'. The concluding chapter acknowledges this and suggests how the OTP's attempt at performance measurement can begin to tackle this challenge.

¹⁰¹ Margaret DeGuzmann, *Choosing to Prosecute: Expressive Selection at the International Criminal Court* (2012) 33(2) *Mich.J.Int'l L.* 265, 267.

¹⁰² Clark, *supra* note 7, at 40-41.

¹⁰³ David Bloomfield, 'Reconciliation: An Introduction' in David Bloomfield, Teresa Barnes and Luc Huyse (eds.), *Reconciliation after Conflict: A Handbook* (IDEA 2003) 12.

¹⁰⁴ ASP, *Report of the Court on the development of Performance Indicators for the International Criminal Court* (12 November 2015) para 10.

¹⁰⁵ George Doran, 'There's a S.M.A.R.T. Way to Write Management's Goals and Objectives' (1981) 70(11) *Management Review* 35.

Before turning to the chapter outline, one should remark on how the methodology is expressed in the forthcoming chapters. Briefly, the first chapter outlines the OTP's selection of *outputs*. The second chapter sharpens the focus on the *goal* of reconciliation. The third chapter conducts an in-depth examination of reconciliation and details the *outcome* (i.e. the Court's perceived legitimacy) that can facilitate the OTP's effective contribution to reconciliation. The fourth, fifth and sixth chapters all analyse the OTP's effectiveness vis-à-vis the Court's perceived legitimacy.

Chapter Outline

The study is organised into six chapters. The opening chapter outlines the OTP's selection procedure, and, particularly, discusses the central role of prosecutorial discretion. The second chapter explores the OTP's selection goals and sharpens the focus on the goal of reconciliation. Chapter three offers further specificity by examining reconciliation and emphasising that affected communities need to perceive the Court to be legitimate. In this light, the fourth chapter then turns to analyse the OTP's selection procedure vis-à-vis the perceptions of the Court in affected communities. The penultimate fifth chapter analyses the persuasiveness of a key feature of OTP's rhetoric on selections. The study's final chapter assesses the OTP's performance indicators and the attempt to measure effectiveness. The concluding remarks consider the implications of the study's recommendations for future research, and for the Court's future steps toward improving its effectiveness.

Contribution to Literature

This study is the first to enquire into the OTP's effectiveness in contributing to reconciliation. Research on the Court and reconciliation has tended to incorporate broad assessments about the rights of victims and other regional peacebuilding initiatives.¹⁰⁶ Other literature has been oriented towards country specific-assessments of ICC interventions and their contribution (implicitly or explicitly) to reconciliation.¹⁰⁷ Specifically, this study is situated within a literature space at the intersection between the fields of international criminal law and transitional justice—two fields that have been historically intertwined.¹⁰⁸ This intersection can be characterised as the combination of a 'top-down' and 'bottom-up' approach.

International criminal law scholarship tends to explore the relationship between prosecutions and reconciliation with a 'top-down' approach – i.e. taking tribunals as the starting point. For instance, there are philosophical perspectives on the role of international criminal tribunals (and trials) to reconciliation.¹⁰⁹ From a different vantage, there are procedural discussions concerning whether international criminal trials can contribute to reconciliation by facilitating apologies or remorse from defendants.¹¹⁰ The sentencing practice of tribunals has also been critiqued by reference to their consequent impact on reconciliation.¹¹¹ Other accounts have examined the ways in which international criminal tribunals fulfil transitional justice agendas.¹¹² Furthermore, the literature also includes assessments of the ad-hoc tribunals' specific legacy in respect of reconciliation.¹¹³

¹⁰⁶ See for example, Tim Muruthi and Allan Ngari (eds.), 'The ICC and Community- Level Reconciliation: In-Country Perspectives' Regional Consultation Report (21-22 February 2011). <http://www.iccnw.org/documents/IJR_ICC_Regional_Consultation_Report_Final_2011.pdf> accessed 31 July 2018.

¹⁰⁷ See for example, Tim Murithi, 'Ensuring Peace and Reconciliation while Holding Leaders Accounts: The Politics of ICC Cases in Kenya and Sudan' (2015) 2 *Africa Development* 73-97; Line Engbo Gissel, 'Legitimising the Juba Peace Agreement on Accountability and Reconciliation: the International Criminal Court as a third-party actor?' (2017) 11(2) *Journal of East African Studies* 367.

¹⁰⁸ For an overview see the Naomi Roht-Arriaza, 'Editorial Note' (Special issue on the role of international criminal justice and transitional justice). (2013) 7 *IJTJ* 383.

¹⁰⁹ Colleen Murphy, 'Political Reconciliation and International Criminal Trials' in Larry May and Zach Hoskins (eds.), *International Criminal Law and Philosophy* (CUP 2010) and Janine Natalya Clark, 'The three R's: retributive justice, restorative justice, and reconciliation' (2008) 11(4) *Contemporary Justice Review* 331.

¹¹⁰ See for example, Oliver Diggelman, 'International Criminal Tribunals and Reconciliation: Reflections on the Role of Remorse and Apology' (2016) 14 *JICJ* 1073.

¹¹¹ See for example, Janine Natalya Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) 20(2) *EJIL* 415.

¹¹² See, for example, Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large and Marieke Wierda (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer 2009) 19-105; Jeremy

In contrast, transitional justice scholarship tends to view the relationship between reconciliation and tribunals with a bottom-up approach — i.e. taking reconciliation as the relevant starting point. For example, such scholarship tends to contrast reconciliation against the retributive justice offered by prosecutions. These accounts of reconciliation tend to be rooted in restorative justice and political processes that advocate apologies, forgiveness and reparations, and other forms of redress to name a few.¹¹⁴ These perspectives often contrast the contribution of tribunals with that of other domestic mechanisms such as amnesties or truth and reconciliation commissions.¹¹⁵ Transitional justice scholarship tends to critique to international criminal tribunals' contribution to reconciliation by references to truth, peace and other societal goals such as the establishment of the rule of law, social inclusion and community solidarity.¹¹⁶

The study finds that the OTP may effectively contribute to reconciliation when it helps to boost the Court's perceived legitimacy in affected communities. Perceptions are always likely to be contested, fluid and shaped by individual attachments to identity e.g. ethnicity or religion. However, despite the challenges, I make the original argument that the OTP should align itself towards procedural justice by developing the fairness of its selection procedure from the perspective of affected communities. Hitherto, the OTP has understated the significance of procedural justice, but research suggests positive perceptions of fair procedures lead to an acceptance of eventual decisions i.e. selections. The acceptance of these selections can boost the Court's perceived legitimacy, and thereby may increase the chance of justice being seen to be done, and of the truth being accepted.

Sarkin, 'Enhancing the Legitimacy, Status and Role of the International Criminal Court Globally By Using Transitional Justice and Restorative Justice Strategies' (2011/12) 6(1) *Interdisciplinary Journal of Human Rights* 83.

¹¹³ See, for example, Sigall Horowitz, 'International Criminal Courts in Action: The ICTR's Effect on Death Penalty and Reconciliation in Rwanda' (2016) 48 *Geo. Wash. Intl L. Rev* 505; Francois-Xavier Nsanzuwera, 'The ICTR Contribution to National Reconciliation' (2005) 3, *JICJ* 944; Payam Akhavan, 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda' (1997) 7 *Duke J. Comp. & Intl Law*. 325.

¹¹⁴ Okechukwu Oko, 'The Challenges of International Criminal Prosecution in Africa' (2007) 31(2) *Fordham Intl L.J.* 7.

¹¹⁵ See Charles Villa-Vicencio, 'Why perpetrators should not always be prosecuted: Where the International Criminal Court and Truth Commissions Meet' (2000) 49 *Emory Law Journal* 205; Anjia Seibert-Fohr, 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) *Max Planck Yearbook of United Nations Law* 553; Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court (2003) 14(3) *EJIL* 481; Elizabeth B. Ludwin King, 'Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures' (2013) 45 *Geo. Wash. Intl L. Rev.* 85.

¹¹⁶ For an indicative overview see Gideon Boas, *International Criminal Justice* (EEP 2017) 195-220.

Furthermore, I make novel arguments on how the OTP can enhance the Court's perceived legitimacy in affected communities. These arguments emerge from paying attention to two under-researched features of the OTP, namely, its rhetoric and its attempt at measuring its own performance. First, I demonstrate that the OTP's rhetoric in, typically, explaining its selections, lacks persuasiveness and is therefore unlikely to boost the Court's perceived legitimacy. Second, I expose the OTP's adoption of performance indicators currently overlook the measurement of prosecution effectiveness in terms of the Court's perceived legitimacy.

The study's findings and recommendations are principally directed to the OTP but will be of interest to other international tribunals, civil society, policy makers, and the academic community at large. In addition, it is hoped that the study may provide a foundation for future empirical studies on the OTP (and the Court's) effects. In light of this intention, before proceeding to the opening chapter, it is important to briefly clarify the study's relationship to existing empirical research on international criminal tribunals and reconciliation.

Empirical research on international tribunals and reconciliation has generally been confined to the ad-hoc tribunals, and, particularly the ICTY.¹¹⁷ The findings of Stover and Weinstein, tend to pour scepticism on international criminal tribunals' contribution to reconciliation in conflict-affected societies.¹¹⁸ One of their conclusions was that international criminal tribunals could not contribute to reconciliation unless the factual record established by the tribunal was 'recognised and internalised by those most affected by the violence.'¹¹⁹ They argued that the ICTY's contribution to reconciliation is limited as perceptions of the tribunal were modified by ethnic, group and national affiliations and individuals' own identification as victims.¹²⁰ Clark's research supports a similar view. She concludes that the ICTY failed to provide reconciliation in the region as it was unable to

¹¹⁷ In this context, empirical research refers to observations of actual behaviours, experiences and opinions. Its methods can include qualitative social science research (e.g. interviewing) and/or quantitative methods.

¹¹⁸ Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the aftermath of Mass Atrocity* (CUP 2004) and Clark, *supra* note 7. Empirical research in respect of the ICTR can be found in Timothy Longman, Phuong Phan, and Harvey M. Weinstein, 'Connecting justice to human experience: attitude toward accountability and reconciliation in Rwanda' in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the aftermath of Mass Atrocity* (CUP 2004).

¹¹⁹ Eric Stover, and Harvey M. Weinstein (eds.), 'Conclusion: a common objective, a universe of alternatives' in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the aftermath of Mass Atrocity* (CUP 2004) 333.

¹²⁰ Laurel E Fletcher and Harvey M Weinstein 'A world unto itself? The application of international justice in the former Yugoslavia' in Eric Stover and Harvey M Weinstein (eds.), *My Enemy: Justice and Community in the aftermath of Mass Atrocity* (CUP 2004) 33.

overcome the ethnic allegiances and established war narratives on all sides to the conflict; Serbian, Bosnian Muslims, and Croat.¹²¹ Innumerable sociological studies on the ICTY supports the view that one's ethnicity shapes the perception of tribunals, and thus, is a persistent obstacle to reconciliation.¹²²

Nonetheless, there is still cause for optimism. Orentlicher's recent book argues that, despite such entrenched (ethnic) positions and widespread denialism about incidents of atrocities, the ICTY did still have an impact on reconciliation. She suggests that a tribunal cannot, by itself, transform societies and achieve reconciliation, but it *can* contribute and provide a foundation for its achievement; for instance, by dispensing justice (irrespective of its quality) and informing public debate that can help to tackle denialism and foster an acknowledgement of the truth.¹²³ The empirical evidence suggests that international criminal tribunals face significant, but not necessarily insurmountable, obstacles in contributing to reconciliation.

In this regard, the present study is justified for, at least, three reasons. First, the current state of empirical research on the ad-hoc tribunals is not conclusive when applied to the ICC. Every tribunal operates within a particular context and thus comparisons between differing tribunals are only illustrative rather than definitive.¹²⁴ More generally, there is, as yet, no exclusive or exhaustive empirical study on the Court's impact on (or contribution to) reconciliation.¹²⁵ Second and relatedly, the current evidence of limited success does not mean that one should abandon attempts at institutional improvement but should motivate efforts towards improvement. As Stahn argues, tackling attitudes and behaviours was part of the task faced by

¹²¹ Clark, *supra* note 7, at 54.

¹²² See also Diane F. Orentlicher, 'Shrinking the Space for Denial: The Impact of the ICTY in Serbia' Open Society Justice Initiative (2008) 60-4; See John Hagan and Sanja Kutnjak Ivković, 'The Legitimacy of International Courts: Victims' evaluations of the ICTY and local courts in Bosnia and Herzegovina (2017) 14(2) *European Journal of Criminology* 200 and Sanja Kutnjak Ivković and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (OUP 2011); James Meernik and Jose Raul Guerrero, 'Can international criminal justice advance ethnic reconciliation? The ICTY and ethnic relations in Bosnia-Herzegovina' (2014) 14(3) *Southeast European and Black Studies* 383; Robert M. Hayden, 'What's Reconciliation Got to do With It? The International Criminal Tribunal for the Former Yugoslavia (ICTY) as Anti-war Profiteer' (2011) 5(3) *Journal of Intervention and Statebuilding* 313.

¹²³ Diane F. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (OUP 2018) 8-11.

¹²⁴ See also Diane F. Orentlicher, 'Shrinking the Space for Denial: The Impact of the ICTY in Serbia' Open Society Justice Initiative (2008) 12.

¹²⁵ There is no discrete empirical research on the effectiveness of the ICC (let alone the OTP and its prosecution strategy) on the achievement of reconciliation. Other empirical research (on complementarity for example) has only touched on reconciliation in passing. See, for example, Sarah M. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013) and Nichols, *supra* note 81.

international criminal justice.¹²⁶ To put it another way, challenging the attitudes that make reconciliation difficult is the problem that international criminal justice was, in part, designed to address.¹²⁷ Thus, the existence of negative empirical evidence is useful because it provokes actors to change their ways, do things differently and seek a more positive impact than has been achieved hitherto.¹²⁸ Third, even if empirical evidence is ascribed significance, the same evidence has rarely distinguished the contribution of a prosecutorial actor (distinct from the contribution of a tribunal as a whole). The current empirical research has not distinguished differing implications for the actors that make up criminal tribunals (e.g. the Office of the Prosecutor, the Judicial Chambers, the Victims and Witness Support etc). There is no study, empirical or otherwise, that suggests the OTP can contribute to reconciliation. It may be the case that the OTP's contribution to reconciliation is limited because, not least, there is no empirical certainty about what reconciliation looks like, or how it can be definitively achieved or measured.¹²⁹ However, a key factor motivating this study is that there is equally no evidence to suggest that the OTP or the Court cannot, in any circumstances, contribute to reconciliation

The study now turns to the opening chapter and begins by introducing the OTP and its underlying mandate.

¹²⁶ Carsten Stahn, 'Between 'Faith' and 'Facts': By What Standards Should we Assess International Criminal Justice?' (2012) 25 *LJIL* 251, 279.

¹²⁷ Mirjan R. Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chi-Kent L. Rev.* 329, 348.

¹²⁸ Gregory Shaffer and Tom Ginsb

urg, 'The Empirical Turn in International Legal Scholarship' (2012) *AJIL* 106 1, 45.

¹²⁹ The study assumes that reconciliation is an ontological phenomenon, and proceeds on the basis that it can be epistemologically established.

Chapter One

The International Criminal Court's Office of the Prosecutor & Selection Procedure

The quest for the judicial international prosecutor—one who is above politics, and who is modelled on domestic prosecutors where all serious crimes against the person are addressed regardless of political considerations—is as elusive as the search for the end of the rainbow.¹

The International Criminal Court's Office of the Prosecutor has been described as a 'manifestation of prosecutorial independence.'² This characterisation finds expression in Article 42(1) of the Rome Statute, which declares that the OTP is an independent and separate entity to the Court. The Article confirms that the Prosecutor has a duty not to seek (or act) on external instructions or engage 'in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence.'³ In like manner, the Prosecutor is prohibited from participating in matters where his/her impartiality may be reasonably doubted.⁴ Furthermore, OTP policy underscores the principles of independence and impartiality and these require the Prosecutor to apply consistent methods and criteria irrespective of the States or parties involved or the person(s) or group(s) concerned.⁵ The OTP must generally adhere to these principles in fulfilling its mandate under the Rome Statute.

The OTP's mandate is simply — in the words of the Deputy Prosecutor — to investigate and prosecute.⁶ Nonetheless, before embarking on those investigations and prosecutions, the OTP must decide whether an investigation is warranted. First, the Office typically receives referrals and substantiated information about crimes

¹ William A. Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (OUP 2012) 93.

² Morten Bergsmo, Frederik Harhoff and Dan Zhu 'Article 42' in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck/Hart 2016) 1274.

³ Art. 42(5) ICCSt.

⁴ Art. 42(7) ICCSt.

⁵ OTP, *Policy on Case Selection and Prioritisation* (15 September 2016) para 20.

⁶ James K. Stewart, 'Thoughts on the Organisation of the ICC Office of the Prosecutor' in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5* (Torkel Opsahl 2017) 577.

within its jurisdiction.⁷ On this basis, the selection procedure begins with a determination about whether to open an investigation—something known as a preliminary examination. These activities of preliminary examinations, investigations and prosecutions are carried out within their respective organisational divisions.⁸ However, those activities are essentially connected: proceeding from a preliminary examination to an eventual decision to prosecute requires satisfying legal assessments that permit considerable prosecutorial discretion. The discretion begins with the selection of a situation before cases are selected from within those situations and subsequently brought before the Court’s Pre-Trial Chamber (PTC).

The OTP’s prosecutorial discretion is unique to that which is typically exercised by other prosecutors. To illustrate, the OTP’s selection of situations enables it to operate with significant geographical breadth, in contrast to, say, the Prosecutors at the ICTY and ICTR that operated within the confined limits of the tribunals’ territorial jurisdiction.⁹ Second, and peculiar to the Court, the OTP has discretion in its assessment of admissibility: a determination of whether it should defer to national proceedings and/or whether the alleged crimes are of sufficient gravity to warrant its intervention. These discretionary assessments are unique and are shaped by the OTP’s policy of ‘positive complementarity’ (its encouragement of national proceedings) and its interpretation of gravity — a notion described as ‘vague, nebulous and quintessentially subjective.’¹⁰ Third, and typically, the OTP selects cases i.e. it makes a decision about the prosecution of particular persons on particular charges. From one angle, this form of discretion is commonly exercised by prosecutors in national criminal justice systems, but, the OTP, by contrast, can only target a small fraction of alleged perpetrators.¹¹ Perhaps most comparable to domestic prosecutors, the OTP can decline to proceed with an investigation or prosecution, something it does by an assessment of an ambiguous expression: ‘the interests of justice’.¹²

⁷ Art. 42(1) ICCSt.

⁸ Respectively these are the Jurisdiction, Complementarity and Cooperation Division, the Investigation Division and the Prosecution Division.

⁹ See, for example, UNSC Res 955 (9 November 1994) UN Doc S/RES/955 para. 1.

¹⁰ William A. Schabas, *An Introduction to The International Criminal Court* (CUP 2017) 241.

¹¹ William A. Schabas, ‘Selecting Situations and Cases’ in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 365.

¹² Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *EJIL* 481, 483.

The OTP's exercise of discretion has attracted significant academic and public criticism. Such scrutiny is unsurprising given that the decision to investigate and/or prosecute is the Court's most dramatic feature, and central to [its] capacity to garner and retain support from essential audiences.¹³ The exercise of discretion is the first stage in orienting the Prosecutor's authority to those societies that have experienced the most serious crimes and their affected communities.¹⁴ In particular, it is the first step in fashioning the perceived legitimacy of the Court among various constituencies, but particularly, in those affected communities. Put simply, the OTP is on the 'frontline' and, as the current Director of the Prosecution Division Fabricio Guariglia discussed in 2003, the Office has always been concerned with managing perceptions of legitimacy.¹⁵ This challenge was foreseen when the OTP was established. In 2002, Morten Bergsmo—who led the preparatory team that established the Office—issued a warning that remains relevant today; the exercise of prosecutorial discretion can aggravate (or ameliorate) perceptions of bias and thus weaken or bolster the OTP's (and the Court's) effectiveness.¹⁶

To begin, however, one must first understand the OTP's selection procedure: understood as the manner or way of deciding upon a selection.¹⁷ In this light, this opening chapter outlines the selection procedure and, principally, discusses the role of prosecutorial discretion. Drawing on the Rome Statute and the OTP's issued policies, the chapter highlights criticisms and these provide the background for the detailed analysis undertaken in chapter four. This opening chapter also indicates the need for further clarity on the goals the OTP's selections are seeking to achieve.

The chapter is organised as follows. First, the opening section explains the significance of prosecutorial discretion. Next, the chapter discusses the selection of situations—the logical precursor to its selection of cases. Subsequently the chapter

¹³ Ron Levi, John Hagan and Sara Dezalay, 'International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law' (2016) 79 *LCP* 289, 291.

¹⁴ *Ibid.*

¹⁵ See Jessica Peake, 'The Institutional Framework, Legitimacy and Overcoming Bias Allegations' in Richard Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (Brill Nijhoff 2016) 353; Fabricio Guariglia, 'Policy and Organisational Questions' in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5* (Torkel Opsahl 2017) 267.

¹⁶ Morten Bergsmo, 'Institutional History, Behaviour and Development' in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5* (Torkel Opsahl 2017) 7-9, 12.

¹⁷ Procedure is defined as an established or official way of doing something, or a series of actions conducted in a certain order or manner. The term can be distinguished from the word 'process' which means a series of actions or steps taken in order to achieve a particular end and does not denote the method in which the end is reached. See Angus Stevenson (ed.), *Oxford Dictionary of English* (OUP 2010) 1415.

outlines, in more detail, case selection, and particularly focuses on selecting defendants. The penultimate section considers selectivity in the admissibility assessments, before the chapter, finally, reviews the discretion not to proceed with an investigation/prosecution in the ‘interests of justice.’

1.1 Prosecutorial Discretion

Discretion is the ‘freedom to decide what should be done in a particular situation’.¹⁸ In professional contexts, the term describes the capacity to choose between two (or more) equally permissible courses of action.¹⁹ Hart argued that discretion enables an office-holder to choose responsibly ‘having regard to their office, and not [to] indulge in mere fancy or whim’.²⁰ Thus, discretion can permit a decision-maker to choose the course of action that is equitable, just and otherwise reasonable in the circumstances.²¹ Prosecutorial discretion is concerned with a range of choices; whether or not to launch investigations, issue charges and—ultimately—deciding who is charged.²² Self-evidently, most prosecutors enjoy such discretion, particularly (but not only) in adversarial and common-law systems.²³ However, the degree of the discretion invariably depends on the limits of a prosecutor’s powers.²⁴ In this regard, Dworkin argued that discretion is like a hole in a doughnut—it would not exist without a surrounding belt of restriction.²⁵ Put another way, before discretion can be exercised, rules need to be applied, and that is not a mechanical process but requires human judgment.²⁶ This section discusses the significance of prosecutorial discretion in both domestic and international settings.

First, prosecutorial discretion plays a prominent role in most national criminal justice systems. In these systems, discretion is deemed to be of practical significance as it can control the capacity of a criminal justice system and prevent it from becoming over-burdened.²⁷ For example, the relative seriousness of a crime

¹⁸ Ibid. 567.

¹⁹ Candace McCoy, ‘Prosecution’ in Michael Tonry (ed.), *The Oxford Handbook of Crime and Criminal Justice* (OUP 2011) 673.

²⁰ H. L. A. Hart, ‘Discretion’ (2013) 127 *Harvard Law Review* 652, 657.

²¹ The dictionary definition of discretion also indicates the term implies the discernment or wisdom to avoiding injurious consequences. See Stevenson, *supra* note 17, at 1415; Daniel. D Ntanda Nsereko, ‘Prosecutorial Discretion before National Courts and International Tribunals’ (2005) 3 *JICJ* 122, 122.

²² Angela Davis, *Arbitrary Justice* (OUP 2007) 12; James A. Goldston, ‘More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court’ (2010) 8 *JICJ* 383, 389.

²³ It is beyond the scope of the study to survey the role of prosecutors within differing legal systems. In the UK (alongside many commonwealth countries), prosecutors do not directly oversee investigations but work with the police, and nonetheless still enjoy discretion over charging decisions. In civil law and inquisitorial legal systems such as France, prosecutors may set limits on investigations, but once commenced, it is overseen by an investigative judge (juge d’instruction).

²⁴ For instance, German and Italian Prosecutors are, in theory, required to charge and prosecute all crimes for which there is an adequate evidentiary basis.

²⁵ Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 31; See also John Kleinig (ed.), *Handled with Discretion: Ethical Issues in Police Decision Making* (Rowman and Littlefield 1996) 2.

²⁶ Ibid. Dworkin 31.

²⁷ See Davis, *supra* note 22, at 13-14.

may mitigate against the use of scant time and resources to prosecute an alleged wrongdoer. Second, and more fundamentally, discretion is crucial to provide flexibility for ‘individualised justice.’²⁸ To elaborate: prosecutors are regularly described as ‘ministers of justice’ rather than lawyers involved in a competitive enterprise to obtain a conviction at all costs.²⁹ Thus, ‘individualised justice’ can require the Prosecutor to make moral judgments about particular circumstances, including whether exceptional cases deserve exceptions to normal and standard treatment.³⁰ For instance, considerations of blameworthiness and mercy might have to temper a strict policy that mandates a prosecution in all circumstances. Third, and finally, discretion helps guarantee prosecutorial independence and respect for the separation of powers. In common-law systems, the executive grants prosecutors their powers, and thus the retention of discretion is believed to insulate the prosecutor from political interests and pressures.³¹ By contrast, in civil law jurisdictions, discretion tends to be curtailed for fear of opening the door to unfettered prosecutorial power that risks encroaching on that enjoyed by the executive.³² In short, prosecutorial discretion, to varying degrees plays a pivotal role in the effective functioning of national criminal justice systems.

Equally, prosecutorial discretion has been a long-standing and established feature of international criminal justice. It is not within the present scope to undertake a historical survey of the prosecutorial discretion that operated at other international criminal tribunals. In this regard, Ohlin is correct in arguing that, for present purposes, the greatest attention should be placed on addressing the ICC Prosecutor’s ‘unique brand of discretion.’³³ Nonetheless, to illustrate in brief, prosecutorial discretion was in operation at the International Military Tribunal in

²⁸ Ibid. 13

²⁹ See, indicatively, *Randall v The Queen* [2002] UKPC 19, para. 10 and *Boucher v The Queen* [1955] SCR 16, 24-25 (‘It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction ... the role of prosecutor excludes any notion ‘of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings). See generally, Bennet Gershman, ‘The Prosecutor as ‘Minister of Justice’ (1988) 60 *New York State Bar Journal* 8; Richard Young and Andrew Sanders, ‘The Ethics of Prosecution Lawyers’ (2004) 7(2) *Legal Ethics* 190.

³⁰ Stephanos Bibas, ‘The Need for Prosecutorial Discretion’ (2010) 19 *Temple Political & Civil Rights Law Review* 369, 372.

³¹ This explains the judiciary’s reticence to review the exercise of prosecutorial discretion for fear of producing a chilling effect on prosecutors and undermining prosecutorial effectiveness. On this, see Davis, *supra* note 22, at 14 and Nsereko, *supra* note 21, at 125-30.

³² Such as in France and Germany. On this point see Jacqueline Hodgson, ‘The Democratic Accountability of prosecutors in England and Wales and France: independence, discretion and managerialism’ in Máximo Langer and David Alan Sklansky (eds.), *Prosecutors and Democracy: A Cross-National Study* (CUP 2016).

³³ Jens David Ohlin, ‘Peace, Security, and Prosecutorial Discretion’ in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (MNP 2009) 185.

Nuremberg. The then Allied Prosecutors exercised discretion in the conduct of the investigation, the collection of evidence, the preparation of the indictments and, ultimately, the selection of the defendants.³⁴ Justice Jackson, the Chief American Prosecutor, led a policy that focused on indicting high-ranking leaders of the Hitler regime (including those representing Nazi organisations such as the Schtutzstaffel (SS)). In general, however, the process of selection was ‘hasty [and] chaotic’,³⁵ and the product of significant political compromise.³⁶ The team of prosecutors were not, strictly speaking, independent, but de facto representatives of their respective Allied governments and hence pursuing their interests.³⁷ The Charter did not specify how the defendants were to be selected (there were no guiding principles of selection), and it has been argued that governments had a definitive say on the selection of defendants.³⁸ In summation, prosecutorial discretion at Nuremberg came to be implicated in the wider complaint of ‘victor’s justice’ that is now invariably attached to the tribunal.³⁹

Renewed attention was paid to prosecutorial discretion when the ad-hoc tribunals began their operations. The ICTY and ICTR Prosecutors enjoyed extensive discretion, up to and including, the withdrawal of indictments and within their general prosecutorial strategy.⁴⁰ The rationale for their discretion was similar to that found nationally; it ensured prosecutorial independence from political interests (of states) and, as recognised in *Prosecutor v Delalic and others (Čelebići case)*, finite financial and human resources prevent the prosecution of every offender falling within the Court’s jurisdiction.⁴¹ However, whereas domestic prosecutors in nearly all instances bring cases against those alleged to have committed the most serious

³⁴ William A. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 *JICJ*, 731, 731.

³⁵ Frederiek de Vlaming, ‘Selection of Defendants’ in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors* (OUP 2012) 545.

³⁶ Richard Overy, ‘The Nuremberg Trials: International Law in the Making’ in Phillippe Sands (ed.), *From Nuremberg to The Hague* (CUP 2003) 7.

³⁷ See Schabas, *supra* note 34, at 731.

³⁸ Hanna Kuczyńska, ‘Selection of Defendants Before the ICC: Between the Principle of Opportunism and Legalism’ (2014) 34 *Polish Yearbook of International Law* 187, 191-2.

³⁹ Ohlin, *supra* note 33, at 185; Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (Knopf 1992) 90; See generally Margaret. M deGuzman and William A. Schabas, ‘Initiation of Investigations and Selection of Cases’ in Goran Sluiter and others (eds.), *International Criminal Procedure: Rules and Principles* (OUP 2012) 156-7.

⁴⁰ *Prosecutor v Delalic and others (Čelebići case)* (Judgment in the Appeals Chamber) IT-96-21-A (20 February 2001) para. 602; *Prosecutor v Ntuyahaga* (Decision on the Prosecutor’s Motion to Withdraw the Indictment) ICTR-98-40-T Trial Chamber (18 March 1999) para. 40.

⁴¹ *Prosecutor v Delalic and others (Čelebići case)* (Judgment in the Appeals Chamber) IT-96-21-A (20 February 2001) para. 602; *Prosecutor v Akayesu* (Judgement in the Appeals Chamber) ICTR-96-4-A (1 June 2001) para. 94-96.

crimes, an international prosecutor's discretion extends to potential jurisdiction over hundreds, if not thousands, of cases. Thus, prosecutors, at the ad-hoc tribunals needed to be highly selective before committing scarce resources because — in the words of former Prosecutor Louise Arbour — prosecutors choose 'from many meritorious complaints the appropriate ones for international intervention.'⁴²

Anxiety about prosecutorial discretion has now come to be at the centre of the dilemma of selectivity in international criminal justice. By its very nature, discretion creates concern among those with a positive conception of law. Prosecutorial discretion is shaped by the context, policies and the institution where it operates, rather than solely resting on objective legal criteria.⁴³ In this sense, critics argue that discretion is vulnerable to arbitrariness and inconsistency, and the exercise of such discretion — intentionally or not — can contribute to unfair disparities between similarly situated circumstances and persons. This finds expression in the words of Davis: 'the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.'⁴⁴ For some, discretion heightens the 'extremely powerful'⁴⁵ decision to prosecute and creates an inherent risk to public confidence in the criminal justice system. In addition, discretionary power is inherently hidden and opaque: an assessment that is generally insulated from public scrutiny.⁴⁶ This absence of transparency can make legitimate questioning difficult, lead to distrust, and result in poor accountability for those charged with its exercise. These general reservations help to explain why the concept invites considerable legal and policy-based scrutiny.

From a legal perspective, prosecutorial discretion is, or has been, frequently challenged. One of the ICTY defendants in the *Čelebići* case argued that he was 'selectively prosecuted' on the basis that he 'represented' Bosnian Muslims. His defence contended his prosecution was on the grounds of extraneous policy such as ethnicity, gender or practical convenience, instead of perceived criminal

⁴² Louise Arbour, cited in James A. Goldston, 'More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8 *JICJ* 383, 389.

⁴³ Maria Varaki, 'Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court' (2016) 27(3) *EJIL* 769, 774.

⁴⁴ See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1969) 34.

⁴⁵ Candace McCoy, 'Prosecution' in Michael Tonry (ed.), *The Oxford Handbook of Crime and Criminal Justice* (OUP 2011) 673.

⁴⁶ Stephanos Bibas, 'The Need for Prosecutorial Discretion' (2010) 19 *Temple Political & Civil Rights Law Review* 369, 373.

responsibility.⁴⁷ Similarly, there were numerous challenges of selective prosecution at the ICTR based on the absence of cases against members of the Rwandan Patriotic Front (the force that defeated the Hutu Government that had orchestrated the genocide), and against whom there were allegations of serious atrocities. These challenges— based on equality under the law and non-discrimination arguments— were, ultimately, unsuccessful. The Appeals Chamber in *Čelebići* confirmed it was up to the applicant to prove discriminatory or improper motives on the part of the Prosecutor, and to demonstrate that similarly situated persons had not been prosecuted.⁴⁸ For similar reasons, the Trial Chamber in *Prosecutor v Nindilimana* confirmed previous decisions,⁴⁹ noting that prosecutorial discretion attracted a presumption of regularity, and that the defence has the (relatively heavy) burden to demonstrate that its exercise has been abused.⁵⁰ On the one hand, the jurisprudence reflects significant deference to prosecutors and that only when a defendant is selected — *exclusively* — on personal factors such as ethnicity, will a potential abuse of discretion be declared.⁵¹ However, the possibility of these courtroom challenges demonstrate that the exercise of prosecutorial discretion remains subject to considerations of legality.

From a policy perspective, numerous commentators have frequently criticised the *absence* of criteria to guide the exercise of discretion. Many have argued that published prosecutorial guidelines would be of intrinsic and extrinsic benefit: they would enhance the quality of internal decision-making and boost the external perceptions of its legitimacy.⁵² For example, and well before the OTP's selection policy was issued in 2016, McDonald and Havemann insisted on prosecutorial discretion being 'objectified' with publicly available guidelines, arguing that criteria would improve transparency and insulate the Prosecutor from

⁴⁷*Prosecutor v Delalic and others* (Brief of Appellant, Esad Landzo, on Appeal Against Conviction and Sentence) IT-96-21-A (2 July 1999) 13.

⁴⁸*Prosecutor v Delalic and others* (*Čelebići* case) (Judgment) IT-96-21-A Appeals Chamber (20 February 2001) para 602.

⁴⁹*Prosecutor v Ntakurutama*, (Decision on the Prosecutor's motion to Join the Indictments) ICTR 96-10-1, Trial Chamber (22 February 2001) para 870-887; *Prosecutor v Akayesu*, (Judgment) ICTR-96-4-A Appeals Chamber (1 June 2001) para 94-96.

⁵⁰*Prosecutor v Nindilimana*, (Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council) ICTR-2000-56-1 Trial Chamber (26 March 2004) para 2.

⁵¹ deGuzman and Schabas, *supra* note 39, at 156-7.

⁵² Claudia Angermaier, 'Essential Qualities of Prioritisation Criteria ...' in Morten Bergsmo, *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl 2010) 200-1.

external criticisms of arbitrariness.⁵³ In addition, Danner urged that *ex ante* guidelines would ensure consistency and coherency of decision-making, and that their explanatory power would increase perceived legitimacy.⁵⁴ Finally, Goldston, in offering support for guidelines, noted they would, ‘... bridge the yawning gap between The Hague-based Court and its constituencies across the world ... [and balance] their hopes for justice against their often-uncertain knowledge of the Court’s operations and limitations’.⁵⁵ There has long been a case made for the establishment of prosecutorial guidelines in extending a benefit to the Prosecutor and in improving the perceptions of external constituencies.

In this context, and as discussed below, the OTP retains prosecutorial discretion in its selection procedure. The considerable power to select investigations and then prosecute individuals is, — however —not without restraint. Principally, the Prosecutor’s exercise of discretion is curtailed in an ethical sense because her professional duty requires being committed to the Court’s goals and its wider mission in the international community.⁵⁶ This form of restraint is neatly illustrated by the Appeals Chamber in the *Čelebići* case, which declared that the Prosecutor’s discretion is circumscribed at all times ‘by the nature of her position as an official [under] the Tribunal and...by the recognised principles of human rights.’⁵⁷ However, the operation of the discretion is formally constrained by the Rome Statute and the OTP’s policies. It begins with the selection of situations to which the chapter now turns.

⁵³ Avril McDonald and Roelof Haveman, ‘On the Exercise of Prosecutorial Discretion’ in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume Five* (Torkel Opsahl 2017) 507-10.

⁵⁴ Alison Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court* (2003) 97 *AJIL* 510, 541-550.

⁵⁵ James. A. Goldston, ‘More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court’ (2010) 8 *JICJ* 383, 402-3.

⁵⁶ This point is developed further in the following chapter.

⁵⁷ *Prosecutor v Delacic and others (Čelebići case)* (Judgment in the Appeals Chamber) (20 February 2001) IT-96-21-A para 604.

1.2 Situation Selection

The OTP's selection of situations precedes its selection of cases. It not only forms the relevant background but, situation selection is often beset by similar challenges to that of case selection — namely — a lack of perceived legitimacy. In that regard, the OTP's choice of situations *and* cases are highly contentious and comprise the often cited 'selectivity dilemma' in international criminal justice and this further addressed in chapter four. This section discusses the procedure of situation selection, before turning to a range of criticisms that it has attracted.

To begin, it is useful to distinguish the meaning of situations and cases. The definition of 'situations,' is cast in terms of temporal, territorial or personal parameters i.e. the Situation in Uganda, or the Situation in Libya.⁵⁸ The term 'situation' is found in Article 13 of the Rome Statute, and identifying a situation is the first step in the Prosecutor determining charges against one or more specific persons for the commission of crimes under the Court's jurisdiction.⁵⁹ This leads to the identification of 'cases': a term that refers to specific incidents *within* a given situation. The Court's Pre-Trial Chamber has confirmed that a case refers to 'specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects.'⁶⁰ Thus, the definition of a case is in its scope: by the suspect under investigation and the alleged criminal conduct under the Statute.⁶¹ However, as Rastan has argued, the precise parameters of the case depends on the context and stage at which it is discussed.⁶² Furthermore, the evolution from a situation to a concrete case is neither definitive nor precise. Schabas contends 'there is no sense defining a 'situation' in the absence of some indication that there are 'potential cases' involving the individual accused.'⁶³ Hence, the evolution from a situation to a case involves an interim 'potential case' and an actual 'case' is only formally identified when an arrest warrant or summons is

⁵⁸ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) para 21.

⁵⁹ Art. 14(1) (Referral of a situation by a State Party) ICCSt.

⁶⁰ See *Situation in the Democratic Republic of Congo* (Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS, 4, VPRS-5, VPRS-6) Pre-Trial Chamber I (19 January 2006).

⁶¹ See, indicatively, *The Prosecutor v. Thomas Lubanga Dyilo*, (Decision concerning Pre-Trial Chamber's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo) ICC-01/04-01/06-8-Corr. Pre-Trial Chamber I (23 February 2006).

⁶² Rod Rastan, 'What is a 'case' for the purpose of the Rome Statute' (2008) 19 *Crim.L.F.* 435, 448.

⁶³ Schabas, *supra* note 11, at 367.

issued.⁶⁴ Undeniably, despite the technical differences on paper, there is a blurred distinction between the two terms.

The OTP's selection of situations begins with an initial 'preliminary examination'. The notion of a preliminary examination — referred to in Article 15(6) and Article 42(1) of the Rome Statute — denotes a phase that involves determining whether there is a reasonable basis to start an investigation.⁶⁵ The preliminary examination phase has come to be one of the most crucial centres of the OTP's activities and has come to be a focal point for contemporary critiques of the Court.⁶⁶ To focus, at present, just on procedure, the OTP conducts the examination holistically, but it can be broken down into four distinct phases. Generally, these phases examine whether the communications or situations that come to its attention meet the legal criteria to proceed to an investigation. For instance, the opening phase is comprised of an initial assessment that seeks to filter out crimes that are manifestly outside of the Court's jurisdiction.⁶⁷ The process is objectively conducted, based on the facts and information available and should not be influenced by the presumed or known wishes of any party.⁶⁸ For example, the OTP should not be bound or constrained by information pointing to potential perpetrators, but should scrutinise *all* information that points to alternative perpetrators.⁶⁹ Furthermore, its commitment to impartiality mean that geo-political considerations should not form part of the examination, and it should assess both incriminating and exonerating circumstances because its duty is to establish the truth.⁷⁰ The conduct of a preliminary examination process is uniform, irrespective of how the situation comes to the OTP's attention.

Situations come to the OTP's attention after an attempt to trigger the Court's jurisdiction. Under Article 13 of the Rome Statute the Court's jurisdiction can either

⁶⁴ Ibid.

⁶⁵ The concept of a preliminary examination has been interpreted as a 'sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed.' See *Situation in the Republic of Kenya*, (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr Pre-Trial Chamber II (31 March 2010) para 35. At the time of writing, the Office is undertaking eight on-going preliminary examinations; Afghanistan, Colombia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine and the Ukraine.

⁶⁶ Carsten Stahn, 'Damned If You Do, Damned If You Don't; Challenges and Critiques of Preliminary Examinations at the ICC' (2017) 15(3) *JICJ* 413.

⁶⁷ See *Situation in the Republic of Kenya*, (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr Pre-Trial Chamber II (31 March 2010) para 50.

⁶⁸ OTP, *Policy Paper on Preliminary Examinations* (November 2013) para. 26.

⁶⁹ Ibid. para. 27.

⁷⁰ See Art. 54(1) (a) ICCst (Duties and Powers of the Prosecutor with Respect to Investigations).

be triggered by a State Party,⁷¹ the United Nations Security Council (UNSC) in accordance with Chapter VII of the UN Charter,⁷² or by the Prosecutor herself *proprio motu*,⁷³ on the basis of received information.⁷⁴ Thus, Article 13 is a key source of prosecutorial discretion in both the *proprio motu* selection of situations and/or in refusing to proceed with a situation referred to it by a State Party or the UNSC.⁷⁵ Indeed, the provisions express this discretion by declaring the Court *may* exercise its jurisdiction rather than the use of language obligating the Prosecutor to proceed e.g. ‘shall’.⁷⁶ In summary, Article 13 outlines a set of general rules that surround the discretion, but, ultimately, offers no further formal guidance as to how (or when) the Prosecutor should exercise such discretion.

The lack of statutory guidance on the exercise of discretion is highlighted by the Prosecutor’s *proprio motu* powers; one of the most fiercely negotiated provisions of the Rome Statute.⁷⁷ During the Rome Conference, there was fundamental resistance from some States about the undefined degree and scope of the Prosecutor’s ability initiate his/her own investigations. The reservations centred on whether granting such discretion would compromise or protect prosecutorial independence. For some it opened the door to the Prosecutor furthering her own political allegiances, risking the possibility of a ‘lone ranger running wild,’⁷⁸ for others such discretion was necessary to protect prosecutorial decision-making from being susceptible to the political interests of States.⁷⁹ In the end, a compromise was reached: independent prosecutorial powers to commence investigations would be subject to judicial review and require authorisation from the Court’s Pre-Trial

⁷¹ See Art.14 ICCSt (Referral of a Situation by a State Party). Exceptionally a State can submit a declaration to the Court and accept its jurisdiction on an ad hoc basis. See Art. 12(3) of the Rome Statute (Preconditions to the exercise of jurisdiction).

⁷² See Art.16 ICCSt (Deferral of investigation or prosecution) that allows the UNSC to defer an investigation for 12 months under Chapter VII of the UN Charter.

⁷³ The Latin phrase *proprio motu* refers to ‘on his/her impulse. See Art. 15 (Prosecutor). For a fuller analysis of the article, see *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19-Corr Pre-Trial Chamber II (31 March 2010).

⁷⁴ The information can come from a variety of sources including individuals, groups, States or inter-governmental or non-governmental sources.

⁷⁵ Schabas, *supra* note 11, at 370.

⁷⁶ On this point see Morten Bergsmo, ‘Preliminary Observations on the Powers and the Role of the Prosecutor of the International Criminal Court’ Current Problems of International Humanitarian Law, IIHL, 23rd Round Table, San Remo (September 2000) p.34.

⁷⁷ Morten Bergsmo and others, ‘Article 15’ in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck/Hart 2016) 726-8.

⁷⁸ Silvia A d Gurmendi, ‘The Role of the International Prosecutor’ in Roy S Lee (ed.), *The International Criminal Court The Making of the Rome Statute, Issues, Negotiations and Results* (Kluwer International 1999) 175, 181.

⁷⁹ For an overview see Alison Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *AJIL* 510, 513-4.

Chamber.⁸⁰ For present purposes, it is useful to outline the relevant powers outlined in Article 15 of the Rome Statute.⁸¹

Article 15 (Prosecutor)

(1) The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

(2) The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

(3) If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

Article 15 provides constraints on the OTP's *proprio motu* discretion. On the one hand, the need for judicial authorisation exists to insulate the Prosecutor from external pressure and prevent the abuse of prosecutorial power. In the words of Judge Hans-Peter Kaul, it prevents the Court from proceeding with 'unwarranted, frivolous or politically motivated investigations that could have an effect on its credibility.'⁸² However, the role of the PTC is restricted because it does not guide or direct the exercise of discretion. Thus, the only assistance as to the exercise of discretion can be gleaned from Article 1 of the Rome Statute, which refers to 'the most serious crimes of international concern', and Office Regulations (no. 29) that simply redirect attention to Article 53(1) (a-c) of the Rome Statute.⁸³ These statutory provisions are the basis for the OTP's selection of cases and are discussed in further detail below.

The OTP has complemented the statutory criteria with policy papers. These papers have been incrementally released to provide further transparency about the

⁸⁰ Bergsmo and others, *supra* note 77, at 726-8.

⁸¹ See for example William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, OUP 2016) 393-397.

⁸² Dissenting Opinion of Judge Hans-Peter Kaul in the *Situation in Republic of Kenya* (ICC-01/09) (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya) ICC-01/09 Pre-Trial Chamber II (31 March 2010) para. 15.

⁸³ Regulations of the OTP ICC-BD/05-01-09 (April 2009) Regulation 29 (Initiation of an investigation and prosecution).

Office's selection processes, and to tackle questions of perceived arbitrariness or bias. In 2006, a draft paper on the 'criteria for selection of situations and cases' explained that selection was guided by the principles of independence, impartiality, objectivity, and non-discrimination. Furthermore, it declared that selection would be focused on the most serious crimes, and those bearing the greatest responsibility for the crimes.⁸⁴ The policy also alluded to the constraints of capacity and resources that, inevitably play a part in any given selection decision.⁸⁵ It took the OTP another ten years to release a formal policy on selection; confined to case selection and prioritisation (considered below).⁸⁶

The OTP's practice of situation selection has led to the perception of a lack of legitimacy. The OTP is currently investigating eleven situations: Burundi, Côte d'Ivoire, Georgia, Central African Republic (I and II), Libya, Kenya, Darfur (Sudan), Uganda, and the Democratic Republic of Congo.⁸⁷ These situations have been initiated by self-referrals (e.g. Uganda and the DRC), triggered by the UNSC (e.g. Libya and Sudan)⁸⁸ or have been based on the Prosecutor's *proprio motu* discretion (e.g. Côte d'Ivoire and Kenya).⁸⁹ Irrespective of the trigger for the exercise of discretion, the popular refrain has been of the OTP pursuing political selections and targeting countries on the African continent.⁹⁰ The Court has been described by African leaders as 'racist' 'neo-colonial' or as the International Caucasian Court.⁹¹ These perceptions are not fixed and not necessarily universal and they can differ depending on the precise audience one is referring to. Yet, in general, such perceptions are unsurprising when only one out of the current eleven situations

⁸⁴ A public version of this policy has never been formally released. See Schabas, *supra* note 34, at 735.

⁸⁵ William A. Schabas, 'Victor's Justice; 'Selecting 'Situations' at the International Criminal Court' (2010) 43 *J. Marshall L.Rev.* 535, 542-3.

⁸⁶ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016).

⁸⁷ For an up to date list of the Court's situations see <<https://www.icc-cpi.int/Pages/Situations.aspx>>accessed 31 July 2018.

⁸⁸ See UNSC Resolution 1970 S/Res/1970 (26 February 2011); UNSC Resolution 1593 S/Res/1593 (31 March 2015).

⁸⁹ *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Republic of Kenya) ICC-01/09 Pre-Trial Chamber II (31 March 2010); *Situation in the Côte d'Ivoire* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Côte d'Ivoire) ICC-02/11 Pre-Trial Chamber III (3 October 2011).

⁹⁰ This criticism has become pervasive the literature on the Court and its selection of situations and cases. For an indicative overview, see Richard H. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court* (MNP 2016) (Part VII); André M. Mangu, 'The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview' (2015) 40(2) *Africa Development* 7-32; Kai Ambos, 'Expanding the Focus of the 'African Criminal Court' in William A. Schabas, Yvonne McDermott and Niamh Hayes, (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013) 499.

⁹¹ For an overview of such sentiment see, Simon Allison, 'African revolt threaten international criminal court's legitimacy' *The Guardian* (27 October 2016).

is outside the continent of Africa. This selection pattern is a component of the Court's lack of perceived legitimacy on the African continent.

There are, of course, several other factors that have done little to address (and have even aggravated) the Court's lack of legitimacy. To name only three examples, former Prosecutor Luis Moreno Ocampo lost credibility after being seen to chase the Court's first (self-) referrals from Uganda and the Democratic Republic of Congo in the pursuit of 'easy wins'.⁹² Furthermore, the UNSC's ability to trigger the Court's jurisdiction (despite some permanent members not being party to the Court) has also led to the Prosecutor being perceived as a tool subject to the vagaries of power geopolitics.⁹³ Finally, the Prosecutor's cases have also led to acrimony, including the protracted and unsuccessful cases against the Kenyan leaders Uhuru Kenyatta and William Ruto.⁹⁴ However, one can also add another factor into the mix, namely, the OTP's explanations for the choice of its selections from the many 'that cry out for the Court's attention.'⁹⁵

The OTP's explanations have generally focused on the notion of gravity. In light of the Rome Statute failing to illuminate the discretion in selecting situations,⁹⁶ the OTP has, nonetheless, declared that — once the temporal and subject-matter jurisdiction requirements are met — 'the Rome Statute ... clearly foresees and requires an additional consideration of 'gravity' whereby the OTP must determine whether the case is of sufficient gravity to justify further action ...'⁹⁷ The idea of 'situational gravity' is based on preamble references to the most serious crimes and the general political justifications for establishing international tribunals.⁹⁸ Moreover, it recognizes matter-of-factly that all admissible situations cannot proceed to an investigation for simple want of resources.⁹⁹ Ultimately, the use of situational gravity reflects its later and more defined role in case selection (in relation to the

⁹² Phil Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda', in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008) 37, 44.

⁹³ Art. 16 (Deferral of investigation or prosecution) ICCSt.

⁹⁴ See Chapter 3.2. For an impressive overview of the Court's intervention in Kenya, see Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015).

⁹⁵ Schabas, *supra* note 85, at 542-3.

⁹⁶ See, generally, Kevin Jon Heller, 'Situational Gravity Under the Rome Statute' in Carsten Stahn and Larissa van den Herik (eds.), in *Future Directions in International Criminal Justice* (CUP 2009).

⁹⁷ OTP, *Report on the Activities Performed During the First Three Years (June 2003-June 2006)* (Sep 12 2006) 6-7.

⁹⁸ Margaret DeGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2009) 32(5) *Fordham Int'l L.J.* 1400-1.

⁹⁹ The Office's early Draft Regulations appeared to suggest just that—a position that William Schabas describes as 'the height of absurdity.' See Schabas, *supra* note 85, at 547.

admissibility of cases under Article 17 and in the initiation of investigation once cases are identified under Article 53(1) (b)). By contrast, at this preliminary examination stage, gravity is examined against a backdrop of the likely set of *potential* cases that would arise from an investigation.¹⁰⁰ Different interpretations of situational gravity have been proposed in the literature.¹⁰¹ However, the present question is simply to consider *how* the OTP uses gravity to justify its selections.

The OTP assesses the *relative* gravity of a situation to justify its selection. To illustrate, the Situations in Uganda and the DRC were described as the ‘gravest admissible situations under the jurisdiction of the Court’¹⁰² and their selections, based on their gravity, were used to justify *not* selecting the situation in Iraq (concerning the alleged conduct of British troops during the Iraq War). The cited reason was that in the Iraq referral the numbers of victims of willful killing and inhuman treatment were in the tens, compared with in the Ugandan and DRC situations where there were ‘thousands of willful killings as well as the intentional and large-scale sexual violence against, and abduction... [and] displacement of more than 5 million people.’¹⁰³ More recently, the OTP also declined to proceed to an investigation in the *Situation on Registered Vessels of Comoros, Greece and Cambodia*.¹⁰⁴ The Office argued that the number of victims were limited and drew a comparison with the case of *Prosecutor v Abu Garda and others* where the number of victims were comparable (twelve)¹⁰⁵. The Prosecutor argued that the latter case could be distinguished by the nature of the alleged crimes (in that case attacks were intentionally directed against AU peacekeepers in Sudan, including the attempted killing of another eight peacekeepers, and the destruction of property) and their impact,—arguing that attacks on peacekeepers ‘strike at the very heart of the international legal system established for the purpose of maintaining international

¹⁰⁰ See Côte D’Ivoire Article 15 Decision, paras. 202-204 and Kenya Article 15 Decision, paras. 48, 50 *supra* note 89.

¹⁰¹ See for example, Kevin Jon Heller, ‘Situational Gravity Under the Rome Statute’ in Carsten Stahn and Larissa van den Herik (eds.), *Future Directions in International Criminal Justice* (CUP 2009); Mark Osiel, ‘How Should the ICC Office of the Prosecutor Choose its Cases? The Multiple Meanings of ‘Situational Gravity’ (5 March 2009) < <http://www.haguejusticeportal.net/index.php?id=10344> > accessed 31 July 2018.

¹⁰² OTP, *Report on the Activities Performed During the First Three Years (June 2003-June 2006)* (12 Sep 2006) p. 6-7.

¹⁰³ OTP, Luis Moreno-Ocampo, Letter (9 Feb 2006) < <https://www.legal-tools.org/doc/5b8996/pdf/> > accessed 31 July 2018.

¹⁰⁴ In 2010, Israeli Defence Forces (IDF) forcibly boarded a convoy of vessels (‘Gaza Freedom Flotilla’) that were intending to breach an Israel-imposed naval blockade and deliver humanitarian aid to the Gaza Strip. The IDF’s interception— principally on a Comorian-registered vessel called the *Mavi Marmara*—led to the death of ten people and alleged abuses against detained passengers.

¹⁰⁵ *The Prosecutor v Baha Idriss Abu Garda* (Decision on the confirmation of Charges ICC-02/05-02/09 Pre-Trial Chamber I (8 February 2010).

peace and security.’¹⁰⁶ However, as will be elaborated on in chapter four, the OTP’s reliance on relative gravity leaves itself, open to charges of inconsistency.

The Prosecutor, despite its reliance on relative gravity, explains its selections by reference to objective criteria and the principle of impartiality.¹⁰⁷ However, objective criteria and the principle of impartiality do not sufficiently explain its selections, rather, they merely describe the method of selections. At best, objective criteria helps to explain situations that *are* chosen but, crucially, they do not explain situations that are not selected.¹⁰⁸ This argument is irrefutable because a given selection entails a comparative or relative judgement: in the context of several eligible situations the criteria does not explain, at any one time, why a situation is *not* selected. To maintain that objective criteria does explain *all* choices would be to beg the question; surely an alternative situation would then have been chosen. Furthermore, one can argue that were objective criteria to provide the complete picture then there would be no margin for the exercise of discretion; but that is also not the case. In other words, objective criteria do not, and cannot, explain the decision to select one situation ahead of an alternative.

The OTP’s rebuttal to such criticism has taken many forms. For instance, its legal advisor, Rod Rastan, has argued that the burden of proof is on those who claim situations are chosen for political reasons (either by demonstrating that current situations do not conform to legal criteria and/or the situations that are not selected are motivated by political factors.) Furthermore, he defends selections because of the Court’s capacity and jurisdictional limits and maintains that the arguments of those opposed to certain selections imply that those situations should be ignored or ‘deselected’ — because of a failure to select others. The OTP deploys these arguments, alongside frequent appeals to meeting the needs of the victims of crimes, to reject criticisms of political bias.¹⁰⁹ These arguments, however true, are not direct responses to the criticisms. In the main, the argument is not whether situation selections *are* politically biased in a concerted or overtly deliberate sense. Rather, the argument is that objective criteria cannot entirely explain selections and thus — unavoidably — do not address *perceptions* of bias, political or otherwise.

¹⁰⁶ OTP, *Situation on Registered Vessels of Comoros, Greece and Comoros Article 53(1) Report* (6 November 2014) para 144.

¹⁰⁷ See Chapter 5 and 5.3 more specifically.

¹⁰⁸ Schabas, *supra* note 11, at 370.

¹⁰⁹ Rod Rastan, ‘Comment on Victor’s Justice and the Viability of Ex Ante Standards’ (2010) 43 *J. Marshall L.Rev.* 573, 574-80.

The OTP's reliance on legalistic explanations, as discussed later in chapter five of the study, misconstrue the operation of discretion and have, hitherto, been lacking in persuasion. Furthermore, these explanations do little to illuminate the choices and merely strengthen the case to clarify the OTP's selection goals. A similar set of arguments can be made when one considers the discretion involved in selecting cases.

1.3 Case Selection

This study's principal focus is the OTP's selection of cases. The degree to which the OTP can generate a positive impact and inspire the Court's perceived legitimacy depends, to a substantial extent, on who is investigated and later prosecuted. Article 53(1) (a)-(c) and Article 53(2) (a)-(c) of the Rome Statute prescribes the limits of the Office's prosecutorial discretion in case selection.¹¹⁰ Furthermore, the OTP's Policy on Case Selection and Prioritisation, issued in September 2016, seeks to clarify prosecutorial discretion and to boost the transparency of its exercise.¹¹¹ The selection of cases attracts considerable attention with critique centring on the choice of the alleged crimes (*rationae materiae*) but — perhaps more notoriously— on the choice of particular individuals (*rationae personae*).¹¹² One key criticism that has invariably emerged are challenges to a Prosecutor's impartiality in their selection of defendants. This section outlines the procedure of case selection before discussing the adherence to impartiality in the selection of defendants.

The process of identifying cases within situations begins in the second formal phase of a preliminary examination. The OTP conducts an assessment in accordance with Article 53(1) (a)-(c) of the Rome Statute, a provision that has been described as a compromise between prosecutorial discretion and strict legality.¹¹³ On the one hand, the Prosecutor enjoys the indeterminacy of its provisions because it provides her with 'enormous space for highly discretionary determinations'.¹¹⁴ On the other hand, the Article reserves a supervisory role for the Pre-Trial Chamber to review a decision not to proceed with an investigation or a prosecution. For completeness, the provisions are detailed below:

¹¹⁰ Maria Varaki, 'Towards a Fairness-Based Theory of Prosecutorial Legitimacy' (2016) 27 *EJIL* 769, 775.

¹¹¹ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) 3.

¹¹² Timothy L. H McCormack, 'Selective Reaction to Atrocity' (1996-7) 60 *Albany Law Review* 681.

¹¹³ Varaki, *supra* note 110, at 776.

¹¹⁴ See Schabas, *supra* note 34, at 735.

Article 53 Initiation of an investigation

(1) The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

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Under Article 53(1) (a), the OTP assesses whether the pre-conditions under Article 12 are satisfied.¹¹⁵ Furthermore, the OTP determines whether there is a reasonable basis to believe alleged crimes fall within the subject-matter jurisdiction of the Court.¹¹⁶ The determination entails a ‘thorough factual and legal assessment of the alleged crimes committed in the situation at hand with a view to identifying potential cases falling within the jurisdiction of the Court.’¹¹⁷ The phase pays particular attention to the most serious crimes often committed ‘on a large scale, as part of a plan, or pursuant to a policy.’¹¹⁸ This focus hints at the OTP’s general zone for the selection of individuals — those within the top echelons of responsibility.¹¹⁹ Hence, the second phase of a preliminary examination permits a pivotal exercise of prosecutorial discretion: the selection of a defendant and their alleged crimes.

Once a case is identified, the OTP undertakes the third and fourth phases of a preliminary examination and these involve, respectively, the consideration of admissibility and the interests of justice. For reasons of organisation, these phases are discussed in the sections that follow this one. Subject to those tests being satisfied, and should the Prosecutor determine there is a reasonable basis to proceed

¹¹⁵ With the exception of a UNSC referral, this includes whether the alleged crimes have been committed by a national of a State party (*jurisdiction razione personae*) or on the territory of a State party (*jurisdiction razione loci*). See Art. 12(2) (Preconditions to the exercise of jurisdiction) ICCSt.

¹¹⁶ In other words, whether alleged conduct falls within the definition and elements of war crimes, crimes against humanity and/or genocide (*jurisdiction razione materiae*).

¹¹⁷ OTP, *Report on Preliminary Examination Activities* (4 December 2017) para. 15.

¹¹⁸ OTP, *Policy Paper on Preliminary Examinations* (November 2013) para. 81.

¹¹⁹ See, indicatively, OTP, *Prosecutorial Strategy 2009-2012* (1 February 2010) para. 19.

to an investigation, the Prosecutor submits a request for authorisation to the Pre-Trial Chamber.¹²⁰ Under Article 15(4), if the investigation is authorised, its conduct is governed by Article 54 of the Rome Statute. The Prosecutor is expected to establish the truth and extend the investigation to cover all facts and evidence relevant to an assessment of criminal responsibility including the equal consideration of incriminating and exonerating circumstances.¹²¹ The Prosecutor's investigation is expected to respect the interests and personal circumstances of victims and witnesses, including their age, gender and health in light of the nature of the crimes and in particular, where alleged crimes involve sexual violence and gender violence, or violence against children.¹²² In summary, the OTP should be sensitive to victim needs throughout the conduct of its investigation.¹²³ Once the investigation is concluded, the Prosecutor determines whether there is a 'sufficient basis' for a prosecution of a suspect under Article 53(2). In similar fashion to its initiation of an investigation, this discretion is informed by the following criteria:

Article 53 Initiation of an investigation

53(2) If upon an investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

The Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

Article 53(2), more or less, mirrors the provisions in Article 53(1), but there are some subtle differences. Generally, the Article is written in the negative, i.e.

¹²⁰ Art. 15(3) (Prosecutor) ICCSt.

¹²¹ The use of an imperative 'shall' denotes that there is no discretion available for the Prosecutor with regard to subparagraphs (a) (b) and (c) of Art. 54(1) (a) ICCSt (Duties and Powers of the Prosecutor with respect to investigations) ICCSt.

¹²² Art. 54(1) (b) Rome Statute (Duties and Powers of the Prosecutor with respect to investigations) ICCSt.

¹²³ See ICC, *Regulations of the Office of the Prosecutor* (entered force 23 April 2009); Regulations 36(1) and 36(3) require the Office to consider the risk of re-traumatisation for persons questioned by the Office.

based on an assumption that investigations should lead to prosecution(s). The reference to ‘no sufficient basis’ suggests a more demanding test, and under 53(2) (a) it is likely the legal and factual basis encompasses an assessment of the quality of evidence and/or access to witnesses. The test mirrors the ‘evidential’ test often exercised by national domestic prosecutors — for example in England and Wales, where prosecutions are only launched by the Crown Prosecution Service (CPS) if there is a ‘realistic prospect of conviction.’¹²⁴ The phraseology under Article 53(1) (b) also reflects that a more definitive assessment about admissibility can be made having developed a case against an individual. Finally, under Article 53(1) (c) there is a comparable determination of whether the interests of justice, among other factors, should mitigate proceeding to a prosecution. Generally, and leaving aside the subtle differences, the discretion exercised in proceeding to a prosecution is of a comparable degree, type and scope to that of opening an investigation.

These statutory provisions can be read alongside the OTP’s Policy Paper on Case Selection and Prioritisation that was released in September 2016. The policy was issued to clarify the exercise of discretion and promote transparency, but these benefits do not depend on the policy’s simple existence but, rather, on its actual content. On the one hand, should policy consist of rigid criteria requiring dogmatic application, then, the function and purpose of discretion would be undermined e.g. to provide flexibility and ensure independence. On the other hand, should policy contain vague criteria that render its application meaningless then its utility can be fundamentally questioned. The utility is expected to be internal and external: of purported benefit to the OTP, but of equal value to external stakeholders i.e. states, national judicial systems, civil society and, particularly, affected communities. That said, the content of the policy can only reveal so much because the exercise of discretion is, by nature, neither art nor science but — in the words of Paul Seils — ‘a craft, based on guiding principles ‘ ... sufficiently flexible to address the infinite variety of factual scenarios that will present themselves.’¹²⁵ In other words, there is a natural limit to the policy’s degree of transparency and openness.

In broad terms, the OTP’s selection policy emphasises fundamental principles. This begins with the repeat of earlier elaborations of independence,

¹²⁴ CPS, *The Code for Crown Prosecutors* (January 2013) para 4.4.

<https://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html> accessed 31 July 2018.

¹²⁵ Paul Seils, ‘The Selection and Prioritisation of Cases by the Office of the Prosecutor in Morten Bergsmo (ed.), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl 2010) 69, 73.

impartiality and objectivity. The policy declares that the selection of cases reflects the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges.¹²⁶ The weight given to each criterion depends on every precise set of facts and circumstances. The OTP targets those alleged perpetrators that bear the greatest responsibility for atrocities, but it may also decide to pursue investigations against a small number of mid-or high-level perpetrators to build an evidence base against those most responsible. In conjunction, the OTP's Strategic Plan adds that lower level perpetrators may be prosecuted where 'conduct is particularly grave and has acquired extensive notoriety.'¹²⁷ Finally, in terms of the charges, the OTP aims to represent, as much as possible, the true extent of the criminality in selecting a representative sample of the main types of victimisation and of the affected communities, and thus, seeks to end impunity for, and contribute to the prevention of such crimes.¹²⁸ In recent years, the OTP has placed attention on sexual and gender-based crimes and other under-prosecuted crimes such as offences related to attacks on cultural, historical and religious protected objects.¹²⁹ In addition, the Policy Paper outlines 'case prioritisation' criteria that govern the process of 'rolling-out' cases over a given period. The criteria include the impact of investigations/prosecutions on victims or affected communities, their impact on ongoing criminality and on the prevention of crimes, and the potential impact and ability of the OTP to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis.¹³⁰

For the purpose of this study, the principle of impartiality is especially significant. Presently, one need simply to acknowledge that the OTP declares that impartiality stems from the application of consistent methods and legal criteria irrespective of the parties, persons or groups concerned. The OTP confirms that it will examine allegations against *all* groups and has gone on to explain:

¹²⁶ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) p.12-15.

¹²⁷ OTP, *Strategic Plan 2016-2018* (6 July 2015) para. 35.

¹²⁸ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) p.12-15.

¹²⁹ *Ibid.* p.15.

¹³⁰ *Ibid.* p.16.

‘Impartiality does not mean ‘equivalence of blame’ within a situation. It means that the Office will apply the same processes, methods, criteria and thresholds for member of all groups to determine whether the crimes allegedly committed by them warrant investigation and prosecution. *This may in fact lead to different outcomes for different groups.* Cases against specific persons will only be brought if they meet the case selection and prioritisation criteria identified in this policy paper. Accordingly, *the Office will not seek to create the appearance of parity* within a situation between rival parties by selecting cases that would not otherwise meet the criteria set out herein.’ (*my emphasis*)

The quoted excerpt confirms that the OTP’s commitment to impartiality is largely procedural, by way of rule application. The commitment does not acknowledge the perceptions of any distribution patterns of selected defendants and the groups they may purport to represent. Put succinctly, the OTP does not to adhere to impartiality by deliberately pursuing even-handedness in the final selections i.e. seeking to achieve a balance of numbers from differing sides. I return to this theme in chapter four. However, one can say for now, that historically the selection of defendants has rarely been, exclusively, about the application of rules. A brief return to the experiences of previous international criminal prosecutors reveals that defendant selection involves, to varying degrees, taking into account political and social considerations.

Evidence of these, often contested, considerations can be found at the Nuremberg and Tokyo Tribunals. American prosecutors at the Nuremberg trials sought to prioritise the selection of those persons that had waged the war and led criminal organisations, but, by contrast, British prosecutors were inclined to select defendants based on their notoriety and public attention those indictments would generate.¹³¹ At the Tokyo tribunals, those selected were a representative cross-section of those responsible for Japanese policy, but many close to the proceedings were uncomfortable that, owing to political reasons (namely post-war reconstruction), the Emperor was exempt from prosecutions and other leading politicians and businesspersons were not charged.¹³² Leaving aside the disagreement

¹³¹ Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (Knopf 1992) 83-90.

¹³² On this, see Frederiek de Vlaming, ‘The Yugoslavia Tribunal and the Selection of Defendants’ (2012) *Amsterdam Law Forum* 90, 91-2.

about the content of the considerations, the underlying dilemma is the extent to which taking account of the said consideration can be reconciled with an adherence to impartiality. More recently, Prosecutors have taken account of the political and social context to differing degrees, and this can be briefly illustrated by turning to the strategies adopted by Richard Goldstone, Carla Del Ponte and Hassan Jallow.

First, Richard Goldstone, at the ICTY, had a very legalistic prosecutorial strategy and emphasised that the selections of defendants should be exclusively based on evidence, and otherwise disregard broader political and social considerations such as the ethnic or political affiliations of alleged perpetrators.¹³³ His practice of selection was, nonetheless marked by some pragmatism. In the early part of his incumbency, financial pressures required an urgent need to ‘set the wheels of international prosecution in motion’¹³⁴ and this led to the indictment of Dragan Nikolić, a comparatively low-level perpetrator who, in Goldstone’s own terms, was ‘hardly appropriate’ for the tribunal’s first indictment.¹³⁵ By contrast, Carla Del Ponte preferred the selection of defendants to be partly based on their membership of particular national or ethnic groups rather than on evidential or legal criteria alone. She took into account the ICTY’s wider political and social mandate and integrated the aim of reconciliation into her policy.¹³⁶ She stressed ‘even-handedness’ and had a concerted desire, as later evidenced in her autobiography, to bring indictments against individuals *on all sides* of a given conflict.¹³⁷ Her policy found expression in a never-released set of case selection criteria that included non-legal factors such as public perceptions of the tribunal’s effectiveness including, especially, perceptions of its balance and impartiality.¹³⁸ Finally, the ICTR’s Prosecutor Hassan Jallow took a similar position to that of Del Ponte. He considered that national reconciliation was an outcome of the prosecution process, and the corresponding exercise of prosecutorial discretion could positively affect its prospects.¹³⁹ In this context,

¹³³ Ibid. generally.

¹³⁴ Ibid.

¹³⁵ Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (YUP 2000) 106.

¹³⁶ Evidenced by the number of times Del Ponte referred to aspirations for a multi-ethnic society and/or to reconciliation in the context of her prosecutorial work. See, for example, Carla Del Ponte, ‘Address by Tribunal Prosecutor Carla Del Ponte to NATO Parliamentary Assembly in Belgrade: The ICTY and the Legacy of the Past (26 October 2007); Carla Del Ponte ‘Address by Carla Del Ponte in Bern on 1 September 2005: Civilian Peace Building and Human Rights in South-East Europe’ Hague Press Release; Angela M. Banks, Carla Del Ponte, ‘Her Retrospective of Four Years in The Hague’ (2004) Conference Scene 37.

¹³⁷ Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity* (Other Press 2007) 7, 371.

¹³⁸ Angermaier, *supra* note 52, at 31-33.

¹³⁹ Hassan B. Jallow, ‘Prosecutorial Discretion and International Criminal Justice’ (2005) 3 *JICJ* 145, 153-4.

Jallow's case selection criteria included the political or military status of individuals, the extent of their participation, the gravity of the offence, and more peculiarly, the need for a geographic spread. These criteria were based on the principle that crimes should be selected to avoid 'impressions of bias, favouritism or discrimination and as a way of enhancing the prospects for national reconciliation in Rwanda.'¹⁴⁰ Thus, individual prosecutors have deployed subtly differing strategies to assess the broad political and social context in the course of its selections. There are several questions that emerge but chief among them include: a) how far one can take into account the appropriate context and still maintain impartiality, and b) how far one *should* take into account the relevant context in order to, at least, be *seen* as impartial.¹⁴¹

To turn back to the OTP's policy, one can make the following observation: the policy fails to recognise the risk that selection patterns can produce perceptions of bias; something that is damaging to the Court's perceived legitimacy. This finds greatest expression in one of the most frequently cited selection patterns: 'victor's justice.' Evidence of this pattern is found in the *absence* of indictments of those on the 'winning sides'. For example, there were no indictments against Allied forces at the Nuremberg Tribunals; no charges brought against members of the Rwandan Patriotic Front at the ICTR; and similarly, no indictments against NATO personnel for their air campaign over Kosovo in 1999.¹⁴² There are many other selection patterns too and these can intertwine with group-identities based on ethnicity, political affiliation, religion or race. Crucially, these identities can parallel the parties to a conflict or war and mirror the divisions between the 'victorious' and 'defeated', 'perpetrator' and 'victim' and — one might add — 'The State (or Government)' and those in opposition.¹⁴³ In this holistic sense, the OTP's case selections have been no less vulnerable to accusations of victor's justice.

The OTP has brought twenty-five cases¹⁴⁴ before the Court from a range of situations. Every situation presents a specific conflict and a particular political and

¹⁴⁰ Ibid.

¹⁴¹ Sophie T. Rosenberg, 'The International Criminal Court in Côte d'Ivoire: Impartiality at Stake?' (2017) 15(3) *JICJ* 471, 471.

¹⁴² The list includes the absence of cases against international peacekeepers before the Special Court for Sierra Leone. See Human Rights Watch (HRW), 'Shocking War Crimes in Sierra Leone' in reference to the summary executions of 180 members of rebel forces. <<https://www.hrw.org/news/1999/06/24/shocking-war-crimes-sierra-leone>> accessed 31 July 2018.

¹⁴³ Asad Kiyani, 'Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity' (2016) 14 *JICJ* 939, 949.

¹⁴⁴ These cases are currently at differing stages; pre-trial, trial, appeals, reparations and in the case of some closed, as charges have been vacated, withdrawn, not confirmed and in one instance a defendant acquitted. For an up to date list of the Court's cases <<https://www.icc-cpi.int/Pages/cases.aspx>>accessed 31 July 2018.

social context. Across those situations (i.e. inter-situation), the OTP has brought cases against a range of defendants from sitting Heads of State, leaders of rebel groups, and commanders of armed forces. However, the case selections within individual situations (i.e. intra-situation) have produced some unbalanced patterns. One general trend has been that the OTP has tended to overlook alleged crimes committed by Government forces in favour of targeting Government *opponents*. For example, only members of the Lord's Resistance Army were indicted in the *Situation in Uganda*, despite credible evidence of abuses committed by Government forces.¹⁴⁵ These government-skewed patterns are not necessarily confined to self-referred situations. The Prosecutor's *proprio motu* investigations in the *Situation of the Côte d'Ivoire*, led to the indictment(s) of the ousted Laurent Gbagbo (and his supporters) but alleged crimes committed by rival supporters of current President Alassane Ouattara have not been prosecuted.¹⁴⁶

This pattern is by no means universal or one that can be entirely predicted. In the *Situation in Kenya*, the OTP targeted high-ranking government representatives from opposing parties that mirrored different ethnicities, perhaps in an effort to balance or offer 'even-handed justice.'¹⁴⁷ The indictments of Uhuru Kenyatta (belonging to the Kikuyu) and William Ruto (belonging to the Kalenjin group) represented charges from 'both sides' of alleged crimes committed in the aftermath of the Kenyan elections in 2007-8.¹⁴⁸ Thus, the OTP's case selections are not entirely predictable and are obviously dependent on situation-specific factors as well as those that can be safely assumed, such as the available evidence. In general, however, there is a trend in case selection that tends to defer or submit to the interests of the State.¹⁴⁹

¹⁴⁵ See Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide* (CUP 2015) 187-197.

¹⁴⁶ For an overview see, Rosenberg, *supra* note 141; Giulia Piccolino, 'Côte d'Ivoire, Victor's Justice, the Gbagbos and the Mega-Trial (25 March 2015) <<http://africanarguments.org/2015/03/25/cote-divoires-victors-justice-icc-the-gbagbos-and-the-mega-trial-by-giulia-piccolino/>> accessed 31 July 2018.

¹⁴⁷ Thomas Hansen, 'The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and Their Implications for the Future of International Justice' (2012) 18(2) *Australian Journal of Human Rights* 187, 187.

¹⁴⁸ See Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015) 82-6.

¹⁴⁹ David Bosco argues that States can exert considerable influence over the OTP's exercise of discretion, particularly in situations that are referred to the Court. This influence includes the State's co-operation for potential investigation and the political legitimacy they can offer the Court. See David Bosco, 'Discretion and States Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations' (2017) *AJIL* 11(2) 395, 406-10.

Turning to the critique of policy, for all the detail of its eighteen-pages, the OTP's Policy Paper on Case Selection and Prioritisation has been put together very cautiously. The OTP admits the policy strikes a balance between ensuring sufficient flexibility — so that it has the potential to apply to all potential situations and cases — but sets out sufficiently identifiable criteria to genuinely assist the process of selection.¹⁵⁰ However, in trying to maintain this balance, the policy is all the weaker and can be criticised for, at least, four reasons.

First, the OTP omits a clear articulation of its goals/aims for its case selections within a situation. Put simply, what does the OTP's selections intend to achieve or further in an overall sense and thus be later assessed and measured against?¹⁵¹ In this regard, and troublingly, the OTP does not place achieving local impact within affected communities—where justice must be seen to be done— at the centre of the policy, but instead, (re)-asserts at length principles such as objectivity and independence that are arguably self-evident.¹⁵² Second, and in general, the policy has a tendency to justify past and present selection practice but sheds little light on why particular cases —among those that *could* have been selected — were indeed chosen instead of those that were not.¹⁵³ Third, and similarly, while the OTP declares those cases not prioritised are not deselected, the notion of prioritisation entails a selection ahead of an alternative. At any one time, to prioritise is to select, and to suggest otherwise is to distort the very meaning of the term; the definition of 'selection' suggests an implicit bias — a choice of the best or most suitable, or, a preferred choice relative to others.¹⁵⁴ Thus, de-prioritising may lead to deselection, particularly if, due to time delays, evidence is now unable to be gathered.¹⁵⁵ This resonates with 'sequencing' cases —completing one case before commencing another — but which has always carried the risk that cases can end up being shelved. Finally, there is little detail on the prioritisation (i.e. selection) criteria, such as the impact of investigations and prosecutions on the victims of crimes/affected

¹⁵⁰ Helen Brady and Fabricio Guariglia, 'An Insider's View: Consistency and Transparency While Preserving Prosecutorial Discretion' (15 December 2016) <<https://www.international-criminal-justice-today.org/arguendo/an-insiders-view/>> accessed 31 July 2018.

¹⁵¹ HRW, 'Comments on the ICC Office of the Prosecutor Draft Policy Paper on Case Selection and Prioritisation' (3 May 2016) 3.

¹⁵² William. A. Schabas, 'Feeding Time at the Office of the Prosecutor' (23 November 2016) <<https://www.international-criminal-justice-today.org/arguendo/icc-prosecutors-perpetuation-of-the-fiction-of-objectivity/>> accessed 31 July 2018.

¹⁵³ Ibid.

¹⁵⁴ Stevenson, *supra* note 17, at 1613.

¹⁵⁵ The same point is made by HRW 'Comments on the ICC Office of the Prosecutor Draft Policy Paper on Case Selection and Prioritisation' (3 May 2016) 3.

communities, or on the impact of pursuing cases involving opposing parties to a conflict in parallel/sequentially. These criteria remain vague with no indication of what they mean, how those impact assessments are made, and/or how they are to be applied or interpreted.

In the end, the publishing of policies and their accompanying content have hitherto shed little light on the exercise of discretion. Indeed, Schabas has argued that the sheer volume of such policies tends to generate more ‘smoke’ that seeks to inadequately ‘cover up’ or explain the exercise of discretion.¹⁵⁷ However, the reality is that significant discretion remains intact, as corroborated by the admission of a senior OTP insider:

The policies about important issues in the Office are interesting but they don’t really bind the Office very much. For the most part, they simply outline factors to be considered and how the decision making is structured, but as policies they leave considerable discretion...¹⁵⁶

To sum up, the OTP’s procedure of case selection faces a key challenge to demonstrate impartiality. The study returns to this theme, but for now, one can certainly state that the OTP’s prosecutorial discretion in selecting cases remains highly opaque. These arguments add compelling weight, in the meantime, for clarity on the OTP’s selection goals. The chapter now turns to the penultimate section and considers another crucial feature of selection procedure.

¹⁵⁶ Interview with OTP staff member cited in Jens Meierhenrich, ‘The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory’ in Martha Minow, Cora True-Frost and Alex Whiting (ed.), *The First Global Prosecutor: Promise and Constraints* (UMP 2015) 120.

¹⁵⁷ William A. Schabas, Remarks: ‘Panel Discussion on the Goals and Functions of the International Criminal Court’ 20 Years of the ICC’s Rome Statute: Utopia-Reality-Crisis Conference, Liverpool (7-8 September 2018).

1.4 Admissibility

The OTP's assessment of admissibility in its selection of cases grapples with the Rome Statute's fundamental principles. On the one hand, admissibility is a procedural question concerning the allocation of cases between the national or international jurisdictions, and ultimately centres on determining the jurisdiction that should take precedence.¹⁵⁸ However, those rules encompass one of the cornerstones of the Rome Statute: 'complementarity', a principle that recognises state sovereignty and the primacy of national jurisdictions. In addition, the principle of gravity strikes at the Rome Statute's aim to end impunity for the *most serious* crimes, described in its Preamble as 'unimaginable atrocities that deeply shock the conscience of humanity.'¹⁵⁹ The OTP's use of complementarity and gravity in selecting cases helps to manage its capacity to hear cases given that it is simply not able (and nor is it its aim) to investigate or prosecute *all* potential cases. To summarise, the exercise of prosecutorial discretion in the admissibility assessment fundamentally addresses whether it is appropriate for the Court to hear a particular case.

Nonetheless, and perhaps by design, the notions of complementarity and gravity are not rigid, but permit a breadth of interpretation. The application of the principles is always context and fact-sensitive.¹⁶⁰ The OTP thus uses complementarity and gravity flexibly. For instance, the policy of 'positive complementarity' — the promotion of national proceedings — may interfere with selecting cases with some being effectively delayed, de-prioritised and ultimately not selected. Similarly, gravity can be invoked to prioritise the selection of one case ahead of an alternative. To some degree, both complementarity and gravity invite scrutiny as to the predictability and consistency of decision-making. This section discusses the rules on admissibility before highlighting the extent of the discretion that those rules permit.

The OTP's assessment of admissibility takes place in the third phase of a preliminary examination and is in furtherance of Article 53(1) (b) of the Rome Statute. The discretion permitted under these provisions is closely linked to Article

¹⁵⁸ William A. Schabas and Mohamed M. El Zeidy, 'Article 17' in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edn, Beck/Hart 2016) 783.

¹⁵⁹ Preamble, Rome Statute para 2.

¹⁶⁰ Marco Longobardo, 'Everything is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the Mavi Marmara Affair' (2016) 14 *JICJ* 1011, 1021.

17(1): complementarity within paragraphs (a)-(b) and gravity within paragraph (d).¹⁶¹ Article 17(2) and Article 17(3) go on to illuminate the interpretation of two essential terms within the assessment of complementarity — ‘unwillingness’ and ‘inability’. The relevant provisions are outlined below:

Article 17 Issues of admissibility

(1) Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

...

(d) The case is not of sufficient gravity to justify further action by the Court.

(2) In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exists, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court....

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

(3) In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out the proceedings.

Beginning with complementarity, the OTP’s case selection is inevitably shaped by the existing judicial treatment of admissibility. It is beyond the purpose of this study to discuss, in detail, the jurisprudence on Article 17. However, it is useful to outline the Chambers’ attempts to clarify some essential terms. Pursuant to Article 17(1), the term ‘case’ encompasses both the person and the conduct; the Court has

¹⁶¹ Art. 17(1) (c) ICCst refers to another basis of inadmissibility and pursuant to Art. 20(3) concerns the *ne bis in idem* rule i.e. double jeopardy.

confirmed that for a case to be inadmissible, national investigations must cover the ‘same individual and substantially the same conduct’ as alleged in the Court’s proceedings.¹⁶² Generally, therefore, a ‘case’ is often pithily described as ‘same person/same conduct’. The concept of ‘investigation’ found in 17(1) (a-b) pertains to actual steps that ascertain whether suspects are responsible for alleged conduct e.g. the interviewing of suspects, forensic analyses or collection of documented evidence.¹⁶³ The notion of ‘unwillingness’ found in Article 17(2) has also received attention, and the Court has clarified that a case would be admissible when a State was simply *not acting* on investigations and prosecutions (rather than being unwilling or unable). The Trial Chamber in *The Prosecutor v Katanga* confirmed:

[The] second form of unwillingness, which is not expressly provided for in article 17 of the Statute, aims to see the person brought to justice, but not before the national courts. The Chambers considers that a State which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in article 17.¹⁶⁴

Despite the clarification of the terms, there is little doubt that complementarity permits considerable and unpredictable discretion in the selection of cases. Its unpredictability can be evidenced in numerous ways. For instance, the OTP’s own interpretation of terms such as ‘unwilling’ and ‘genuinely’ are entirely a matter of its own professional (subjective) judgment.¹⁶⁵ The extent to which a State is sufficiently willing to bring perpetrators to justice, is a question initially assessed by the Office,

¹⁶² *Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Prosecutor’s Application for a warrant of arrest, Article 58,’ (10 February 2006) ICC-01/04-01/06 para. 31; *The Prosecutor v Ruto and others* ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’ (30 August 2011) ICC-01/09-01/11-307 OA para(s) 37, 41, 43, 46, 100.

¹⁶³ *The Prosecutor v. William Samoei Ruto and others*, (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute)) ICC-01/09-01/11-307 OA (30 August 2011) para. 41.

¹⁶⁴ See *The Prosecutor v Katanga* and others, (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)) ICC-01/04-01/07 (16 June 2009) para 77. The Court explained that such a reading is consistent with the Rome Statute’s aim to end impunity and avoid ‘thousands of victims being denied justice’ because— to decide otherwise— would prevent the exercise of jurisdiction when the State, in principle, could be willing or able to investigate/prosecute, but had no real desire to do so. On this see, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016) 456.

¹⁶⁵ Bertram Kloss, *The Exercise of Prosecutorial Discretion at the International Criminal Court: Towards a More Principled Approach* (Herbertz Utz Verlag 2017) 20.

and without judicial oversight. Second, the discretion to prosecute is not time-barred and the OTP can evaluate admissibility ‘for as long as a situation remains under investigation.’¹⁶⁶ However, another significant factor complicating the exercise of discretion is a competing policy goal.

One of the principal policies the OTP pursues is that of ‘positive complementarity’, namely, its general endorsement and promotion of national criminal proceedings.¹⁶⁷ This finds expression in a collaboration or the sharing of burdens, so that the Court *and* national courts work together to end impunity and contribute to the prevention of crimes.¹⁶⁸ It has been described as a managerial concept based on the interaction between the Court and national jurisdictions. An ideal division of labour between the Court and national legal systems intends to fill the gap in impunity, i.e. to ensure that potential perpetrators who escape the OTP’s attention are still held to account at the domestic level.¹⁶⁹ The policy is somewhat in opposition to assessing whether a case is admissible before the Court, based on a contest of jurisdictions (sometimes labelled classical or negative-complementarity).¹⁷⁰ The co-existence of positive complementarity alongside the traditional assessment of admissibility can therefore produce unpredictability in the exercise of discretion. For example, the OTP’s strategy of positive complementarity in the *Situation in Kenya* was evidenced by the considerable encouragement and patience the Office demonstrated towards the Kenyan authorities, before finally issuing indictments.¹⁷¹ In the *Situation in Colombia*, the Prosecutor sought to use positive complementarity as a tool to catalyse national prosecutions and otherwise monitor domestic proceedings.¹⁷² In summary, the policy makes the exercise of prosecutorial discretion unpredictable because it remains unclear *when* the OTP will adopt such a policy and for how long — a debate I revisit in chapter four.

¹⁶⁶ OTP Regulation 29 (4) (Initiation of an investigation and prosecution) of the Regulations of the OTP ICC-BD/05-01-09 (April 2009).

¹⁶⁷ See OTP, *Paper on Some Policy Issues before the Office of the Prosecutor* (September 2003) 3 and later OTP, *Prosecutorial Strategy 2009-2012* (1 February 2010) 4-5. (‘The positive approach to complementarity means the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various network of cooperation, but without involving the Office directly in capacity building’).

¹⁶⁸ Rod Rastan, ‘Complementarity: Contest or Collaboration?’ in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl 2010) 106.

¹⁶⁹ See generally, Carsten Stahn, ‘Complementarity: A Tale of Two Notions’ (2008) 19 *Crim.L.F.* 87.

¹⁷⁰ *Ibid* 87, 100.

¹⁷¹ For an overview of this period, see Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015) 70-86.

¹⁷² See James Stewart, ‘Transitional Justice in Colombia and the Role of the International Criminal Court’ (13 May 2015) <<https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf>> accessed 31 July 2018.

Moving on to gravity, the Chambers' treatment of this particular concept has also been inconsistent and unclear. Instead of offering clarity, the Chambers have underlined the concept's subjectivity. For instance, the PTC, in recognising that all crimes within the Court's jurisdiction are, on one level, already grave, previously declared that gravity should include large scale or systematic conduct that provokes 'social alarm.'¹⁷³ The Appeals Chamber later overruled this assertion and argued that a criterion of social alarm would invite further subjectivity to a term that, as far as possible, requires crimes to be assessed objectively.¹⁷⁴ In addition, the Appeals Chamber has stressed that there should not be an unduly restrictive legal bar to overcome the gravity threshold, emphasising that all potential perpetrators, irrespective of their precise rank or status, can be selected in order to maximise the Court's retributive and preventive role.¹⁷⁵ Later, the Pre-Trial Chambers in *The Prosecutor v Garda* and the *Situation in the Comoros*, reverted to the OTP's characterisation of gravity confirming that, in general, gravity should be assessed in terms of the ability to prosecute those most responsible for the alleged crimes and depend on a quantitative and qualitative assessment of the crimes including their scale, nature, manner and the impact on the victims.¹⁷⁶

Gravity is notoriously subjective. The factors of scale, nature, manner and impact are inherently flexible, and no single factor is determinative. The assessments of these factors inevitably entail a degree of political judgement. The OTP's assessment of gravity tends to rely on relative judgments; choices made in comparison (or in contrast) to other options.¹⁷⁷ Strictly speaking, however, the OTP's assessment of gravity should be based on 'sufficient gravity' (found in admissibility criterion in Article 17(d)) and this notion of 'sufficient' implies a minimum threshold.¹⁷⁸ However, as many cases are potentially admissible, the

¹⁷³ *The Prosecutor v Lubanga* (Decision on the Prosecutor's Application for a Warrant of Arrest) ICC-01/04-01/06 Pre-Trial Chamber I (10 February 2006) para 46.

¹⁷⁴ *Situation in the Democratic Republic of the Congo*, (Decision on the Prosecutor's Application for Warrants of Arrest Article 58) ICC-01/04-169 Appeals Chamber (13 July 2006) paras. 69-79.

¹⁷⁵ *Situation in the Democratic Republic of the Congo*, (Decision on the Prosecutor's Application for Warrants of Arrest Article 58) ICC-01/04-169 (13 July 2006) Appeals Chamber paras. 69-79.

¹⁷⁶ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation.) (16 July 2015) ICC-01/13 para 21; OTP Regulation 29 (4) (Initiation of an investigation and prosecution) of the Regulations of the OTP ICC-BD/05-01-09 (April 2009).

¹⁷⁷ The dictionary defines 'relative' in terms of being in relation or proportion to something else—or—possessing a specified characteristic that can only be understood with the use of a comparison. See Angus Stevenson (ed.), *Oxford Dictionary of English* (3rd edn, OUP, 2010) 1499.

¹⁷⁸ See Kloss, *supra* note 165, at 20. See also Margaret DeGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32(5) *Fordham Int'l L.J.* 1400.

Office uses relative gravity as the predominant criterion ... and embeds the concept into considerations of both the degree of responsibility of alleged perpetrators and charging decisions.¹⁷⁹ Inevitably, this then entails an assessment of comparative gravity to decide which potential cases go first, and the OTP has confirmed that it uses a stricter test when assessing gravity for the purpose of case selection.¹⁸⁰ However, the OTP cryptically does not elaborate on the content of this test. The test may allude to relative gravity but no detail is provided on the considerations (or the weight given to them) in balancing the gravity of cases prior to their selection.¹⁸¹

Unsurprisingly, relative judgements are, for all intents and purposes, incommensurable. These judgments are likely to invite criticisms of inconsistency because, under the equal application of law, decisions about one case should be consistent with decisions applied to other similar cases. Hitherto, the ad-hoc invoking of gravity to justify the selection of cases has done little to inspire perceived legitimacy. The arbitrary (and incorrect) comparison of the number of victims in the *Situation in Uganda*, with the victims of alleged abuses by British Troops in Iraq is a good example.¹⁸² The very contestability of gravity was confirmed by the Pre-Trial Chamber in the *Situation in the Comoros*. The Pre-Trial Chamber, disagreeing with the OTP's decision that the situation did not pass the gravity threshold, asserted that there was discrepancy in the Office's reasoning between:

On the one hand, the Prosecutor's conclusion that the identified crimes were so evidently not grave enough to justify action by the Court, of which the *raison d'être* is to investigate and prosecute international crimes of concern to the international community, and on the other hand, the attention and concern that these events attracted from the parties involved, also leading to several fact-finding efforts on behalf of States and the United Nations to shed light on the events.¹⁸³

¹⁷⁹ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) p.4 para 6.

¹⁸⁰ *Ibid.* p.13-4, para 36.

¹⁸¹ Margaret M. DeGuzman, 'Gravity and the Legitimacy of the International Criminal Court.' (2008) 32(5) *Fordham Int'l L.J.* 1400, 1459-62.

¹⁸² See Schabas, *supra* note 34, at 740.

¹⁸³ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation.) (16 July 2015) ICC-01/13 para 51.

The passage above confirms the degree to which the gravity assessment is contestable and entirely dependent on perspective. In the end, to coin Marco Longobardo's expression: 'everything is relative.'¹⁸⁴ This being the case, there is credence in the claim that gravity can obfuscate and inherently depends on contrived reasoning to justify selection decisions.¹⁸⁵

In summary, the OTP uses admissibility to select and prioritise particular cases. This finds expression in the Prosecutor acting as the Court's 'gatekeeper', i.e. its selections act like a filtering mechanism.¹⁸⁶ However, as the section demonstrated, uncertainty can arise in exercise of discretion. In particular, the practice of positive complementarity can permit the OTP to delay, indefinitely, the selection of certain cases. In addition, the use of the gravity assessments remains highly arbitrary. Both admissibility components can challenge the consistency of decision-making and such unpredictability can aggravate perceptions of the Court's bias — a theme the study returns to in chapter four. This attendant risk merely underscores the need for clarity on the OTP's selection goals. The chapter's concluding section now turns to the most explicit source of prosecutorial discretion.

¹⁸⁴ Marco Longobardo, 'Everything is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the Mavi Marmara Affair (2016) *JICJ* 14 1011, 1021.

¹⁸⁵ William A. Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (OUP 2012) 86.

¹⁸⁶ Lovisa Bådagård and Mark Klamberg, 'The Gatekeeper of the ICC: Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court' (2017) 48 *Geo. J. Int'l L* 639, 642.

1.5 The Interests of Justice

Article 53(1) (c) and Article 53(2) (c) are commonly shortened to ‘the interests of justice’ provisions and are those that permit the Prosecutor to decline an investigation or prosecution. The first of those, Article 53(1) (c), is considered at the final fourth phase of a preliminary examination and prior to a decision to investigate, and Article 53(1) (2) (c) is considered post-investigation and prior to a decision to prosecute. The OTP has stressed this form of discretion is only to be relied on in exceptional circumstances, and indeed, to date, there has been no reliance on either provision. Nonetheless, both articles offer a ‘very useful safety valve’¹⁸⁷ that is comparable to the discretion afforded to national prosecutors. In so doing, as Gallavin maintains, the Prosecutor is granted ‘an apparently wide and substantially unfettered discretion.’¹⁸⁸ Indeed, it has been said that these provisions reflect where ‘the philosophical and operational challenges ... of international criminal justice coincide.’¹⁸⁹ Unsurprisingly, the articles have generated significant academic discussion.¹⁹⁰ This final section discusses these provisions before underlining the highly uncertain parameters of the ‘interests of justice’.

Both articles (outlined earlier in this chapter) refer to factors that can be considered in the assessment of whether to investigate and prosecute. By way of a brief refresher, under Article 53(1) (c), the Prosecutor shall consider, whether taking into account the gravity of the crimes and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.¹⁹¹ Under Article 53(2) (c) the Prosecutor can conclude, a prosecution is not in the interests of justice, taking into account those factors outlined in Article 53(1) (c) alongside the age and infirmity of the perpetrator and

¹⁸⁷ See Schabas, *supra* note 34, at 748.

¹⁸⁸ Chris Gallavin, ‘Prosecutorial Discretion within the ICC: Under the Pressure of Justice’ (2006) 17 *Crim.L.F.* 43, 52.

¹⁸⁹ OTP, *Policy Paper on the Interests of Justice* (September 2007) p.1.

¹⁹⁰ See Maria Varaki, ‘Revisiting the Interests of Justice Policy Paper’ (2017) 15(3) *JICJ* 455; Talita De Souza Dias, ‘Interests of Justice’: Defining the scope of prosecutorial discretion in Article 53(1)(c) and 2(c) of the Rome Statute of the International Criminal Court’ (2017) 30 *LJIL* 731; Daryl Robinson ‘Serving the Interests of Justice: Amnesties, Truth Commission and the International Criminal Court’ (2003) 14(3) *EJIL* 481, Kenneth A. Rodman, ‘Is Peace in the Interests of Justice: The case for broad Prosecutorial Discretion at the International Criminal Court (2009) 22(1); HRW Policy Paper ‘The Meaning of the ‘Interests of Justice in the Rome Statute (June 2005), Henry Lovat, ‘Delineating the Interests of Justice: The Case for Broad Prosecutorial Discretion at the International Criminal Court (2007) 35 *Denver Journal of International Law and Policy* 275.

¹⁹¹ The inclusion of ‘substantial reasons’ countervails the presumption to investigate. This expression is absent in Article 53(2) and so an ordinary comparison between them would imply there is a stronger impulse to proceed to an investigation than a prosecution.

his/her role in the alleged crime.¹⁹² The OTP's policy on these provisions (discussed in detail below) elaborates on the assessment of these listed factors; the gravity of the crime (by reference to the scale, nature, manner of their commission and their impact), the role of the accused in the alleged crimes (by reference to their alleged status or hierarchical level, and their involvement e.g. actual commission, ordering or indirect participation) and the present circumstances of the accused (by reference to whether the accused is suffering from a terminal illness or have themselves been subject to abuse).¹⁹³

However, it is worth acknowledging that the OTP's discretion not to prosecute is not unchecked. If a decision is made solely under Article 53(1) (c) or 53(2) (c) then the Pre-Trial Chamber retains the option to exercise judicial oversight of the relevant decision. In this case, the Pre-Trial Chamber, after being informed by the Prosecutor, may review the decision not to proceed and the said decision will be 'effective only if confirmed by the Pre-Trial Chamber.'¹⁹⁴ Put another way, if the Pre-Trial Chamber refuses to confirm, the Prosecutor shall proceed with an investigation or prosecution.¹⁹⁵ Thus, the Prosecutor is given a breadth of criteria to guide the discretion, but its eventual exercise takes place with the Chamber 'looking over his [or her] shoulder.'¹⁹⁶ This legal and institutional arrangement is not dissimilar from that found in domestic (and generally) adversarial legal systems.

By way of brief comparison, a national prosecutor can exercise similar discretion in deciding not to prosecute. In England and Wales, prosecutors at the CPS must be satisfied that a prosecution would be in the 'public interest' and can weigh factors that might mitigate their impulse to prosecute.¹⁹⁷ A prosecutor is expected to determine the amorphous 'public interest' by considering a set of non-exhaustive questions. These questions concern the following: the seriousness of the alleged offence, the level of culpability of the suspect, the circumstances of and the harm done to the victim, the impact on the wider community, and the overall

¹⁹²The age or infirmity—refers presumably to the poor physical or mental health or well-being of a defendant, and the opaque 'his or her role in the alleged crime' may indicate whether the defendant was an abettor to the main perpetrator, or, in prosecuting them, it may put witnesses in personal danger.

¹⁹³ OTP, *Policy Paper on the Interests of Justice* (September 2007) p.7.

¹⁹⁴ Art 53(3) (b) ICC St

¹⁹⁵ Rule 110(2) Rules of Procedure and Evidence.

¹⁹⁶ Daniel D. Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *JICJ* 124, 140.

¹⁹⁷ CPS, *The Code for Crown Prosecutors* (January 2013) para 7.

<https://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html> accessed 31 July 2018

proportionality of a prosecutorial response.¹⁹⁸ Determining the answers to these questions entail assessments of the suspect (including their motive, age and health), the victim(s) (including their vulnerability at the time the crime occurred, the nature of the offence and their views about the impact the crime has had) and the community (an inclusive term that is not restricted to communities defined by geography).¹⁹⁹ The weight attached to each of the questions will vary and are dependent on the merits of the case; a single answer to one of those questions may even outweigh answers to other questions that tend in the opposing direction.²⁰⁰ Leaving aside the indeterminacy of the judgment, if the Prosecutor is not satisfied that a prosecution would be in the public interest, they, by implication will decline to proceed. This is comparable to the OTP's discretion, save for one crucial distinction; the OTP's determination of the interests of justice is confined as a reason not to proceed i.e. it is only linked to the absence of prosecutorial action rather than being a threshold to justify commencing an investigation or prosecution.²⁰¹

Similarly, the domestic exercise of prosecutorial discretion can be subsequently challenged in the Courts. In England and Wales, both the decision *to* prosecute and not to prosecute can be judicially reviewed. If such a review is successful, the court is not entitled to substitute its assessment, but can direct the prosecutor to reconsider his/her original decision. In reality, these challenges are only successful when, say, decisions are based on a fundamental misapplication of the law or evidence i.e. perverse,²⁰² or it is made in bad faith²⁰³ or it is judged to be irrational (traditionally requiring a high threshold).²⁰⁴ In this regard, the standard of judicial review over domestic prosecution decisions is neither substantive, and nor is it rigorous.

Before turning to the interests of justice, it should be pointed out that the article's surrounding terminology is also opaque and affords flexibility. For example, the reference to 'substantial reasons' —discussed in *The Prosecutor v Jean-Pierre Bemba Gombo* — means solid, significant and material reasons but, the precise type

¹⁹⁸ CPS, *The Code for Crown Prosecutors* (January 2013) para 4.12 a)-g).

<https://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html> accessed 31 July 2018.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.* para. 4.11.

²⁰¹ For an argument that makes the case that the OTP should use the interests of justice in this active positive sense, see Solon Solomon, 'Broadening International Criminal Jurisdiction: The Rome Statute 'Interests of Justice' Clause as a Prosecutorial Platform' (2015) 4 *Int.C.L.R.* 53-80.

²⁰² *R v DPP, ex p. C* [1995] 1 Cr App R 136; *R v DPP, ex p. Jones (Timothy)* [2000] Crim LR 858.

²⁰³ *R v DPP, ex p. Kebilene* [2000] 2 AC 326.

²⁰⁴ *R v DPP, ex p. Jones (Timothy)* [2000] Crim LR 858.

of reasons that are necessary is not clear and these may for example, include intangible policy considerations.²⁰⁵ Second, the reference to the gravity of the crimes re-invites the earlier subjective assessment but it is unclear what additional factors would be considered at this stage—making its inclusion in paragraph (c) superfluous.²⁰⁶ Third, the reference to the interests of victims simply reflects the OTP’s existing commitment to incorporate victims’ interests throughout its work²⁰⁷ and given that victims’ views will differ widely, identifying those interests is — in the words of the Office—a highly complex matter.²⁰⁸ However, with the drafting history offering little clarity, and not elucidating any general criteria, the ‘interests of justice’ attracts the greatest attention.²⁰⁹ The expression is elastic and contested and produces conflicting perspectives as to its interpretation.²¹⁰

Typically, those perspectives are on a spectrum ranging from narrow to broad interpretations. Those advocating a narrow interpretation argue the interests of justice must be strongly confined to prosecutorial or retributive justice. Human Rights Watch (HRW) argue that the OTP should adopt a narrow construction as it would adhere to the object, context and purpose of the Rome Statute, comply with the duty to prosecute under international law, and prevent the OTP from becoming implicated in political factors/considerations (such as peace and security) that could undermine its work.²¹¹ HRW, alluding to the Court’s mission, has strongly encouraged the Office not to submit to — in the words of Robinson — ‘considerations of expedience and realpolitik that had so often led [States] ... to trade away justice in the past.’²¹² However, others argue that a narrow interpretation is not a defensible proposition because it risks being a *non-sequitur*. In other words, the interpretation simply does not follow on an ordinary reading of the provisions; the references to gravity and victims are cited in favour of criminal prosecutions and

²⁰⁵ ICC Pre-Trial Chamber: *The Prosecutor v Jean-Pierre Bemba Gombo*, (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) (15 June 2009) ICC-01/05-01/08 p 11-12; Kloss argues these reasons must be reasonable, material, and arguably proportional to the legitimate purpose of the decision. See Bertram Kloss, *The Exercise of Prosecutorial Discretion at the International Criminal Court: Towards a More Principled Approach* (Herbert Utz Verlag 2017) 26-7.

²⁰⁶ Morten Bergsmo and others, ‘Article 53’ in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edn, Beck/Hart 2016) 1373.

²⁰⁷ OTP, *Policy Paper on Victim Participation* (2010) p. 3-4.

²⁰⁸ OTP, *Policy Paper on the Interests of Justice* (September 2007) p.9.

²⁰⁹ See also Maria Varaki, ‘Revisiting the ‘Interests of Justice’ Policy Paper (2017) 15 (3) *JICJ* 455.

²¹⁰ See Goldston, *supra* note 55, at 392.

²¹¹ See, for example. HRW Policy Paper: The Meaning of ‘The Interests of Justice’ in Article 53 of the Rome Statute (June 2005); Janine Natalya Clark, ‘Peace, Justice and the International Criminal Court: Limitations and Possibilities (2011) 9 *JICJ* 521, 541-3.

²¹² Daryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 *EJIL* 481,483.

this is countervailed by an assessment of the interests of justice.²¹³ Put another way, as Lepard argues, ‘it would be hard to see how any prosecution could not be in “the interests of justice” if justice is to be defined so narrowly’²¹⁴ One can conclude that the OTP must envisage the ‘interests of justice’ to mean something beyond criminal justice and the impulse to prosecute.²¹⁵

On the opposite side of the spectrum, broad interpretations take a flexible and pluralistic interpretation of justice. This has produced significant speculation as to whether the clause should include political factors and considerations. For example, Brubacher posits that the interests of justice would inevitably include public policy considerations such as the political ramifications of an investigation on the State in question.²¹⁶ Similarly, Rodman argues that there is a case for the Prosecutor to use the interests of justice to assess the domestic political context.²¹⁷ Others suggest the Office is permitted to use the clause to consider national level mechanisms such as truth commissions (especially for low-level perpetrators) or the existence of properly constituted amnesties in transitioning and fragile democracies.²¹⁸ However, one key problem of the dichotomy between narrow and broad interpretations is it assumes that political considerations are inherently separable from the OTP’s legal mandate, and that the Office would be making an *active* choice to take into political factors into account.

In this vein, some commentators argue the clause simply reflects the OTP’s deep entrenchment in politics. The Prosecutor is inevitably immersed in and implicated by the realities of politics. Gallavin, in writing on the provisions, argues that law and politics are fused, and it would be folly (and I would add impossible) to exclude politics from the assessment of the interests of justice — politics is structurally embedded into the provision. This being the case, it is hard to imagine what would not be relevant in the interests of justice provisions; it might well be

²¹³ Ibid. 488; OTP, *Interests of Justice Policy Paper* (1 September 2007) p. 8.

²¹⁴ Brian D. Lepard, ‘How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles’ (2010) 43 *J. Marshall L.Rev.* 553, 566.

²¹⁵ For a systematic interpretation of the provision, see Talita De Souza Dias, ‘Interests of Justice’: Defining the Scope of Prosecutorial Discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court (2017) 30 *LJIL* 731.

²¹⁶ Matthew R. Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’ (2004) 2 *JICJ* 71, 81.

²¹⁷ Kenneth A. Rodman, ‘Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court’ (2009) 22 *LJIL* 99.

²¹⁸ Richard J. Goldstone and Nicole Fritz, ‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers’ (2000) 13 *LJIL* 655; Jeremy Sarkin, ‘Enhancing the Legitimacy, Status and Role of the International Criminal Court by Using Transitional Justice or Restorative Justice Strategies’ (2012) *Interdisciplinary Journal of Human Rights Law* 83, 93.

characterised as ‘all things considered’.²¹⁹ For Schabas, the expression is another highly nebulous notion...and a clause that diverts attention from the political judgements, prejudices, pre-dispositions, and the leanings of the individual to whom they are entrusted.²²⁰ In this sense, the interests of justice provisions is a subjective (but hardly onerous) hurdle for the Prosecutor to navigate and overcome in the way he or she sees fit.

The OTP — in one of its earliest attempts to boost transparency — issued a Policy Paper to clarify the interpretation of the interests of justice provisions. First, the policy confirms that there is a strong presumption in favour of investigations and prosecutions and that any exceptional reliance on them will be guided by the objects and purpose of the Rome Statute.²²¹ The OTP expresses this exceptionality by, amongst other claims, stressing the interests of justice is distinct from the interests of peace — the latter a preserve of other institutions.²²² Primarily, this is to honour the Court’s mission and avoids the OTP being implicated in ‘bartering away justice for political results, albeit in the pursuit of peace.’²²³ Second, and relatedly, the policy simply endorses the complementary role that can be played by domestic and alternative justice mechanisms (e.g. traditional justice bodies, truth-seeking processes), and seeks to work with such approaches to encourage a comprehensive approach.²²⁴ The policy offers some transparency but the future reliance on the interests of justice remains highly opaque — demonstrated by the policy’s admission on the interests of victims.

Arguably of greatest interest is the fact that the ‘interests of justice’ must be reconciled with the ‘interests of victims’. The latter expression appears in both Article 53(1) (c) and Article 3(2) (c). In the balance between the two, the OTP’s policy states that the interests of victims will generally be in favour of prosecution, but, nonetheless, it will seek to listen to the views of all parties concerned. The OTP declares that in respecting victims through the ‘possibilities of participation’ it is under a duty to be respectful of possibly divergent views from a broad set of groups including direct victims, their communities and representatives, local political and

²¹⁹ Ohlin, *supra* note 33, at 188.

²²⁰ William. A. Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (OUP 2012) 88.

²²¹ OTP, *Policy Paper on the Interests of Justice* (September 2007) pp.1, 3.

²²² *Ibid.* p.9.

²²³ Mahmoud Cherif. Bassiouni, *International Criminal Law: Enforcement* (3rd Edition, Transnational Publishers 1999) 6.

²²⁴ OTP, *Policy Paper on the Interests of Justice* (September 2007) p.8.

religious leaders as well as other intermediaries from civil society.²²⁵ However, these expressions are simply rhetorical. It remains unclear, how such a decision not to proceed in the interests of justice seeks to *represents* the interests of victims (and their affected communities). Ultimately, the decision on whether to prosecute should— as far as possible — represents the concrete community that is the victim of the crime and that will have to live with the consequences of the decision (a discussion I pick up in chapter four).²²⁶

The notion of justice is philosophically contentious. Despite its attempts at transparency, the OTP's policy on the interests of justice does not adequately illuminate how a decision to decline an investigation/prosecution will be made. Crucially, the absence underlines the lack of clarity on the precise selection goal that any decision, at any one time, will seek to pursue.

²²⁵ Ibid. p.5.

²²⁶ Adam Branch cited in Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Books 2006) 24.

Conclusion

This chapter introduced the OTP's selection procedure and provided the study's essential background. The chapter began by discussing the significance of prosecutorial discretion — the concept at the centre of its selection procedure. Specifically, the chapter discussed prosecutorial discretion in four essential areas: the selection of situations, the same of cases, the discretion in the admissibility assessment and lastly — and self-evidently — the option to decline an investigation or prosecution in the interests of justice. The discussion revealed the Rome Statute provides weak constraints on the OTP's prosecutorial discretion with rules that are uncertain, indeterminate and permitting of political and subjective assessments. Equally, the OTP's Policies e.g. on Case Selection and Prioritisation policy and the Interests of Justice policy maximises its manoeuvrability. The Prosecutor's tool of discretion is essential for her to navigate a stage where law and politics wholly converge.

It has not been the intention to question the existence of the OTP's prosecutorial discretion or to argue that it should be curtailed. The Prosecutor does (and should) take into account factors that are not limited to the Statute or the evidence; that is in the nature of discretion. There are difficult choices and value judgments to be made and, inevitably, agreement will be hard to come by.²²⁷ However, that does not mean that problems in the exercise of that discretion cannot be identified and potentially addressed. This is altogether more important because, by nature, discretion attracts suspicion when the decisions are judged unsatisfactory.

In this light, the chapter identified a set of challenges in the exercise of the discretion: consistency in assessing admissibility, impartiality with respect to case (i.e. defendant) selection, and the representation of the interests of victims and affected communities. The study returns to these challenges in the analysis in chapter four and picks up on the central theme of this chapter: selectivity and perceived legitimacy.²²⁸

²²⁷ Goldston, *supra* note, at 402-3.

²²⁸ Schabas, *supra* note 11, at 374-5.

The OTP's selection of cases is the Court's most significant act, and, by this token, it is a ripe time to reflect on the goals those selections seek to advance.²²⁹ Before such a reflection can take place, one needs to be specific about two things. First, one must be able to identify the potential range of the OTP's selection goals and, second, one must attempt to clarify, precisely, an individual goal. The next chapter tackles the first of those questions and, thus begins to sharpen the study's focus on reconciliation.

²²⁹ deGuzman and Schabas, *supra* note 39, at 167.

Chapter Two

The International Criminal Court's Office of the Prosecutor & Selection Goals

The ICC's core selectivity problem is that the Court lacks sufficiently clear goals and priorities to justify its decisions ... This ... poses a serious challenge to the ICC's legitimacy. [Those] wishing to ensure an important place for the ICC in the global legal order must urgently engage the task of clarifying the institution's goals and priorities.¹

The Office of the Prosecutor's selection goals belie simplicity. The challenge begins with being able to locate the source of those goals—a task that is no less complex. In general, goals can come from multiple sources, some can be left unstated, and some are simply assumed by dint of the OTP's operations.² Other goals can be traced to the Assembly of States Parties (ASP): the body that maintains budgetary oversight of the OTP.³ Alternatively, goals can stem from the expectations of constituencies, such as domestic civil society or the victims of the alleged crimes.⁴ Diverse goals may also be idiosyncratically generated, by the personnel that work within the OTP, at all levels of its administrative hierarchy.⁵ Finally, goals may emerge from the Court as an organisational entity—based on declared strategy and the natural constraints of its functions.⁶ However, to locate the OTP's selection goals one must first look to the Court's founding instrument.

The Rome Statute is the principal source for the OTP's selection goals. The Statute represents states parties' delegation of prosecutorial powers, and therefore, possesses the greatest 'source legitimacy' i.e. the Statute is the source of the OTP's duties, obligations and powers.⁷ The Statute also offers methodological certainty because the agreement it attracts helps to exclude those particularistic goals that are

¹ Margaret DeGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33(2) *Mich.J.Int'l L.* 265-7, 319.

² Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 35.

³ See Chapter 6.2.

⁴ Shany, *supra* note 2, at 35.

⁵ Herbert A. Simon, 'On the Concept of the Organisational Goal' (1964) 9(1) *Administrative Science Quarterly* 1, 3.

⁶ *Ibid.*

⁷ Shany, *supra* note 2, at 33. See also Karen Alter, 'Delegation to International Courts and the Limits of Re-Contracting Political Power' in Darren Hawkins and others (eds.), *Delegation and Agency in International Organisations* (CUP 2006).

based on personal desires/preferences.⁸ Most of all, the Rome Statute, its Preamble and the *travaux préparatoires*, all formally indicate the Court's object and purpose.⁹ The Office (as one of the Court's principal entities) is specifically committed to furthering the Court's purpose. This commitment is variously expressed in the Office's Strategic Plan and is reinforced by the ICC's Strategic Plan.¹⁰ The OTP declares in its Code of Conduct that its fundamental rule is to be conscious of the Court's goals and establish a culture rooted in the purposes of the Rome Statute.¹¹ However, the Rome Statute, like many international treaties, does not have a single, undiluted purpose, but can pursue a range of inter-related and contested goals at the same time.¹²

In turn, identifying the Statute's goals is a complex endeavour but a useful starting point is to adopt a foundational perspective: justice. This is to say that the Court's fundamental purpose is to deliver justice and such a goal is self-evident for any criminal tribunal (domestic or international).¹³ Jon Heller remarks that bringing to justice the individuals responsible for committing crimes is the basic purpose for all criminal tribunals.¹⁴ This premise finds expression in a basic description of a criminal trial; in the words of Arendt, trials render justice by way of law's core business — 'to weigh the charges brought against the accused, to render judgement and to mete out due punishment'.¹⁵ The significance of justice also finds expression in descriptions of the Prosecutor; she is an 'organ or minister of justice because her duty is to help the Court administer the same'.¹⁶ This being said, the concept of justice does not attract consensus as to its meaning or type. Justice is multi-

⁸ Edward Gross, 'The Definition of Organisational Goals' (1969) 20(3) *The British Journal of Sociology* 277, 278.

⁹ See Vienna Convention on the Law on Treaties UNTS 18232 (VCLT hereafter) Art 31(1) ('A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.') See also VCLT art 31(2) ('Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.').

¹⁰ ICC, *Strategic Plan 2013-2017* (24 July 2015) p.2.

¹¹ ICC, *Code of Conduct for the Office of the Prosecutor* (5 September 2013) Chapter 1, Section 4 (General Principles).

¹² Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd Edition, Manchester University Press 1984) 130.

¹³ Shany, *supra* note 2, at 19.

¹⁴ Kevin Jon Heller, 'Completion' in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors* (OUP 2012) 300.

¹⁵ Hannah Arendt, *Eichmann in Jerusalem: A report on the banality of evil* (First Published 1963) Penguin 2006) 253.

¹⁶ *Prosecutor v Barayagwiza* (Decision on Prosecutor's Request for Review or Reconsideration) Separate Opinion of Judge Shahabuddeen ICTR-97-19-AR72 Appeals Chamber (31 March 2000) para. 68.

dimensional; there are differing types of justice with their own ideologies and their own respective goals.¹⁷ It has been claimed the Rome Statute system endorses differing types or categories of justice.¹⁸ One can therefore use such categories to explore the Court's goals.

Under the Rome Statute, one can identify three main categories of goals. The first and second categories are frequently labelled as 'criminal justice' and 'transitional justice'—described by some as the Court's 'primary' and 'secondary' sets of goals.¹⁹ Criminal justice goals are based on the Court being akin to an 'ordinary' domestic criminal court and include, most prominently, retribution and deterrence. Transitional justice goals are based on the Court being akin to an international organisation responsive to conflict and these include peace, truth and reconciliation.²⁰ However, one can discern another category of justice from the Statute that is frequently discussed in the literature: 'restorative justice'. The goals of restorative justice are founded on the Court helping to undo or repair the serious harms that atrocities have inflicted upon victims.²¹ Restorative justice, often by way of participation, is concerned with repairing relationships and reaffirming community values and thus strongly resonates with goals such as reconciliation.²² The three categories are not exhaustive or closed (goals can be complementary and reinforce one another) and they do not represent a fixed hierarchy. Nonetheless, they do capture the broadest range of goals that are commonly associated with the Statute and that are raised both by Court officials and the academic literature.²³

¹⁷ Hugo Van Der Merwe, 'Delivering Justice during Transition: Research Challenges' in *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace 2009) 121. For other accounts see Gideon Boas, 'What is International Criminal Justice?' in Gideon Boas, William Schabas and Michael P. Scharf (eds.), *International Criminal Justice: Legitimacy and Coherence* (EEP 2012); Miriam J. Aukerman, 'Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice' (2002) 15 *Harv.Hum.Rts.J.* 39; Ray Nickson and John Braithwaite, 'Deeper, broader, longer transitional justice' (2014) 11(4) *European Journal of Criminology* 445.

¹⁸ See Judge Sang-Hyun Song, 'Remarks at the Opening Session' 7th Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law (10 December 2012); ICC, 'End of Mandate Report by President Silvia Fernandez de Gurmendi' (9 March 2018).

¹⁹ See Carsten Stahn, 'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?' (2012) 25 *LJIL* 251, 279.

²⁰ Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harv.Hum.Rts.J.* 69, 75-8.

²¹ Miriam J. Aukerman, 'Extraordinary Evil, Ordinary Crimes: A framework for Understanding Transitional Justice' (2002) 15 *Harv.Hum.Rts.J.* 39, 77-8. For an in-depth overview of the definition of restorative justice see, Kathleen Daly and Gitana Proietti-Scifoni, 'Reparation and Restoration' in Michael Tonry(ed.), *The Oxford Handbook of Crime and Criminal Justice* (OUP 2011).

²² UN Office on Drugs and Crimes, *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series 2006) 8-9.

²³ It is beyond the present scope to consider other types of justice. Some, such as 'transformative justice', are yet to be fully established in policy, practice or academic literature. Others, such as 'reparative justice', bear a very close resemblance to restorative justice. See, indicatively, Paul Gready, 'From Transitional to Transformative: A New Agenda for Practice' (2014) 8(3) *IJTJ* 339; Elmar Weitekamp, 'Reparative Justice: Towards a victim-oriented system' (1993) 1(1) *European Journal on Criminal Policy and Research* 70.

Using these categories, this chapter explores the OTP's selection goals. The chapter, thus, contributes to the literature, as hitherto, research has tended to discuss the Court's goals in terms of their thematic breadth or complexity.²⁴ There is also considerable literature that offers general conceptual accounts of the Court's contribution to particular goals.²⁵ The present chapter, by contrast, uses the three categories of justice as a framework to sharpen the focus on reconciliation.²⁶ In particular, I explore the OTP's relationship to each category and consider what each category reveals about the goal of reconciliation. In doing so, the chapter establishes a foundation for the OTP to be concerned about reconciliation. The chapter's exploration stresses that the OTP's contribution to reconciliation requires *a priori* clarity of the concept, its context and the precise audience where it is desired. The chapter is organised into three main sections that reflect each category: criminal justice, transitional justice, before turning, finally, to restorative justice, but first, the chapter, begins by discussing the significance of goals.

²⁴ See, indicatively, Shahram Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations' (2014) 3 Penn St. J. L & Int'l Aff. 30; Patrick J. Keenan, 'The Problem of Purpose in International Criminal Law' (2016) 37(3) *Mich.J.Int'l L.* 421; 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; See Mirjan Damaška, 'What is the Point of International Criminal Justice' (2008) 83 *Chi-Kent L. Rev* 329.

²⁵ These accounts do not always emphasize the concept of goal, but nonetheless, tend to assess the Court against commonly declared aims/aspirations. In this regard, the literature is dominated by accounts of retribution, deterrence, and peace. See, indicatively, Dawn L. Rothe and Victoria E. Collins, 'The International Criminal Court: A Pipe Dream to End Impunity?' (2013) 13(1) *Int.C.L.R.* 191; Katie Cronin-Furman, 'Managing Expectation: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7(3) *IJTJ* 434; Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism' (2009) 31 *HRQ* 624; Alexander K. A Greenawalt, 'International Criminal Law for Retributivists' (2014) 35(4) *University of Pennsylvania Journal of International Law* 969.

²⁶ The literature contains only one account of selection goals; DeGuzmann, *supra* note 1. NB This chapter is not concerned with goals that emanate from other activities or Court entities e.g. witness protection, outreach. It is also not concerned with other broader goals such as contributing to the development of international criminal law, or providing a common framework for States Parties to develop domestic criminal justice systems or negotiate accountability/extradition agreements.

2.1 Goals

The Oxford Dictionary of English defines a ‘goal’ as an aim or a desired result: the object of one’s efforts.²⁷ However, one should be careful to distinguish the meaning of ‘goal’ because it is a concept that is used interchangeably with aim,²⁸ objective,²⁹ or even motive.³⁰ In general, the meanings of such terms can often overlap, and this depends on the type of goal one is referring to: individual, group or organisational. For instance, as Doran outlines, ‘in some organisations goals are short-term and objectives are long-term, [but], in others, the opposite is true.’³¹ In a similar fashion, goals are not the same as motives; the latter refers to an immediate justification and tends to lack transparency.³² Nonetheless, a motive and a goal may each have role in a particular effort or course of action. Simon argues that goals are the ‘value premises that serve as inputs to decisions’ whereas motives are the (specific) causes that lead individuals to select a goal as the premise for a decision.³³ A useful starting point to distinguish the precise meaning of goals is to consider its relevant type.

For present purposes, the relevant type of goal is that of an organisation. Organisational goals are a ‘desired state of affairs which the organisation attempts to realise.’³⁴ Put another way, an organisation’s goals form its general purpose(s) and express its mission — a definition that resonates in Perrow’s notion of ‘official goal.’³⁵ In organisational contexts, official goals have been described as ‘executive beliefs and philosophies’.³⁶ In this regard, it is not surprising that goals are regularly left open-ended, and thus permit a diversity of approaches in their pursuit.³⁷

Nonetheless, it is important that these organisational goals be duly interrogated for, at least, two reasons.

²⁷ Angus Stevenson (ed.), *Oxford Dictionary of English* (3rd edn, OUP 2010) 748.

²⁸ The dictionary defines an ‘aim’ as the intention to achieve i.e. a purpose, intention or a desire outcome. Ibid. 173.

²⁹ The dictionary defines an ‘objective’ as a thing aimed at, sought, or a goal. Ibid. 457.

³⁰ The dictionary defines ‘motive’ as simply the reason for doing something or causing or being the reason for something. Ibid 1155.

³¹ George T. Doran, ‘There’s a S.M.A.R.T. way to write management’s goals and objectives’ (1981) 70 *Management Review* 35, 35.

³² Yuval Shany argues that motives are often hidden, unstated and less useful to evaluating effectiveness. For instance, he suggests that motives may be self-interested or idiosyncratic (e.g. placating public opinion or political gain) that do not (or cannot) reflect an organisation’s purpose(s); Shany, *supra* note 2, at 25-6.

³³ See Simon, *supra* note 5, at 3.

³⁴ Amitai Etzioni cited in Edward Gross, ‘The Definition of Organisational Goals’ (1969) 20(3) *The British Journal of Sociology* 277, 278.

³⁵ Charles Perrow, ‘The Analysis of Goals in Complex Organisations’ (1961) 26(6) *American Sociological Review* 854, 855

³⁶ See Doran, *supra* note 31, at 35

³⁷ Perrow, *supra* note 35, at 855.

First, imbued in the establishment of such goals is *not* what the organisation is descriptively doing, but rather what it deems desirable to do. Put simply, these goals contain an implicit normative statement about the desirability and the manner of organisational conduct.³⁸ Crucially, goals help to align organisational effectiveness to produce outcomes (by generating impact) that leads to the goal's achievement.³⁹ In the words of Gross, goals optimise internal behaviours and processes resulting in a 'collective effort so as to maximise the probability of attaining the goal'.⁴⁰ Second, and relatedly, goals are valuable to those within an organisation by, amongst other things, helping to develop action plans, motivate workforces, promote clarity of vision, and generating feedback on performance.⁴¹ In conclusion, these goals are a crucial 'normative yardstick' against which an organisation's effectiveness can be measured and, in the process, help those outside the organisation to do the same.⁴²

Goals are, nonetheless, flexible constructs and are variously formulated. For instance, all organisations have a suite of 'operative' goals, which are distinct and intermediate in character, and based on organisational operations or policies.⁴³ Such goals are rooted in the organisation's normal day- to- day operations. Gross outlines examples of such operative goals; output goals (those focused on improving the organisation's products or service(s)), adaptation goals (those focused on ensuring the organisation adapts to its environment e.g. finances, staff retention, general efficiency and resource demands) and management goals (those focused on enhancing governance, personnel or decision-making).⁴⁴ These operative goals frequently tend to blur into sets of objectives that describe a more immediate and institutional aim (possibly centred on solving problems), but, nonetheless, still intend to serve the organisation's official goals.

The Court has adopted a range of operative goals that necessarily influence the OTP. The goals include — rather amorphously — 'quality of justice' (i.e. to conduct fair, effective and expeditious public proceedings in accordance with the

³⁸ Shany, *supra* note 2, at 14.

³⁹ *Ibid.* 15.

⁴⁰ Gross, *supra* note 8, at 277.

⁴¹ See, generally, Birju Kotecha, 'The ICC's Office of the Prosecutor and the Limits of Performance Indicators' (2017) 15(3) *JICJ* 543.

⁴² *Ibid.* 15.

⁴³ Perrow, *supra* note 35, at 855. See also Hal Griffin Rainey, *Understanding and Managing Public Organisations* (2nd Edition, Jossey-Bass 1997) 127.

⁴⁴ Gross, *supra* note 8, at 287-90.

Rome Statute and with high legal standards, ensuring full exercise of the right of all participants) and ‘a well-recognised and adequately supported institution’ (i.e. enhance awareness of, effect a correct understanding of, and increase support for the Court).⁴⁵ Among the Court’s operative goals is another essential goal: its desire to be a ‘model of public administration.’ This particular goal established a ‘One Court’ structure, whereby entities such as the OTP can work with other Court organs on matters of common concern.⁴⁶ The structure provides for the OTP’s ‘maximal integration’ into the Court, especially within strategic planning.⁴⁷ On this basis, the Office’s first two prosecutorial strategies⁴⁸ — in 2006 and in 2010 — adopted and aligned the Court’s operative goals to its own declared objectives.⁴⁹ These objectives were procedural and quantifiable in character, focusing on the quality and number of investigations and prosecutions, or focused on enhancing co-operation to maximize the its contribution to fighting impunity and preventing crimes.⁵⁰ Later strategies, have adopted ‘strategic goals’ and are heavily focused on improving the quality of its prosecutorial performance, adapting its capabilities, and otherwise enhancing efficiency and strengthening co-operation.⁵¹

The current argument is not to challenge the content or the utility of these operative goals, but to make the point that they originate exclusively from functions, policies, or output operations. The OTP has not meaningfully engaged with official goals (beyond vaguely iterating the importance of ending impunity and contributing to the prevention of crimes). Equally, there has been no engagement, declarations, or strategies from the Court at large regarding its long-term official goals. The absence of engaging and declaring long-term official goals has a by-product: elevating the significance of operative goals. Operative goals, though valuable in

⁴⁵ See ASP, *Strategic Plan of the International Criminal Court*, ICC-ASP/5/6 (5th Session), (5 August 2006), 5-6, 9–10. The current ICC Strategic Plan includes a range of twenty-one goals organised into categories of ‘judicial and prosecutorial’, ‘managerial’ and ‘cooperation and support.’; See ICC, *Strategic Plan (2013-2017)*, (24 July 2015) p. 3.

⁴⁶ *Ibid.*, *Strategic Plan 2006*, at 3–4.

⁴⁷ *Ibid.* See also Art. 42(1) (The Office of the Prosecutor) ICCSt.

⁴⁸ The Office has issued four prosecutorial strategies since 2006. The first was in the form of a report on prosecutorial strategy, and the second merely a prosecutorial strategy. Both the third and current strategies are in the form of strategic plans. For simplicity, the study adopts the term ‘strategy’.

⁴⁹ OTP, *Report on Prosecutorial Strategy* (14 September 2006) p. 4, para. 1; OTP, *Prosecutorial Strategy 2009-2012* (1 February 2010) p. 2, para. 4.

⁵⁰ *Ibid.* The first-three objectives in the second strategy were to a) Continually improve the quality of prosecutions, completing at a minimum three trials, starting at least one new trial...; b) Continue ongoing investigations in seven cases, conduct up to four new investigations of cases within current or new situations and be ready to start another investigation at short notice; c) Conduct up to ten preliminary examinations in relation to currently examined or new situations.

⁵¹ OTP, *Strategic Plan June 2012-2015* (11 October 2013) p. 17 para. 32; ICC OTP *Strategic Plan 2016-2018* (6 July 2015) p. 6 para 4.

themselves, confine questions about effectiveness to simple output performance — i.e. prosecutorial successes.⁵² Operative goals say little about effectiveness in terms of transforming successful prosecutions to outcomes (consisting of short, medium and long-term changes on, typically, real-world attitudes, behaviours, conditions or perceptions⁵³) within target audiences.⁵⁴ Instead, one requires official goals because they focus attention on prosecutions' outcomes rather than simply the prosecutions themselves.⁵⁵ The absence of current engagement on official goals is unsurprising given the existing lack of consensus on the Court's goals.⁵⁶ However, in this context, the chapter's enquiry into the Court's goals is significant for, at least, two, briefly described, reasons.

First, the enquiry is central to understanding the OTP's effectiveness. Of course, the relationship is reciprocal; the OTP's effectiveness can equally help to determine the Court's goals.⁵⁷ Second, the enquiry can help to specify the audience upon which its effectiveness can be judged.⁵⁸ In doing so, the chapter can help to tackle the Court's well-known audience dilemma i.e. the absence of a defined constituency to which the Court is responsible.⁵⁹ The chapter turns to explore the first category of the Court's goals.

⁵² See Chapter 6.2-6.5.

⁵³ Neil Carter and others, *How Organisations Measure Success: The Use of Performance Indicators in Government* (Routledge 1995) 36; See also Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation (2000) 32 *Case Western Reserve Journal of International Law* 387, 398 ('To speak of effectiveness is to speak directly of causality: to claim that a rule is 'effective' is to claim that it led to certain behaviours.')

⁵⁴ *Ibid.* This definition accords with that of the dictionary, which outlines effectiveness as the degree to which something is successful in producing a desired result. See Stevenson (ed.), *supra* note 27, at 550.

⁵⁵ See Chapter 6.5.

⁵⁶ DeGuzman, *supra* note 1, at 276.

⁵⁷ Shany, *supra* note 2, at 17.

⁵⁸ See Aukerman, *supra* note 21, at 43.

⁵⁹ DeGuzman, *supra* note 1, at 276.

2.2 Criminal Justice

The Preamble of the Rome Statute strongly points towards the Court's criminal justice goals. Criminal justice refers to the control, management and ultimate prevention of crimes and, the principal means is a penal system that provides sanctions against those violating the law, and thereby deterring others from similar actions. In this connection, the literature on the Preamble has concentrated on paragraph five, that outlines a desire to, 'put an end to impunity for the perpetrators of ... crimes and thus to contribute to the prevention of such crimes.'⁶⁰ However, this vague declaration needs to be unpacked to identify goals that are more concrete.⁶¹ The first of those — the desire to end impunity — was mentioned repeatedly at the Rome Conference and was rooted in the notion of 'retribution'.⁶² The second aim — to contribute to the prevention of crimes — was also frequently expressed at the Rome Conference and referred to the idea of 'deterrence'.⁶³ Unsurprisingly, retribution and deterrence have come to dominate the literature and some commentators describe them as forming international criminal law's

⁶⁰ Preamble of the Rome Statute of the International Criminal Court para. 5. The Preamble carries interpretive value in determining the context of the terms contained within the Statute, as well as its object and purpose. See the VCLT Art 31(1) 31(2). Potential member states and the human rights movement were eager in promoting these twin goals. See 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15th June -17th July 1998) A/CONF.183/13 (Vol. II) and Phillippe Sands QC, *Lawless World: Making and Breaking Global Rules* (Penguin Books 2005) 54.

⁶¹ On this point see indicatively, Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 *Mich.J.Int'l L.* 79, 84-93.

⁶² See 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15th June -17th July 1998) A/CONF.183/13 (Vol. II). See indicative comments including those by President Giovanni Conso ('The establishment of an international criminal court would send the unmistakable message to all those responsible for abominable crimes that they could no longer act with impunity and that they would be brought to justice) para. 21, p. 62; Mexico's delegate ('The creation of a permanent, independent international criminal court was essential in order to provide a legal framework which would eliminate impunity for the authors of serious international crimes.') para. 65, p. 125; Afghanistan's delegate ('Potential aggressors should be aware that they would no longer have impunity.') para. 104, p. 128; See Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (2nd Edition, Penguin Press 2002) 32; See also DeGuzman, *supra* note 1, at 302.

⁶³ See for example some indicative comments in the 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15th June -17th July 1998) A/CONF.183/13 (Vol.II). See indicative comments including those of Denmark's delegate ('The Conference was a historic opportunity to create an effective, independent and fair international criminal court that would act as a deterrent.) para. 1 p. 114; Jordan's delegate (The goal was to create a credible juridical deterrent to those who intended to commit grave breaches of international humanitarian law) para. 6 p. 114; Canada's delegate ('An independent and effective international criminal court would help to deter some of the most serious violations of international humanitarian law') para. 63, p. 68. See also David Bosco, 'The International Criminal Court and Crime Prevention: By-product or Conscious Goal?' (2013) 19 *Michigan State Journal of International Law* 163.

theoretical basis.⁶⁴ This section briefly explores both of these goals before turning to discuss reconciliation.

Retribution and deterrence are based on the justification of punishment.⁶⁵ Retribution is understood in terms of an implied social contract;⁶⁶ the injured individual sacrifices their right of vengeance to the State, that is subsequently empowered to act on the individual's desire for 'revenge' by implementing a public (trial) process that determines the guilt of the wrong-doer.⁶⁷ In the words of Cassese, the trial meets the call for revenge when perpetrators receive their just deserts.⁶⁸ Hence, retribution is deontological and based on the intrinsic merit of the perpetrator being punished as their payback for culpable conduct.⁶⁹ By contrast, deterrence has a consequentialist spirit.⁷⁰ It has been described as the most effective insurance against future repression and is based on the risk that continuing impunity will encourage a protraction of crimes.⁷¹ Deterrence is thus utilitarian because by the 'intimidation and terror of the law',⁷² prosecutions serve to discourage the alleged perpetrator in the dock and act to send a message to the general population to discourage potential offenders from criminal behaviour.⁷³ On this basis, the OTP is likely to be strongly influenced by retributive and deterrence goals.

Unsurprisingly, the OTP, which is primarily comprised of investigators and prosecutors, prioritises both of these goals in its selections. This commitment is somewhat self-evident as both goals are based on the ideal conclusion of a prosecution: a conviction and the dispensing of punishment. The prosecutor's desire for punishment is furthermore, inspired by both goals; each help to determine the

⁶⁴ Otto Triffterer, Morten Bergsmo and Kai Ambos 'Preamble' in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Beck/Hart 2016) 9.

⁶⁵ See, indicatively, Mark Drumbl, *Atrocity Punishment and International Law* (CUP 2007) 1-15; Margaret DeGuzman, 'Harsh Justice for International Crimes?' (2014) *Yale J.Int'l L.* 39.

⁶⁶ Mahmoud Cherif Bassiouni, 'The Philosophy and Policy of International Criminal Justice' in Lal Chand Vohrah and others (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 97.

⁶⁷ Judith N. Shklar, *Legalism; Law, Morals and Political Trials* (HUP 1986) 158; Mahmoud Cherif Bassiouni, 'The Philosophy and Policy of International Criminal Justice' in Lal Chand Vohrah and others (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 97.

⁶⁸ Cited in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 3-4.

⁶⁹ Its Latin origin is *retribuere* which conveys the idea of 'paying back.' See Immanuel Kant, *Metaphysical Elements of Justice: Part One of the Metaphysics of Morals* (2nd edition, Hackett Publishing 1999).

⁷⁰ The Latin origins of the term is 'deterere' conveys the idea of being 'frightened or to be discouraged from'.

⁷¹ Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 (8) *Yale Law Journal* 2542.

⁷² See Aukerman, *supra* note 21, at 63.

⁷³ *Ibid.* See also generally Andrew Ashworth, Andrew Von Hirsch, Julian Roberts (eds.), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing 2009).

degree of punishment i.e. the length of sentences.⁷⁴ More specifically, the OTP's selection procedure exposes the prominence of retribution and deterrence goals. For instance, the OTP prioritises retribution by selecting those allegedly bearing the greatest responsibility for the commission of crimes that are of sufficient gravity (including a focus on gender-based and sexual violence and crimes against children that are seen to be more egregious).⁷⁵ The goal of deterrence is deemed to be the result of pursuing retribution, but even indirectly, the OTP's selection procedure aims for deterrence by its desire to 'maximise [a] preventive impact' by virtue of the announcements of investigation and prosecutions.⁷⁶ More generally, the goals find expression in the OTP's policy on preliminary examinations⁷⁷ and in its case selection policy e.g. by way of references to the gravity of crimes and its commitment to assess the consequences of a particular selection on the prevention of crimes.⁷⁸ However, the fact that the OTP subscribes to retribution and deterrence does not mean they, respectively, escape criticism.

To begin, both retribution and deterrence naturally assume a significance that can be criticised. For instance, in national legal systems, prosecutions can equally prioritise alternative goals such as rehabilitation, victim restoration or other social solidarity purposes.⁷⁹ Indeed, national prosecutions may pursue alternative goals that are part of a broad transitional justice strategy such as reconciliation. Furthermore, one could contend that the significance attached to retribution and deterrence is disproportionate, because they are based on the justification of punishment i.e. only upon conviction.⁸⁰ However, and by contrast, a focus on punishment is at odds with international criminal justice's philosophical emphasis on *bringing the individual to trial*, i.e. to hold him/her to account by answering the charges, rather than by the dispensing of final punishment.⁸¹ Therefore, one can find cause to agree with

⁷⁴ See, indicatively, *Prosecutor v Aleksovski* IT-95-14/1-A Appeals Chamber (24 March 2000) para. 185; *Prosecutor v Rutangira* (Judgment) ICTR-95-3-T Trial Chamber III (14 March 2005) para. 108-9; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S Trial Chamber (7 December 2005); *Prosecutor v Krajisnik* (Judgment) IT-00-39-A Appeals Chamber (17 March 2009) para. 775; *Prosecutor v Jean Kambanda* (Sentencing Judgment) ICTR 97-23-S Trial Chamber I (4 September 1998) para. 28; *Prosecutor v Milutinovic and others* (Judgment) IT-05-87-T Trial Chamber I (26 February 2009) para. 1146.

⁷⁵ OTP, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014) para. 3.

⁷⁶ See, indicatively, OTP, *Prosecutorial Strategy 2009-2012* (February 2010) para. 23.

⁷⁷ OTP, *Policy Paper on Preliminary Examinations* (November 2013) para(s). 16, 93.

⁷⁸ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) para(s). 6, 7, 50(d).

⁷⁹ See Aukerman, *supra* note 21, at 43.

⁸⁰ DeGuzman, *supra* note 1, at 300.

⁸¹ David Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law in Besson S and Tasioulas J (eds.), *The Philosophy of International Law* (OUP 2010) 576; Antony Duff, *Responsibility, Restoration and Retribution* (OUP 2011) 76.

Drumbl, that a simple transplanting or ‘cannibalising’ of retribution and deterrence from domestic criminal justice is problematic.⁸² Nonetheless, each goal attracts further scepticism. I turn to the themes of such criticism below to help illustrate the focus on reconciliation that follows.

The principal critique of retribution is that the degree of punishment is never able to express sufficient outrage for the commission of the atrocities.⁸³ In the words of Arendt, such crimes ‘explode the limits of the law ... [with] no punishment being severe enough.’⁸⁴ Put simply, the severity of punishment is unable to reflect the severity of the crime.⁸⁵ The limits of proportionality are exacerbated when one considers international criminal tribunals dispense punishments that are generally seen to be too lenient.⁸⁶ This has been a frequent criticism of sentencing practice at the ad-hoc tribunals,⁸⁷ and, equally, made of the Court’s first sentence upon conviction: a fourteen-year imprisonment sentence that was characterised as unduly soft.⁸⁸ The problem of quantifying punishment to reflect culpability is accompanied by a similar dilemma; the evaluation of the perpetrator’s blameworthiness. All selected perpetrators are of sufficient blameworthiness based on their participation, and/or on the precise gravity of those alleged crimes. However, judgements about blameworthiness can invite some morally dubious differentiation.⁸⁹ The dilemma is aptly surmised by Drumbl when he states:

⁸² Drumbl, *supra* note 65, at 123-124; Mark Osiel, *Making Sense of Mass Atrocity* (CUP 2011) 8.

⁸³ See Aukerman, *supra* note 21, at 56 and Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998) 121.

⁸⁴ Lotte Kohler and Hans Saner (eds.), *Hannah Arendt-Karl Jaspers Correspondence* in Robert Kimber and R. Kimber (Translation) (Houghton Muffin 1992) 54.

⁸⁵ This problem is brought into focus, if, one considers the maximum punishment of a single act of ‘ordinary’ murder is equivalent to the punishment of ‘extraordinary’ acts of genocide i.e. life imprisonment.

⁸⁶ On this point see generally, Margaret DeGuzman, ‘Proportionate Sentencing at the ICC’ in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2014); Mark Drumbl, ‘Punishment and Sentencing’ in William A. Schabas (ed.), *The Cambridge Companion to International Criminal Law* (CUP 2016) 73-96; DeGuzman, *supra* note 65.

⁸⁷ To offer only one example, on the 3rd of March 2000, by the ICTY Trial Chamber convicted Tihomir Blaškić of crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws or customs of war. He was sentenced to a term of forty-five years of imprisonment. Controversially, and due to a series of legal errors in the judgment, this was later commuted to a nine-year term by the ICTY Appeals Chamber in 2004. Having already served the term in detention the decision led to his release a mere four days after the appeal. The ultimate outcome was poorly received by many Bosnians. See *Prosecutor v Blaškić* (Appeal Judgment) IT-95-14-A (29 July 2004); Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014) 62-3.

⁸⁸ For a discussion on this point see Shahram Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations’ (2014) 30 *3 Penn. St. J.L. & Int’l Aff.* 33-34

⁸⁹ Jens David Ohlin quoted in Clark, *supra* note 87, at 63.

Is Eichmann more worthy of punishment than Pol Pot, and is Pol Pot more worthy of punishment than Slobodan Milosevic or than Foday Sankoh? Is the violence in Rwanda more worthy of punishment than the violence in the former Yugoslavia or in East Timor? It seems difficult to differentiate these shades of evil, yet this is precisely what international criminal justice institutions have done ...⁹⁰

Second and relatedly, retribution is undermined by the selectivity of prosecutions, as just deserts should be met out equally to *all* perpetrators of criminal conduct.⁹¹ In national legal systems, all perpetrators of serious crimes are typically prosecuted, but, by contrast, the OTP's selected 'target zone' of perpetrators (from the many alleged perpetrators that can be selected) leaves a significant 'retributive shortfall.'⁹² This problem is compounded because the OTP tends to prosecute the 'big fish': those 'bearing the greatest responsibility.'⁹³ This often leads to the targeting of 'high-level perpetrators' in terms of military or political rank, but, these individuals may not be the *right* perpetrators in the eyes of the victims, who may believe the greatest retribution should be reserved to low-level perpetrators, specifically, those that physically gave the orders or committed atrocities.⁹⁴ In other words, selectivity can create a shortfall of numbers but also, relatively speaking, of deserts, because the preference to indict those in the highest echelons of power produces an impunity gap; those lower ranked, and equally deserving of prosecution are potentially overlooked.

Third, and finally, retribution is undermined by the practice of plea bargain agreements. These agreements are made between the Prosecutor and those indicted, and involve a quasi-contractual process that negotiates, typically, the dropping of

⁹⁰ Mark A. Drumbl, 'A Hard Look at the Soft Theory of International Criminal Law' in Leila Nadya Sadat and Michael P Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honour of M. C. Bassiouni* (Martinus Nijhoff Publishers 2008) 12.

⁹¹ See Aukerman, *supra* note 21, at 61 and Minow, *supra* note 83, at 31.

⁹² Drumbl, *supra* note 65, at 161.

⁹³ See for example Article 25, 27 and 28 of the Rome Statute. For example, the phrase 'those bearing the greatest responsibility' or 'those most responsible' is across descriptions of the OTP, including within its prosecution strategy(ies). See indicatively the ICC 'About the Office of the Prosecutor' <<https://www.icc-cpi.int/about/otp>>accessed 31 July 2018 OTP, *Report On Prosecution Strategy* (14 September 2006) p.5 and *OTP Strategic Plan 2016-2018* (6 July 2015) para. 35. The ICC Appeals Chamber confirmed that the statute is not limited to applying only to senior leaders suspected of being most responsible. As it pointed out the Rome Statute refers only to perpetrators, with no reference to those being the 'most serious' or the 'most responsible'. See *Situation in the Democratic Republic of Congo* (Judgement on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber 1 Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58) ICC-01/04 Appeals Chamber (13 July 2006) para 73-5.

⁹⁴ Laura Arriaza and Naomi Roht-Arriaza, 'Social Reconstruction as a Local Process' (2008) 2 *IJTJ* 159.

charges in return for a guilty plea.⁹⁵ These pleas, in turn, attract considerable leniency in the final sentence.⁹⁶ The agreements remain in widespread use and can promote efficiency, facilitate further evidence against others, and ensure that some justice is done (expeditiously). However, the practice is controversial and can compete with the principle of retribution.⁹⁷ Drumbl considers that, in the course of the negotiation, punishment can become disconnected from desert or gravity, and contingent on what the convict knows, their willingness to implicate others, and the vulnerability of the punishing institution.⁹⁸ Crucially, it enables perpetrators to use the agreement out of sheer self-interest. In the words of a Bosnian woman from Srebrenica, ‘defendants say they are guilty just to get a short sentence. They are good actors. At the beginning of the trial, every defendant says that he is not guilty, but [when he sees] the evidence against him, he [pleads] guilty.’⁹⁹ In short, plea agreements can leave little ‘rhyme or reason’ to retribution.¹⁰⁰

Turning to the goal of deterrence, one of the most fundamental problems is its premise that choosing to commit an atrocity is a rational decision made by a rational individual.¹⁰¹ Deterrence assumes that the threat of prosecutions alters the calculation made by a perpetrator by way of the fear of a likely and sufficiently severe criminal sanction acting to outweigh the perceived benefit of committing the crime.¹⁰² Nonetheless, sceptics argue that deterrence is limited for several reasons, not least because proving any deterrent effect is difficult and contestable; it is easy to identify those not deterred (atrocities merely persist), but, in contrast, the cessation of crimes, can be attributable to a range of structural, social, economic and political

⁹⁵ See indicatively, Article 28 ICTY Statute and, for example, the *Prosecutor v Momčilo Krajišnik* (Decision of the President on Early Release) IT-00-39-ES (2 July 2013). For more on this see Jonathan H. Choi, ‘Early Release in International Criminal Law’ (2014) 123(6) *Yale Law Journal* 1785.

⁹⁶ See Article 28 ICTY Statute and, for example, the *Prosecutor v Momčilo Krajišnik* (Decision of the President on Early Release) IT-00-39-ES (2 July 2013). For more on this see Jonathan H. Choi, ‘Early Release in International Criminal Law’ (2014) 123(6) *Yale Law Journal* 1785.

⁹⁷ For a consideration of these reasons see for example, Janine Natalya Clark, ‘Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation’ (2009) 20(2) *EJIL* 415.

⁹⁸ Drumbl, *supra* note 65, at 164.

⁹⁹ Quoted in Janine Natalya Clark, ‘Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation’ (2009) 20(2) *EJIL* 415, 432.

¹⁰⁰ Drumbl, *supra* note 65, at 164.

¹⁰¹ Its historical origins are associated with theorists such as Cesare Beccaria, *On Crimes and Punishments*, translation David Young (Hackett Publishing Company 1986) Thomas Hobbes *Leviathan* (Reissue Editions, OUP 2008) and Jeremy Bentham *The Rationale of Punishment* (1830) 20. For current coverage of debates about deterrence see Raymond Paternoster ‘How Much Do We Really Know about Criminal Deterrence’ (2010) 10(03) *Journal of Criminal Law and Criminology* 765, Daniel S. Nagin, ‘Criminal Deterrence Research at the Outset of the 21st Century’ (1998) 23 *Crime and Justice* 1.

¹⁰² For a brief overview of deterrence theory, see Tom Buitelaar, ‘The ICC and the Prevention of Atrocities: Criminological Perspectives’ (June 2016) *HRR* 1, 3-7 and Christopher. W Mullins and Dawn L. Rothe, ‘The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment’ (2010) 10 *Int.C.L.R.* 771, 773-774.

motivations.¹⁰³ Other critics argue that deterrence is flawed on first principles; all courts exist on the basis that crimes do occur, and conducting prosecutions is integral to the Court's legitimacy.¹⁰⁴ More fundamentally, deterrence is said to presume rather naively that an ideologically motivated 'genocidal fanatic'¹⁰⁵ would make a rational or cost-benefit calculation about the prospect of being prosecuted. However, even if such an implausible prospect was taken to be true, the commission of those crimes may have become entirely rationalised against newly established conflict and violence e.g. the commission of crimes may be defended by way of national security justifications or 'self-defence' because perpetrators now believe that the law is 'on their side.'¹⁰⁶

Furthermore, one can argue that deterrence is simply underwhelming because it is hobbled by the low likelihood and severity of sanction, the Court's jurisdictional restrictions, its lack of enforcement, and inherent prosecution selectivity. These factors result in a low cumulative probability of capture, conviction and (serious) punishment.¹⁰⁷ There is ample evidence of this, with those currently indicted by the Court, such as President Bashir of Sudan, being able to travel relatively unhindered across the African continent and often relying on the low prospect of enforcement by other States Parties.¹⁰⁸ Even with credible enforcement, one might argue that the potential sanction in comparison to extra-legal punishments undermines the prospect

¹⁰³ William A. Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2010) 61. Recent political science literature suggests a more optimistic but still limited outlook for the Court's deterrent effect. See for example Hyeran Jo and Beth A. Simmons, 'Can the International Criminal Court Deter Atrocity' (2016) 70(3) *International Organisation* 443.

¹⁰⁴ Gustavo Gallón, 'Deterrence: A Difficult Challenge for the International Criminal Court' (July 2000) The Helen Kellogg Institute for International Studies Working Paper 275 available at <https://kellogg.nd.edu/sites/default/files/old_files/documents/275.pdf> accessed 31 July 2018.

¹⁰⁵ Mark A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *Northwestern University Law Review* 539, 591.

¹⁰⁶ Mark A. Drumbl, 'A Hard Look at the Soft Theory of International Criminal Law' in Leila Nadya Sadat and Michael P Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honour of M. C. Bassiouni* (Martinus Nijhoff Publishers 2008) 8.

¹⁰⁷ Indeed, if anything, the relative leniency might lead some to view The Hague as a source of protection rather than censure. See for example the case of *The Prosecutor v. Bosco Ntaganda* (Trial Ongoing) ICC-01/04-02/06. Bosco Ntaganda voluntarily surrendered himself into custody after walking into the United States Embassy in Kigali, Rwanda on the 18th of March 2013. He was formally in the custody of the ICC four days later. No one knows specifically the reasons for why he handed himself in but it has been speculated that he feared violence within his own rebel group after internal strife. Similarly, he may have seen the opportunity to 'take his chances' with the ICC given recent case failures at the ICC. See Phil Clark, 'Distant Justice: The Politics of the International Criminal Court in Africa' Talk at the Oxford Transitional Justice Research Seminar Series (27 October 2014) <<https://podcasts.ox.ac.uk/distant-justice-politics-international-criminal-court-africa>> accessed 31 July 2018 See also more generally David Wippmann, 'Atrocities, Deterrence and the Limits of International Justice (1999) 23(2) *Fordham Int'l L.J.*473; Julian Ku and Jide Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2007) 84 *Washington University Law Review* 777.

¹⁰⁸ See, indicatively, BBC News, 'Wanted Sudan Leader Bashir Avoid South Africa Arrest' (15 June 2015) available at <<http://www.bbc.co.uk/news/world-africa-33135562>> accessed 31 July 2018; The Guardian, 'Kenya Defends Failure to Arrest Sudan's President Al-Bashir in Nairobi (29 August 2010) <<https://www.theguardian.com/world/2010/aug/29/kenya-omar-al-bashir-arrest-failure>> accessed 31 July 2018.

of genuine deterrence. On this narrow point, one might find cause to agree with the former US Ambassador to the UN, who confidently declared that where ‘cold steel has failed...the prospect of ICC deterrence is a cruel joke.’¹⁰⁹

These are substantial criticisms of the traditional criminal justice goals, but the arguments do not wholly undermine either goal. For instance, one can take issue with the attention critics pay to the degree of punishment because, as the tribunals have regularly confirmed, retribution is not about expressing revenge, but instead, incorporates restraint and the outrage of the international community.¹¹⁰ Indeed, retribution — of which there is several nuanced types more extensively discussed in the criminological literature¹¹¹ — does not mandate a specific degree of punishment to satisfy a pre-determined and sufficient desert.¹¹² Put simply, to equate retribution with ‘harsh justice’ is a basic misconception.¹¹³ Other criticisms such as selectivity does not render retribution a futile goal. For instance, Greenawalt argues that unless one can establish that retributivism imposes some threshold of selectivity beyond which it becomes inapplicable, the more pertinent question to ask is this: how is retribution to be reconciled in a system that is *necessarily* selective?¹¹⁴ Most of all, these problems of both retribution and deterrence can be readily found in domestic criminal justice systems. For example, there is no doubt that the Court’s deterrent effect is limited, but the same might be said of *any* court anywhere e.g. the flawed presumption that would-be criminals make rational calculations about the prospect of punishment is equally implausible for that of a potential burglar, or someone distributing illegal drugs. In summary, the Court’s goals of retribution and deterrence are imperfect, but one can readily question the degree to which their limits are unique to the international setting.

Nonetheless, it is the pervasive scepticism attitude towards retribution and deterrence that has provided the backdrop for the attention paid to other goals. Chief among them, is the attention that has befallen reconciliation. Admittedly, the interest in reconciliation has also been precipitated by the increasing significance of

¹⁰⁹ John R. Bolton, ‘The Risk and Weakness of the International Criminal Court from America’s Perspective’ (2001) 64(1) *LCP* 167,176.

¹¹⁰ See also *Prosecutor v Zlatko Aleksovski* (Judgement) IT-95-14/1-A Appeals Chamber (24 March 2000) para. 185.

¹¹¹ Deirdre Golash, *The Case Against Punishment: Retribution, Crime Prevention and the Law* (New York University Press 2005); Tom Honderich, *Punishment: The Supposed Justifications Revisited* (Pluto Press 2006).

¹¹² Michael S. Moore, *Placing Blame: A General Theory of Criminal Law* (Clarendon Press 1997) 231-2.

¹¹³ DeGuzman, *supra* note 65.

¹¹⁴ Alexander K. A Greenawalt, ‘International Criminal Law for Retributivists’ (2014) 35(4) *University of Pennsylvania Journal of International Law* 101.

transitional justice and restorative justice (see below). In close connection, reconciliation has frequently surfaced because of the rich debate about the alternative justification(s) of punishment and differing methods of holding individuals accountable.¹¹⁵ The mandates of the previous ad-hoc tribunals and the accompanying rhetoric of judges and prosecutors also help to explain the elevation of reconciliation in debates about the Court's goals.¹¹⁶ This has led to further scrutiny on the premise that prosecutions can (and should) contribute to reconciliation.

First and principally, it is suggested that utilising prosecutions to contribute to reconciliation can lead to exaggerated expectations. Some critics extrapolate that prosecutions should not be used to contribute to reconciliation because it can lead to a 'single mechanism mentality', whereby, alternative processes that can (and more ably) contribute to reconciliation are marginalised. Davidovic argues prosecutions should not be (explicitly) utilised to pursue reconciliation aim(s) because the 'bundling of aims in a single mechanism leads to problems not only in the way these processes are envisioned and put into practice, but also in establishing the norms by which the success of these criminal prosecutions is judged.'¹¹⁷

Second and relatedly, critics suggest that using prosecutions to contribute to reconciliation can lead to confusion as to how, precisely, prosecutions facilitate their contribution. Literature suggests that the answer to such a question depends on the ever-contrasting interpretations of reconciliation.¹¹⁸ However, in light of this fact, the resulting uncertainty has frequently led prosecutors to claim that prosecutions can contribute to reconciliation in two ways that, from the outside, are deemed mutually exclusive. On the one hand, the Court's Prosecutor has affirmed on several occasions that (retributive) justice is the pre-condition to lasting reconciliation.¹¹⁹ However, the Court's Prosecutor has also equated the admission of guilt, apologies and/or remorse as the route to reconciliation.¹²⁰ In other words, narrow practices that

¹¹⁵ For a thorough overview, see Aukerman, *supra* note 21.

¹¹⁶ Drumbl, *supra* note 65, at 150.

¹¹⁷ Jovana Davidovic, 'Finding Space for Criminal Prosecutions Post-Conflict' (2016) 33(1) *Journal of Applied Philosophy* 53, 54.

¹¹⁸ See Chapter 3.1.

¹¹⁹ Fatou Bensouda, 'The Reckoning: The Battle for the International Criminal Court' (July 2009) available at <<http://www.pbs.org/pov/reckoning/interview-fatou-bensouda/>> accessed 31 July 2018; Fatou Bensouda, 'Accountability Key to Ending Violence in CAR' available at <https://www.newvision.co.ug/new_vision/news/1474282/accountability-key-violence-car-icc-bensouda> accessed 31 July 2018. See comments made by previous Presidents of the Yugoslavia Tribunal such as Theodor Meron who argued that successfully prosecuting war crimes was the (only) route to reconciliation. See, President of the ICTY Theodor Meron, 'Procedural Evolution at the ICTY' (2004) 2 *JICJ* 520, 520.

¹²⁰ For a discussion of this version of reconciliation see, indicatively, Oliver Diggelman, 'International Criminal Tribunals and Reconciliation': Reflections on the Role of Remorse and Apology' (2016) 14(5) *JICJ* 1073; Susan

revere an acknowledgment or admission of the truth, such as pleading guilty and/or co-operating with investigators etc. are lauded for their contribution to reconciliation. For instance, in her opening speech of the trial in *The Prosecutor v. Ahmad Al Faqi Al Mahdi*¹²¹ the Prosecutor acknowledged,

I am satisfied ... Mr Al-Mahdi's admission directly helps bring justice: it helps uncover the truth and leads to the catharsis that should arise from any judicial process ... The fact that the accused recognises his criminal responsibility is crucial for Timbuktu's victims. It will also support the reconciliation process in the field.¹²²

Historically, this second way has been accorded special value and a defendant's guilty plea (often accompanied by a contrite statement) has been taken as evidence, in and of itself, of a contribution to reconciliation.¹²³ The ICTY frequently endorsed the principle that such admissions do contribute to reconciliation and, controversially, used them to corroborate lenient punishments i.e. used to mitigate sentences.¹²⁴ Today, the Court adopts a similar approach, and the Trial Chamber confirmed in *The Prosecutor v Germain Katanga* that efforts made by the accused to promote peace and reconciliation...must be taken into account in the determination of the sentence, and these efforts may reduce the level of the sentence'.¹²⁵ In *The Prosecutor v Ahmad Al Faqi Al Mahdi*, the Court accepted that the defendant's guilty admission would 'further peace and reconciliation in Northern

Dwyer, 'Reconciliation for Realists' (1999) 13(1) *Ethics and International Affairs* 81, 82-6; Jens Meierhenrich, 'Varieties of Reconciliation' (2008) 33(1) *Law and Social Inquiry* 195, 196-200; Kingsley Chiedu Moghalu, 'Prosecute or Pardon? Between Truth Commissions and War Crimes Trials' in Chandra Lekha Sriram and Suren Pillay (eds.), *Peace v. justice? The Dilemma of Transitional Justice in Africa* (University of KwaZulu-Natal Press 2009) 88-90.

¹²¹ Ahmad Al-Mahdi pleaded guilty to a charge of war crimes for intentionally directing attacks against ten buildings of a religious character in Timbuktu, in Mali between 30 June 2012 and 11 July 2012 See *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) Trial Chamber ICC-01/12-01/15 (27 September 2016).

¹²² Fatou Bensouda, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Mr Ahmad Al-Faqi Al Mahdi' (22 August 2016).

¹²³ See, generally, Oliver Digglemann, 'International Criminal Tribunals and Reconciliation': Reflections on the Role of Remorse and Apology' (2016) 14(5) *JICJ* 1073.

¹²⁴ See, indicatively, *Prosecutor v Predrag Banović* (Sentencing Judgement) IT-02-65/1-S Trial Chamber (28 October 2003) para(s) 67, 70; *Prosecutor v Miodrag Jokić* (Sentencing Judgement) IT-01-42/1-S Trial Chamber (18 March 2004) para. 77.

¹²⁵ *The Prosecutor v. Germain Katanga*, (Decision on the Sentence) ICC-01/04-01/07-3484 (23 May 2014) para. 91; See also Rule 145 of the ICC Rules of Procedure and Evidence. The Trial Chamber also added that provided the efforts were palpable and genuine, there would be no demand or expectation for 'results'.

Mali, by alleviating the victims' moral suffering through acknowledgement of the significance of the [crimes]'¹²⁶

Third, and following the criticism outlined above, sceptics suggest that expecting prosecutions to contribute to reconciliation can lead to an undue appreciation of guilty pleas. This is not to say that facilitating guilty pleas is, in and of itself, wrong or that some leniency in punishment should not be afforded as a necessary incentive. Indeed, a prosecution, by the nature of its process, is always seeking an admission of guilt at any stage of the proceedings. This pursuit reflects a retributive goal i.e. to seek a conviction that leads to punishment being dispensed. In addition, there are often desirable reasons for expediting trials e.g. the defendant's co-operation may add to the historical record of past crimes, and assist future investigations. However, the argument goes that reconciliation can lead to an (over)-gratifying of (early) guilty pleas, that has, in the past, led to morally dubious plea agreements.¹²⁷

One well-known example of such a dubious agreement can be sketched from the arrangement reached in the case of *Prosecutor v Plavšić*.¹²⁸ The ICTY's Prosecutor Carla Del Ponte, agreed to drop charges of genocide against the defendant, in exchange for a guilty plea for crimes against humanity and war crimes. Biljana Plavšić, a former Vice President of the Republika Srpska during the Balkans conflict, issued a statement of remorse at her sentencing hearing.¹²⁹ Del Ponte later admitted to looking on in horror, labelling the statement as 'full of generalistic *mea culpas*, lacking compelling detail and ultimately saying nothing'.¹³⁰ The Tribunal nonetheless sentenced her to eleven years imprisonment and she later became

¹²⁶ *The Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 Trial Chamber (27 September 2016) para. 100.

¹²⁷ See at length the discussion in *Prosecutor v Nikolic* (Judgment on Sentencing Appeal) IT-94-2-A Appeals Chamber (4 February 2005); Clark, *supra* note 87, at 66; *Prosecutor v Zaric* (Order of the Application of the President on the early release of Simo Zaric) IT-95-9 (21 January 2004) Oliver Diggelmann, 'International Criminal Tribunals and Reconciliation': Reflections on the Role of Remorse and Apology' (2016) 14(5) *JICJ* 1073.

¹²⁸ *Prosecutor v Plavšić* (Sentencing Judgment) IT-00-39&40 1/S Trial Chamber (27 February 2003).

¹²⁹ 'I was repeatedly informed of allegations of cruel and inhuman conduct against non-Serbs, I refused to accept them or even to investigate...I have accepted responsibility for my part in this. This responsibility is mine and mine alone. The knowledge that I am responsible for such human suffering and for soiling the character of my people will always be with me...I can only do what is in my power and hope that it will be of some benefit, that having come to the truth, to speak it, and to accept responsibility. This will, I hope, help the Muslim, Croat, and even Serb innocent victims not to be overtaken with bitterness, which often becomes hatred and is in the end self-destructive.' Statement of Guilt: Biljana Plavšić < <http://www.icty.org/en/content/statement-guilt-biljana-plav%C5%A1i%C4%87>> accessed 31 July 2018.

¹³⁰ See Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst War Criminals and the Culture of Impunity* (Other Press 2008) 191.

eligible for early- release after serving two-thirds of the sentence.¹³¹ During her jail term, she denied responsibility, argued that the guilty plea was for reasons of mere convenience, and failed to express regret for her actions.¹³² Subotić argues this was an example of a defendant perpetrating ‘a cynical fraud against the international tribunal and victims of crimes she ordered, endorsed, or failed to prevent.’¹³³ The Plavšić affair serves as a warning that accompanying guilty pleas with lenient punishments can undermine any purported contribution to reconciliation.¹³⁴

In light of the above, there is reason to be cautious in expecting prosecutions to contribute to reconciliation. These three criticisms, nonetheless, do not mean that the goal of reconciliation should be abandoned or marginalised. First, the premise that prosecutors (and prosecutions) are motivated by anything other than retribution and deterrence is — as a working rule — highly implausible. It is not suggested that reconciliation can, or should, supplant retribution or deterrence; these criminal justice goals are based on the very act of prosecuting and any potential goal of reconciliation is likely to be a distant third.¹³⁵ This being said, the fact that reconciliation might appear lower in a suggested ranking order does not mean it is no longer relevant. It is true that expecting prosecutions to contribute to reconciliation can risk a ‘single mechanism mentality’, but it is also true that no single mechanism can or should monopolise a contribution to reconciliation and/or seek to displace the contribution made by other mechanisms. Put another way, it is not an either/or option. If prosecutions can contribute, however modestly, to reconciliation, then one must insist on avoiding such a single mechanism mentality. It is also true that expecting prosecutions to contribute to reconciliation can risk ‘muddying’ our understandings of what a prosecution is ultimately for but these arguments simply add further weight to the case for a clear-headed approach vis-à-vis the goal. The Court and the OTP have not declared a strategy on reconciliation, merely entrenching the uncertainty. The ambiguity can be remedied by pursuing utmost

¹³¹ *Prosecutor v Plavšić*, President of the ICTY (Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs Biljana Plavšić) IT-OO-39 & 40/1-ES (14 September 2009).

¹³² ‘I sacrificed myself. I have done nothing wrong. I pleaded guilty to crimes against humanity so I could bargain for the other charges. If I hadn’t, the trial would have lasted three, three and-a-half years. Considering my age that wasn’t an option’ quoted in Jelena Subotić, ‘The cruelty of false remorse: Biljana Plavšić at The Hague’ (2012) *Southeastern Europe* 39, 48 See also Simon Jennings ‘Plavsic reportedly withdraws guilty plea’ <<https://iwpr.net/global-voices/plavsic-reportedly-withdraws-guilty-plea>> accessed 31 July 2018

¹³³ Jelena Subotić, ‘The cruelty of false remorse: Biljana Plavšić at The Hague’ (2012) *Southeastern Europe* 39, 48.

¹³⁴ For a discussion on this point see Janine Natalya Clark, ‘Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation.’ (2009) 20(2) *EJIL* 415.

¹³⁵ Mark Osiel, *Making Sense of Mass Atrocity* (CUP 2009) 170.

clarity on the concept of reconciliation — something offered by chapter three of this study. The chapter now turns to a further category of the Court's goals.

2.3 Transitional Justice

The Preamble of the Rome Statute is also said to allude to a category of ‘transitional justice’ goals. These goals can be traced to the Court being an international institution with a social and political mission. The Preamble hints at this mission by acknowledging that such crimes ‘threaten the peace, security and well-being of the world’.¹³⁶ In this light, delegates at the Rome Conference stressed the importance of other goals such as the achievement of peace and the establishment of the truth.¹³⁷ These goals spring from the Court’s historical context, including the predecessor international criminal tribunals. For instance, The International Military Tribunal was not exclusively concerned with retribution (Churchill and Stalin maintained that retribution could only be fulfilled by summary executions of the Nazi leadership). Instead, its goals included maintaining harmonious relations with post-war Germany, providing a historical record of German atrocities, supporting the ‘de-nazification’ process, and contributing to the moral (re)education of the German population.¹³⁸ The Tokyo tribunals had similar political goals; namely to establish a peaceful foundation for the Post-War Japanese State.¹³⁹ In summary, the Court operates in a context that inevitably attaches it to broad social and political goals in the societies where crimes have occurred. This section briefly explores these ‘transitional justice’ goals before turning to discuss reconciliation.

¹³⁶ Otto Triffterer, Morten Bergsmo and Kai Ambos ‘Preamble’ in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck/Hart 2016) 8-10. Furthermore, as Bassiouni explains, the growth of international criminal justice did not occur in an isolated vacuum; but grew from the forces of enhanced democratization, globalisation and political integration, particularly after the fall of the Berlin Wall. See Mahmoud Cherif Bassiouni, ‘The Philosophy and Policy of International Criminal Justice’ in Lal Chand Vohrah and others, (eds.), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 71-6; See also *Prosecutor v Furundžija*, IT-95-17/1-T Trial Chamber (10 December 1998), para. 183.

¹³⁷ ‘Summary records of the plenary meetings and of the meetings of the Committee of the Whole’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15th June -17th July 1998) A/CONF.183/13 (Vol. II). See, indicatively, comments by South Africa’s delegate (‘The establishment of an international criminal court would not only strengthen the arsenal of measures to combat gross human rights violations but would ultimately contribute to the attainment of international peace’) para. 14 p. 65; Qatar’s delegate (‘the establishment of a permanent international criminal court, which aimed not only to ensure the victory of truth and justice and the prosecution of criminals but also to spread peace and stability throughout the world.’) para. 64 p. 110.

¹³⁸ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A Knopf 1992) 50. See also Luc Reydam and Jed Odermatt, ‘Mandates’ in Luc Reydam, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors* (OUP 2012) 85; Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity 2007) 123.

¹³⁹ The Tokyo Tribunals were established to help transform Japanese political identity towards peaceful, democratic and responsible government. The intention was to demonstrate a clean break from the totalitarian past and put an end to the authority of the Japanese military. *Ibid.* Reydam and Jed Odermatt, 87-88.

To begin, one must be clear on the definition of transitional justice. The term is highly contested, but Teitel offers the most-cited version, namely, a conception of justice associated with periods of political change, characterised by legal responses confronting the wrongdoing of repressive predecessor regimes.¹⁴⁰ On this basis, it can be argued that transitional justice is not unique, nor does it have any special goals. Deputy Prosecutor of the Court James Stewart, for example, argues that transitional justice is ‘not a special kind of justice, but simply an approach to achieving justice in a time of transition from state oppression or a condition of armed conflict.’¹⁴¹ This finds expression in early understandings of transitional justice when the legacy of Nuremberg had fixed criminal prosecutions as the almost exclusive transitional justice response.¹⁴² From this perspective, transitional justice is ordinary and accounts of its goals are dominated by retribution and deterrence.¹⁴³

However, this author argues a broad definition ought to be adopted: one that reflects the modern, holistic and pluralistic approach to transitional justice prevalent today. Most preferable is the definition advanced by the UN, which interprets transitional justice as a diverse tool-kit comprising the ‘full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses[;] to ensure accountability, serve justice and achieve reconciliation.’¹⁴⁴ Such mechanisms include reparations processes, truth and reconciliation commissions, institutional reforms and other grass-roots mechanisms of redress.¹⁴⁵ This definition is preferable because transitional justice is no longer exclusively concerned with legal (or punitive) solutions — a problem long identified in the literature¹⁴⁶ — but contains debates about how to ‘do’ non-legal justice e.g.

¹⁴⁰ Ruti G. Teitel, ‘Transitional Justice Genealogy’ (2003) 6 *Harv.Hum.Rts.J.* 69, 69.

¹⁴¹ James Stewart, Conference organised by Universidad del Rosario, El Tiempo, Cyrus R. Vance Center for International Justice, UN in Colombia, International Center for Transitional Justice (ICTJ) and Coalition for the International Criminal Court (CICC) ‘Transitional Justice in Colombia and the Role of the International Criminal Court’ (13th May 2015) <<https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf>> accessed 31 July 2018.

¹⁴² Teitel, *supra* note 140, at 70; Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2002); Lauren Marie Balasco, ‘The Transitions of Transitional Justice: Mapping the Waves from Promise to Practice’ (2013) 12 *Journal of Human Rights* 198.

¹⁴³ ICTJ, ‘What is Transitional Justice’ (2009) <<https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>> (2009) accessed 31 July 2018. See also Eric A. Posner and Adrian Vermeule, who argue that transitional justice is simply comprised of typical challenges faced by the domestic law of consolidated democracies. They state that the problems within transitional justice are ‘at most overblown versions of ordinary legal problems’. See Eric A. Posner and Adrian Vermeule, ‘Transitional Justice as Ordinary Justice’ (2003) 117 *Harvard Law Review* 762, 765

¹⁴⁴ UN Security Council Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies S/2004 616** (23 August 2004) 4.

¹⁴⁵ Guidance Note of the Secretary-General, ‘United Nations Approach to Transitional Justice’ (March 2010) 2

¹⁴⁶ Kieran McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34(4) *JLS* 411.

economic, distributive, and social, and is also generally concerned with the cause of peace-building.¹⁴⁷ In this light, one should first consider the general relationship between the OTP and transitional justice.

The OTP and transitional justice are in a relationship of mutual influence. For those States (in the Court's jurisdiction) that are emerging from conflict or the occurrence of atrocities, the Court may end up being annexed to domestic transitional justice debates.¹⁴⁸ The OTP will be at the centre of such debates because prosecutions are still seen as a primary response. The OTP is likely to exert an influence because, its respect of the primacy of national prosecutions is only conditional i.e. the Office can, *de facto*, threaten intervention when the conditions under the complementarity provisions in Article 17 of the Rome Statute, appear not to be satisfied.¹⁴⁹ Closely linked, the Office can encourage national prosecutions by way of positive complementarity, i.e. endorsing attempts at national prosecutions and this may affect the course of concurrent domestic transitional justice responses.¹⁵⁰ The OTP's influence in this respect finds expression in the oversight role it adopts during the preliminary examination phase.

The OTP's preliminary examination in Colombia serves as a prime example of its influence over the progress of transitional justice responses. The intervention has been discussed in further detail elsewhere but to offer the briefest of summaries, the OTP adopted several critical positions over domestic accountability mechanisms since the preliminary examination began in 2004. This includes adopting a critical stance on the Colombian's Justice and Peace Law in 2005¹⁵¹; a mechanism designed to encourage rebel paramilitaries to demobilize and to confess their crimes in exchange for reduced sentences.¹⁵² The provision — labelled as a 'quasi-amnesty'¹⁵³

¹⁴⁷ Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31(2) *HRQ* 321; Office of the High Commissioner of Human Rights *Analytical Study on Human Rights and Transitional Justice* A/HRC/12/18 (United Nations 2009).

¹⁴⁸ Brianne McGonigle Leyh, Nuremberg's Legacy within Transitional Justice: Prosecutions are Here to Stay' (2017) 15 *Wash U. Global Stud. L Rev* 559; Ruti Teitel, 'Transitional Justice Genealogy' *Harv.Hum.Rts.J.* 16 (2003) 69, 90 See also Fletcher and Weinstein who argue international criminal trials have become 'the benchmark of accountability against which all other forms of reckoning, such as truth commissions must be judged.' Laurel E. Fletcher and Harvey M. Weinstein 'Violence and Social Repair; Rethinking the Contribution of Justice to Reconciliation' (2002) 24 *HRQ* 573, 582.

¹⁴⁹ Any potential intervention depends on the Court's jurisdiction being triggered and other procedural hurdles being overcome. See generally Chapter 1.

¹⁵⁰ Michael Humphrey, 'International Intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda' (2003) 2(4) *Journal of Human Rights* 495,500; Galbraith, *supra* note 61, at 91-92.

¹⁵¹ Le 975 de 2005, Ley de Justicia y Paz [Law 975 of 2005, Law of Justice and Peace] Diaro Oficial [D.O.] 45.90 (25 July 2005).

¹⁵² OTP, *Situation in Colombia: Interim Report* (November 2012) para. 164; The basic purpose of the Justice and Peace Law has been described: 'to balance the effective demobilization of the armed groups—by offering alternative and reduced sentences to demobilized former combatants—[with] the obligation to guarantee victims'

— later required, the then Prosecutor to stress that there could be no amnesties for those responsible for crimes under the Court’s jurisdiction (even during a peace process) and he went on to signal to Colombian prosecutors to focus their efforts on those in senior positions.¹⁵⁴ Later on, the OTP applied frequent and tangible pressure on the domestic authorities after the introduction of the Colombian Legal Framework for Peace in 2012, comprised of a domestic prosecution strategy that targeted the most responsible, alongside a conditional dropping (i.e. some suspended sentencing or alternative sanctions) of cases that potentially fell with the Court’s jurisdiction.¹⁵⁵ The OTP, by way of publishing a detailed Interim Report, robustly emphasised the strategy’s shortcomings, expressed concerns at measures that could shield persons from criminal responsibility, and went on to pressure the Colombian authorities to issue proceedings against low-level perpetrators too.¹⁵⁶

To offer a further and more notable example, the OTP’s intervention in Uganda played a crucial (if not controversial) role in the course of its transitional justice agenda. The OTP issued arrest warrants against the leaders of the Lord’s Resistance Army on the 8th of July 2005.¹⁵⁷ During the Juba Peace Process in 2006, members of the LRA demanded that the arrest warrants be dropped as part of its negotiation for a final peace settlement with the Ugandan Government. In an often-cited criticism, the Prosecutor, refused to withdraw the arrest warrants and this lack of flexibility, many suggest was a key reason in the failure of the peace talks.¹⁵⁸ Equally, there has been some discussion that the arrest warrant had a positive impact and helped to bring the LRA leaders to the negotiating table.¹⁵⁹ Whatever the final

rights. The demobilized combatants who applied to take part in the process were required to meet a series of conditions... confess to their crimes, contribute to the clarification of the truth about these crimes and the paramilitary phenomenon, contribute to the reparation of victims, and submit to a re-socialization process. Those who complied with these requirements would receive reduced prison sentences of between five and eight years. See Maria Camila Moreno, ‘Uncovering Colombia’s Systems of macro-criminality’ (12 August 2014) <<https://www.opendemocracy.net/opensecurity/mar%C3%ADa-camila-moreno/uncovering-colombia%27s-systems-of-macrocriminality>>accessed 31 July 2018.

¹⁵³ Jennifer Easterday, ‘Beyond the ‘shadow of the ICC: Struggles over the conflict narrative in Colombia’ in Christian De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) 44.

¹⁵⁴ René Urueña, ‘Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003-2017’ (2017) 111(1) *AJIL* 104, 112.

¹⁵⁵ *Ibid.* 116-7.

¹⁵⁶ OTP, *Situation in Colombia: Interim Report* (November 2012) para(s). 204-205.

¹⁵⁷ Those indicted include Joseph Kony (still at large), Raska Lukwiya (now deceased), Okot Odhiambo (now deceased), Dominic Ongwen (currently on trial), and Vincent Otti (at large and possibly deceased). Their alleged crimes include crimes against humanity committed in the context of a conflict between the LRA and the national authorities in Uganda since 1 July 2002.

¹⁵⁸ For a thorough coverage of this debate see in Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide* (CUP 2015) 232-264.

¹⁵⁹ Payam Akhavan, ‘Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticisms with Political Realism’ (2009) 31 *HRQ* 624, 641-646.

analysis, the OTP's intervention in insisting on prosecutions is an example of its 'positive complementarity' role and, arguably helped to occasion the implementation of legislative and institutional measures in Uganda that would best pursue accountability for atrocities (e.g. the establishment of a War Crimes Division of the High Court of Uganda).¹⁶⁰ Given this context, it is hardly surprising that former Prosecutor, Luis Moreno-Ocampo, once declared that the Court is 'part of the transitional justice project'.¹⁶¹

By this token, the OTP's selection procedure is likely to be sensitive to transitional justice goals. The procedure is 'thickened' by the domestic society's imperatives that can often change over time.¹⁶² The Office's influence in Colombia during its preliminary examination necessarily changed after the peace process began in earnest in 2012 and, as HRW confirm, over time the 'OTP's engagement became more difficult, narrowing opportunities for a more confrontational approach lest it be viewed as spoiling the peace'.¹⁶³ Quoting one official from the Office, 'The OTP walks a thin line, especially regarding the peace process ... Being responsible requires that we are cautious ... and the credibility of the OTP could be at stake...no one should undermine a peace process irresponsibly.'¹⁶⁴ In other respects, the OTP recognizes and endorses the role that can be played by national 'truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.'¹⁶⁵ It has also confirmed that it works with a variety of other mechanisms to best integrate different transitional justice approaches and ensure all efforts are complementary and comprehensive.¹⁶⁶ There is little doubt that the OTP can influence, and be influenced by, transitional justice priorities. This being the case, the question to ask is what are the Court's transitional justice goals.

¹⁶⁰ Lucy Hovil, 'Challenging International Justice: The Initial Years of the International Criminal Court's Intervention in Uganda' (2013) 2(1) *Stability: International Journal of Security and Development*; International Center for Transitional Justice 'Uganda: Impact of the Rome Statute and the International Criminal Court' (May 2010) <<https://www.ictj.org/sites/default/files/ICTJ-Uganda-Impact-ICC-2010-English.pdf>> accessed 31 July 2018.

¹⁶¹ Luis M. Ocampo, 'Transitional Justice in Ongoing Conflicts' (2007) 1(1) *IJTJ* 1, 8-9 See also Obiora Chinedu Okafor and Uchechukwu Ngwaba, 'The International Criminal Court as a Transitional Justice Mechanism in Africa: Some Critical Reflections' (2015) 9 (1) *IJTJ* 90, 105-7.

¹⁶² Mirjan R. Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chi-Kent L. Rev.* 329, 349; UN Security Council Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* S/2004 616* (23 August 2004) 15.

¹⁶³ HRW, 'Pressure Point: The ICC's Impact on National Justice: Lessons from Colombia, Georgia, Guinea and the United Kingdom' (3 May 2018) 57.

¹⁶⁴ *Ibid.* 50.

¹⁶⁵ OTP, *Policy on the Interests of Justice* (September 2007) p.8.

¹⁶⁶ *Ibid.*

Identifying these goals is not straightforward. Transitional justice goals are multiple, complex and have been described as ‘irreconcilable.’¹⁶⁷ The Rome Statute offers no guidance or any semblance of clarity about them. The goals are difficult to pin-down because they are consequential, cast in the general social good, and are the product of expectations that demand, in broad terms, a society’s normative transformation.¹⁶⁸ They are, of course dependent on context, but in this regard, the literature on the Court has tended to describe the goals in a dizzying array of ways.¹⁶⁹ Descriptions of these goals include; securing dignity and justice for victims, establishing a historical record, promoting reconciliation, re-establishing the rule of law and contributing to peace;¹⁷⁰ ‘to outlaw war altogether, erase bitterness or to establish new international norms that help lift us out of anarchy’;¹⁷¹ ‘to produce a reliable historical record of the context of the crime, to provide a venue for giving voice to international crime’s many victims, to propagate human rights values ... [as well as] make advances in international criminal law.’¹⁷² The list continues: to reconcile victims with their erstwhile tormentors, because... the latter have now paid for their crimes;¹⁷³ and to ‘[consolidate] democratic transitions...and to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals.’¹⁷⁴ In light of this context, one needs clearly to distil specific goals.

One can state with reasonable certainty that the transitional justice literature focuses on, in addition to the foundational goal of justice, three specific goals that frequently recur: peace, truth and reconciliation. It is not within the purpose or scope of this study to conduct a more comprehensive discussion on peace.¹⁷⁵ There has been much written on the now well-established ‘peace-justice’ debate and an analysis of peace, in any event, is not required for present purposes.¹⁷⁶ Instead, truth and reconciliation are of greater relevance. These goals are often juxtaposed to one

¹⁶⁷ Bronwyn Anne Leebaw, ‘The Irreconcilable Goals of Transitional Justice’ (2008) 30(1) *HRQ* 95.

¹⁶⁸ Ruti Teitel, *Transitional Justice* (OUP 2000) 28.

¹⁶⁹ Ibid. See also Alexander K. A Greenawalt, ‘Justice without Politics: Prosecutorial Discretion and the International Criminal Court’ (2007) 39 *N.Y.U. J. Int’L L. & Pol* 583, 602.

¹⁷⁰ UN Security Council Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies S/2004 616** (23 August 2004) 15.

¹⁷¹ Bass, *supra* note 142, at 284.

¹⁷² Damaška, *supra* note 162, at 331.

¹⁷³ Antonio Cassese, ‘Reflections on International Criminal Justice’ (1998) 61 *MLR* 1, 6.

¹⁷⁴ Diane F. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100(8) *Yale Law Journal* 2537, 2542.

¹⁷⁵ See, indicatively, Hugo Van Der Merwe and others (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (USIP 2009); Chandra Lekha Sriram and Suren Pillay (eds.), *Peace v. justice? The Dilemma of Transitional Justice in Africa* (University of Kwa-Zulu Natal 2009).

¹⁷⁶ For an extensive overview of this debate, see Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court’s Interventions on Ending Wars and Building Peace* (OUP 2016) 19-35.

another with the former said to be crucial to establishing the latter. Furthermore, reconciliation is said to be *the* central and overarching goal of transitional justice.¹⁷⁷

Turning, then, to the OTP's relationship to the goals of truth and reconciliation. First, and self-evidently, the OTP is concerned with truth by virtue of its prosecutorial functions. Under Article 54 of the Rome Statute, the conduct of an investigation is premised on establishing the truth, including the equal investigation of incriminating and exonerating circumstances.¹⁷⁸ In this regard, Article 54(1) (a), in effect, blends the prosecutor's functions into a mix of the civil law inquisitorial tradition and the adversarial common law function.¹⁷⁹ Establishing the truth is the primary duty of the investigation; there are no temporal limits to the duty, and it persists before, and after, the confirmation of any charges.¹⁸⁰ Indeed, 'objective truth-seeking' is further expressed in OTP's Code of Conduct.¹⁸¹ The obligation to uncover the truth acts as a guarantee of impartiality, and avoids the risk that the Prosecutor will descend to a 'level of a competition where winning the case is the only goal.'¹⁸²

The very notion of truth is complex, but it is significant intrinsically and for its instrumental value. The truth is contested and requires (subjective) interpretation i.e. the truth is rarely understood to be a single, universal, objective reality.¹⁸³ The 'truth' defies a rigid definition, and there may be multiple truth(s) that are understood to be in competition to one another and vulnerable to distortion (see

¹⁷⁷ See Hugo Van Der Merwe, 'Delivering Justice during Transition: Research Challenges' in Hugo Van Der Merwe, and others (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (USIP 2009) 117.

¹⁷⁸ The use of an imperative 'shall' denotes that there is no discretion available for the Prosecutor with regard to subparagraphs (a) (b) and (c) of Art.54(1)(a) ICCSt (Duties and Powers of the Prosecutor with respect to investigations).

¹⁷⁹ Morten Bergsmo, Frederik Harhoff and Dan Zhu 'Article 42' in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Beck/Hart 2016) 1382.

¹⁸⁰ See *The Prosecutor v. Lubanga*, (Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber 1 entitled 'Decision establishing General Principles Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence) ICC-01/04-01/06-568 Appeals Chamber (13 October 2006) para. 52.

¹⁸¹ OTP, *Code of Conduct for the Office of the Prosecutor* (5 September 2013) Art. 49 (...stating that 'the Office shall investigate incriminating and exonerating circumstance equally in all steps involved in the planning and conduct of investigative and prosecutorial activities. In particular, the Members of the Office shall a) conduct investigations with the goal of establishing the truth, and in the interests of justice; b) consider all relevant circumstances when assessing evidence, irrespective of whether they are to the advantage or the disadvantage of the prosecution and c) ensure that all necessary and reasonable enquiries are made, and the results disclosed in accordance with the requirements of a fair trial, whether they point to the guilt or the innocence of the suspect') <<https://www.icc-cpi.int/iccdocs/oj/otp-COC-Eng.PDF>> accessed 31 July 2018.

¹⁸² Morten Bergsmo, Frederik Harhoff and Dan Zhu 'Article 42' in Triffterer O and Ambos K (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition, Beck/Hart 2016) 1384.

¹⁸³ Audrey R. Chapman, 'Truth-Finding in the Transitional Justice Process' in Hugo Van Der Merwe and others (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (USIP 2009) 91-100.

chapter three).¹⁸⁴ However, truth's intrinsic value is often overshadowed by its instrumental benefit. Those benefits include the fact that establishing an authoritative record about past crimes helps victims and the society in which they live to heal, mainly, by removing the prospects of communal or official denial of the atrocities.¹⁸⁵ In so doing, the produced record alongside any official acknowledgement can crucially contribute to the cause of reconciliation.¹⁸⁶ In this regard, truth, in some form, and however contested or challenging for those in society to accept or believe, is vital on the road to reconciliation.

The OTP's concern for reconciliation is based on its core pursuit of justice and truth. This discussion is developed in the following chapter but, for now, one need only state that the pursuit of truth is essential to reconciliation; in the words of Archbishop Desmond Tutu, 'reconciliation is not about pretending that things were other than they were [and if] based on falsehood ... it would not be a lasting or true reconciliation.'¹⁸⁸ In a similar way, prosecutions aim to ensure justice is not only done, but also seen (to be done), and this may indirectly contribute to reconciliation. Some of the suggested benefits of prosecutions to reconciliation are aptly surmised by Robinson:

First, it can help expose violent extremists for what they are—criminals—thereby stigmatising them, diminishing their influence and removing them from power and society. Second, by providing survivors with a sense that justice has been done, it can help end cycles of revenge and vigilante justice, a precondition for real reconciliation. Third, by individualising guilt and exposing the role of leadership group in inciting hatred, prosecution helps a society overcome an 'us' versus 'them' outlook and demonstrates how opportunists manipulated sentiments for their own goals. Fourth, prosecution signifies a clean break with the regimes of the past and establishes the legitimacy of the new democratic government, demonstrating that it respects human rights and the rule of law.¹⁸⁷

¹⁸⁴ Fletcher and Weinstein, *supra* note 148, at 586-9; Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies* (University of Pennsylvania Press 2007) 140-151.

¹⁸⁵ Chapman, *supra* note 183, at 92-6.

¹⁸⁶ *Ibid.*

¹⁸⁷ Daryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14(3) *EJIL* 481, 489.

¹⁸⁸ Archbishop Desmond Tutu 'Foreword by Chairperson' Truth and Reconciliation Commission of South Africa Report Volume One (29 October 1998) available at <<http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>> accessed 31 July 2018 para. 69.

Critics of course, argue that these benefits of criminal prosecutions to reconciliation are only purported. There has been a dearth of positive empirical evidence to support such a contribution. However, there is equally no empirical evidence to suggest that prosecutions do *not*, under any conditions contribute to reconciliation. Some sceptics counter-claim and argue that other mechanisms such as truth and reconciliation commissions are more effective in contributing to reconciliation. Yet, to emphasise the contributions of other mechanisms is, again, to falsely imply an either/or dichotomy; it is an assertion that does not mean that prosecutions cannot contribute to reconciliation too. The burden of proof should be firmly on those who argue that prosecutions cannot *definitively* contribute to reconciliation, and, as yet, there is no evidence to substantiate such a claim.

One can, therefore remain optimistic about the OTP's contribution to reconciliation, but still be careful about making assumptions. One such assumption includes where reconciliation can, or ought, to occur. First, one needs to recognize the fact that 'reconciliation is never [just] a theoretical matter but always happens in a specific context.'¹⁸⁹ In this light, one must interrogate this context, namely, those types of societies where one hopes to see empirical evidence of its achievement. These societies can differ depending on several factors including the nature, degree and scale of the atrocities.¹⁹⁰ Seils is undoubtedly correct when he argues that 'understanding context is particularly important in framing any discussion of reconciliation, as its meanings and aims will vary from place to place'.¹⁹¹ Kerr and Mobekk also support this argument and emphasise that there are no 'one-size fits all' answers. They argue that the success of prosecutions in helping to advance reconciliation depends on, amongst other things, a nuanced understanding of a society's historical, social, cultural and political context, the nature of the conflict and the needs of the victims.¹⁹² The subsequent chapter offers the OTP some specificity about the relevant context for reconciliation, but for now, this chapter turns to the final category of the Court's goals.

¹⁸⁹ David Bloomfield. 'Reconciliation: An Introduction' in David Bloomfield and others (eds.), *Reconciliation After Violent Conflict* (IDEA 2003) 16.

¹⁹⁰ Clark, *supra* note 87, at 41.

¹⁹¹ Paul Seils, 'The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions' International Center for Transitional Justice Briefing Paper (June 2017) <<https://www.ictj.org/sites/default/files/ICTJ-Briefing-Paper-Reconciliation-TJ-2017.pdf>> accessed 31 July 2018.

¹⁹² Rachel Kerr and Eirin Mobekk, *Peace & Justice: Seeking Accountability after War* (Polity Press 2007) 10.

2.4 Restorative Justice

The Preamble of the Rome Statute makes a significant, albeit, fleeting reference to the Court's restorative justice goals. The second paragraph's reference to the 'victims of unimaginable atrocities' reflected the fact that delegates to the Rome Conference felt that 'the eyes of the victims of past crimes, and of the potential victims of the future, were fixed firmly upon them.'¹⁹³ Accordingly, the Rome Statute is said to recognise victims as actors of international criminal justice, demonstrating that the Court has a punitive and a restorative function.¹⁹⁴ The suggestion that the Court has restorative justice goals can be traced to the Court's strategies on victims,¹⁹⁵ and numerous statements made by the Court's President(s) and even opinions of the judges.¹⁹⁶ The rationale for such claims rests, almost exclusively, on opportunities for victim participation at the Court. In this light, this brief section explores the Court's restorative justice goals before turning to discuss reconciliation.

To begin, one must remark on two conceptual concerns. First, it should be acknowledged that there are several contested definitions of restorative justice. These definitions range from those focused on the process of restorative justice (i.e. one that is practice-based) to those that concentrate on its eventual aims.¹⁹⁷ It is not within the scope of the present study to survey a range of definitions found in the literature or engage extensively in debates about its various meanings. It is sufficient for present purposes, to refer to one of the most cited definitions of restorative justice: that of a process 'whereby parties with a stake in a specific offence

¹⁹³ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June -17 July 1998) A/CONF.183/13 (Vol. II) p.62 para. 12.

¹⁹⁴ ASP, *Court's Revised Strategy in Relation to Victims* ICC-ASP/11/38 (5 November 2012) para. 2.

¹⁹⁵ *Ibid*; ASP-ICC, *Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims* ICC-ASP/12/41 (11 October 2013) para. 28. See also ASP, *Report of the Court on the strategy in relation to victims* ICC/ASP/8-45 (10 November 2009) para. 3 (A key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but also a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims.').

¹⁹⁶ See, indicatively, President Silvia Fernandez de Gurmendi, 'End of Mandate Report 2015-2018' (9 March 2018) para. 114; Judge Sang-Hyun Song Remarks at the Opening Session World Parliamentary Conference of Human Rights, International Human Rights Day (10 December 2012); Judge Eboe-Osuji, *The Prosecutor v Uhuru Muigai Kenyatta*. ICC-01/09-02/11 Trial Chamber V (b) (29 November 2013) para. 61. For an overview of other claims made about restorative justice see, Claire Garbett, 'The International Criminal Court and restorative justice: victims, participation and the processes of justice' (2017) 5(2) *Restorative Justice: An International Journal* 198, 199.

¹⁹⁷ For an in-depth overview of the definition of restorative justice see, Kathleen Daly and Gitana Proietti-Scifoni, 'Reparation and Restoration' in Michael Tonry (ed.), *The Oxford Handbook of Crime and Criminal Justice* (OUP 2011).

collectively resolve how to deal with the aftermath of the offence and its implications for the future.’¹⁹⁸ Thus, restorative justice is said to be a process that encompasses practices of communication and opportunities for participation of all relevant stakeholders.¹⁹⁹ Equally, and expressed in most accounts of restorative justice, is the significance of victim participation, principally, so that victims have ownership and/or influence on the process and decision-making that can provide them with redress.²⁰⁰

Second, one must also acknowledge that restorative justice is considered by some scholars to be antithetical or inimical to retribution i.e. fundamentally at odds with prosecutions.²⁰¹ These accounts have, to some degree, deeper philosophical underpinnings, and tend to place more value on apologies and forgiveness.²⁰² However, as Daly argues, the fault-line between retributive and restorative justice, depends only on how people understand and use both sets of terms. Unless one attempts to clarify the term properly, the divide between the two types is often more presumed or occasionally imagined, whereby retribution is readily reduced to a *bad* kind of justice and that of restoration, by default, prevailing as a superior kind.²⁰³ This perceived divide tends to view these principles as inherently contradictory but, in reality, one can depend on one another. For example, Duff argues that crimes can ‘wrong’ a victim, who are subsequently ‘repaired’ or ‘restored’ when the offender undergoes a form of censure i.e. prosecution and subsequent punishment.²⁰⁴ In this sense, though retributive and restorative justice have different points of emphasis, the latter paradigm is not necessarily incompatible or inimical to criminal prosecutions.²⁰⁵

¹⁹⁸ Tony. F Marshall, ‘The Evolution of Restorative Justice in Britain’ (1996) 4(4) *European Journal of Criminal Policy and Research* 21, 37; See, originally, Tony F. Marshall, *Restorative Justice: An Overview* (Home Office 1999).

¹⁹⁹ Janine Natalya Clark, ‘The three R’s: retributive justice, restorative justice, and reconciliation’ (2008) 11(4) *Contemporary Justice Review* 331, 339-340.

²⁰⁰ Hugo Van Der Merwe, ‘Delivering Justice during Transition: Research Challenges’ in *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (USIP 2009) 119-20.

²⁰¹ For an overview of such accounts, see Kathleen Daly, ‘The Punishment Debate in Restorative Justice’ in Jonathan Simon and Richard Sparks (eds.), *The Handbook of Punishment and Society* (Sage 2012).

²⁰² See the comments of Archbishop Desmond Tutu’s rejection of retributive justice in his defence of South Africa’s Truth and Reconciliation Commission (‘We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of Ubuntu, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community that he has injured by his offense.’) Quoted in David A. Crocker, ‘Retribution and Reconciliation’ (2000) 20(1) *Philosophy and Public Affairs* 1, 3.

²⁰³ Kathleen Daly, ‘Restorative Justice: The Real Story’ (2002) 4(1) *Punishment and Society* 55, 58-9.

²⁰⁴ Anthony R. Duff, ‘Restoration and Retribution, Andrew Von Hirsch and others (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart 2003) 43, 44-8.

²⁰⁵ Clark, *supra* note 199, at 340.

In this context, the Court and the OTP demonstrate a strong commitment to restorative justice. The OTP's endorsement of victims is made by way of fully supporting victim participation (as formally established under Article 68(3) of the Rome Statute) and recognising victims as actors (rather than passive subjects) in the international criminal justice system.²⁰⁷ The OTP has confirmed that bureaucratic or resource-related arguments are never a basis to oppose victims' participation once those legal requirements are met.²⁰⁸ In its legal submissions on victims' participation, and its Policy Paper on Victims' Participation, the OTP has underlined its endorsement of victim participation. In summary, the Office has underlined that the Rome Statute;

[Empowers] victims as an actor in the international criminal justice, with a right to express their views and concerns independently in proceedings where their personal interests are affected. The framework established in the Rome Statute regarding victim participation represent a key innovative feature of this Court, and is, in the Prosecution's view, a milestone in international criminal justice...which recognises victims as actors and not only passive subjects of the law and grants them specific rights. It is a main feature of the Statute and the Rules which seek to define those rights with as much precision as possible the nature of those rights (right to protection, right to participate, expressing views and concerns at all stages of the proceedings where their personal interests are affected) and the procedures to implement them.²⁰⁶

More specifically, the OTP's support of victim participation encompasses its commitment to address the interests of victims in its work, to seek their views at an early stage, before an investigation is launched, and to continue to assess their interests on an on-going basis.²⁰⁹ Its victim-responsiveness is intended to ensure victims are 'part of the justice process [so] they will have confidence in the justice process and view it as relevant to their day-to-day existence rather than as remote,

²⁰⁶ *Situation in Darfur, Sudan*, Prosecution's Document in Support of Appeal against the 6 December 2007 Decision on the Victims' Applications for Participation in the Proceedings, ICC-02/05-125 (18 February 2008); OTP, *Policy Paper on Victim Participation* (April 2010) p. 5.

²⁰⁷ OTP, *Policy Paper on Victim Participation* (April 2010) p.2; *Prosecutor v Thomas Lubanga Dyilo*, (Prosecution's Document in Support of Appeal against Trial Chamber I's 18 January 2008); (Decision on Victims Participation) ICC-01/04-01/06-1219 Trial Chamber I (10 March 2008).

²⁰⁸ OTP, *Policy Paper on Victim Participation* (April 2010) p.5.

²⁰⁹ *Ibid.* p. 3.

technical and irrelevant.’²¹⁰ The intention is that when victims perceive justice, it can contribute to their healing process by repairing the harm done to them, and thus helping to restore them.²¹¹ However, this is not to say that the rhetoric converges with the reality. The extent to which the OTP can properly deliver upon its commitment is up for debate because it remains unclear how the OTP’s systematic addressing of the interests of victims is operationalised.²¹² This necessarily leads to questions about *how* the OTP *represents* those interests in the procedure that leads to a selection decision — a theme taken up in chapter four.²¹³ The question that follows is to identify the goals of restorative justice.

Most relevant for present purposes is arguably the most pivotal restorative justice goal: reconciliation. This finds expression in restorative justice’ aiming to undo or repair the harm(s) done to the victim by seeking to heal and re-empower victims.²¹⁴ It also resonates with an ambition to assist ‘healing ... moral learning, community participation and community caring, respectful dialogue ... and making amends.’²¹⁵ For some commentators, restorative justice is taken to be synonymous with reconciliation.²¹⁶ This finds expression in Llewellyn and Philpott’s argument that restorative justice and reconciliation are partner principles and share a common parentage.²¹⁷ However, restorative justice ultimately aims for reconciliation, in some form, because restoring a victim’s relationships can (though not always) lead to a desire to reconcile with an offender but also to the communities to which an offender belongs.²¹⁸ In this context, restorative justice also pays much-needed attention to communities. In societies that have experienced atrocities, communities are an essential audience as;

²¹⁰ Ibid. p. 2.

²¹¹ ASP, *Court’s Revised Strategy in Relation to Victims* ICC-ASP/11/38 (5 November 2012) para. 2

²¹² OTP, *Policy Paper on Victim Participation* (April 2010) 3; OTP *Prosecutorial Strategy 2009-2012* (1 February 2010) para. 22; ASP, *Report of the Court on the Strategy in relation to victims* ICC-ASP//8/45 (10 November 2009) para. 46.

²¹³ On the complexities of representation see, generally, Rachel Killean and Luke Moffett, ‘Victim Legal Representation before the ICC and ECCC’ (2017) 15 *JICJ* 713, 730-2.

²¹⁴ See Aukerman, *supra* note 21, at 77-8; See also Howard Zehr, *Changing Lenses: New Focus for Crime and Justice* (3rd Edition, Herald Press 1991).

²¹⁵ John Braithwaite, ‘Restorative Justice: Assessing Optimistic and Pessimistic Accounts’ (1999) 25 *Crime and Justice* 1, 6

²¹⁶ David A. Crocker, ‘Retribution and Reconciliation’ (2000) 20(1) *Philosophy and Public Policy Quarterly* 1, 5.

²¹⁷ Jennifer J. Llewellyn and Daniel Philpott, ‘Restorative Justice and Reconciliation: Twin Frameworks for Peacebuilding’ in Jennifer J. Llewellyn and Daniel Philpott (eds.), *Restorative Justice, Reconciliation, and Peacebuilding* (OUP 2014) 16.

²¹⁸ See Aukerman, *supra* note 21, at 77-8.

...the community plays an integral part in the solution of social conflict. The focus on relationships requires not only the inclusion, but also, the meaningful participation of all those with a stake in ... the development of a just future.²¹⁹

Therefore, a restorative justice perspective on reconciliation also requires a degree of concentration on the notion of the community. This, however begs further questions about the specific communities one is referring to and the needs and perceptions of those victims that reside within them. The subsequent chapter offers the OTP some further specificity by addressing such questions.

²¹⁹ Llewellyn and Philpott, *supra* note 217, at 21.

Conclusion and Recommendations

The OTP's selections are no doubt motivated by a range of pragmatic considerations, including costs, resources, the availability of evidence, and, the prospect of a successful investigation and prosecution. The immediate motives behind selection decisions are usually pragmatic. In this sense, motives only paint a very limited picture about an organisation's procedure(s) and decision-making. By contrast, one must be able to identify an organisation's official goals to determine its ultimate effectiveness. This is a question of a different order than simply interrogating the motives behind a particular selection. In respect of the OTP, this means identifying its (selection) goals i.e. what is a given selection's long-term aim or desired result.

The OTP's selection goals are ultimately determined by the Court's goals. The Court's official long-term goals are crucial to judging effectiveness in terms of outcomes i.e. external behavioural changes. Currently, the Court has preferred to establish many operative goals i.e. those based on its day-to-day operations and these influence the OTP's policies and strategies. The OTP, in turn, has also established numerous operative goals that are focused on its outputs. However, perhaps in light of the Rome Statute not offering clarity or certainty, the Court has not established and nor has it engaged in establishing official long-term goals.

This chapter suggested a way forward by adopting a foundational perspective of justice. Under the Rome Statute, the Court is frequently associated with three categories of justice; criminal, transitional and restorative, and each comprises their own set of goals. Using these three categories, this chapter explored the Court's goals and sharpened the study's focus on reconciliation. In doing so, the chapter established a foundation for the OTP to be concerned about reconciliation. The chapter's exploration, more generally, supported the argument that there must be clarity as to the concept of reconciliation and further specificity as to its context and audience. I turn to this task next, but the preceding exploration, nonetheless, has laid a foundation for an OTP strategy towards reconciliation. Preceding the development of this strategy requires, *a priori* steps establishing official goals, and in this light, the chapter concludes with the following recommendations.

First, the Court, alongside the ASP, must take up the challenge of developing a consensus on official long-term goals. Reaching such a consensus on the Court's

goals will no doubt be challenging, take time, require resources, and an engagement with a range of stakeholders. However, these reasons are not enough, in and of themselves, to avoid making such an endeavour. Indeed, the consequences of failing to take efforts to establish the Court's official goals are highly damaging, because the continuing absence of agreement can 'muddy' our understandings of its effectiveness. The commitment to build a consensus could be aligned with the Court's current development of performance indicators — a project hindered and fundamentally weakened by the absence of such official goals.²²⁰ The Rome Statute, despite being in a state of relative infancy is, at the time of writing, entering its 21st year. The time for such a project has arrived

Second and relatedly, the OTP, as an independent organ of the Court, need not wait for a Court-wide agreement but, instead, can open its own consultation on goals, objectives and outcomes. The typology of justice outlined in this chapter could form such a blueprint for a consultation. This would demonstrate the Office's commitment to boosting transparency by declaring its position on a range of goals and, in doing so, help to manage external expectations of the Court. Otherwise, the risk is that these goals only ever appear as a retrospective afterthought, or conveniently left to be constructed by the exigencies of a Situation and/or case. Instead, an OTP consultation should focus on the relationship between its procedure(s), policies and strategies and its overall goals. The establishment of official long-term goals would provide a coherent foundation to motivate practices that are more effective and incentivise the development of objective measurement(s) as to its contribution to the said goals.²²¹

Third and finally, the OTP should undertake a holistic and detailed assessment of individual goals. This involves understanding a single goal from foundational perspectives i.e. that of criminal, transitional and restorative justice. Doing so will help the OTP develop an integrated and multi-faceted strategies oriented towards specific goals. Indeed, and specifically in relation to reconciliation, Drumbl has argued for integrated responses that can blend differing types of justice.²²² This might require the OTP to undertake a fresh audit of its organisational

²²⁰ See the conclusion of Chapter 6 and the study's final concluding remarks.

²²¹ See Aukerman, *supra* note 21, at 92-4.

²²² Mark Drumbl Quoted in Janine Natalya Clark, 'The Three R's: Retributive Justice, Restorative Justice, and Reconciliation' (2008) 11(4) *Contemporary Justice Review* 331, 332-3.

behaviours, procedures and decisions and seek to re-orientate them towards specific goals.

* * *

This chapter has nonetheless, left some key questions unanswered. To take a brief step back, it is recognised that many organisations are likely to grapple with a problem of ‘goal ambiguity’: competing understandings of goals. For those working on the inside, this problem may be inevitable particularly because organisations may prefer a degree of ‘constructive ambiguity’²²³ i.e. preferring the goal to remain general and vague so as to retain freedom in how it can be achieved, and/or avoiding the use of specific terms on a contested concept so as to readily deflect external criticism. However, such a position of interpretive leeway can complicate and limit organisational effectiveness. For example, a goal that is left unduly abstract can be difficult to translate into operations or policies. This, in turn, can limit the development of effective strategies and compound the method(s) of objectively measuring progress towards the goal. Building on the concerns raised in this chapter, the study now offers an in-depth examination of the goal of reconciliation.

²²³ This expression is often credited to the former US Secretary of State Henry Kissinger. See <<https://www.brookings.edu/opinions/when-ambiguity-is-destructive/>> accessed 31 July 2018.

Chapter Three

The Goal of Reconciliation

Reconciliation is deeply compelling precisely because it implicates not only the worst that human beings are capable of, but the best as well. Reconciliation embodies the possibility of transforming war into peace, trauma into survival, hatred into forgiveness; it is the way human beings connect with one another, against all odds. It exemplifies the potential for virtually limitless strength and generosity of spirit that is also immanent in human nature.¹

For most commentators, reconciliation is deemed to be desirable and worthy of support. However, for an idea that is presumed to be so attractive, there remains a lack of consensus as to its meaning. Reconciliation is described as a ‘murky concept with multiple meanings.’² Indeed, it is notoriously contested, and attracts a range of interpretations; on the one hand, some understand it to be a fixed and ‘ideal-state’ and, conversely, others argue reconciliation is a process.³ It can be said to occur at an interpersonal level, but, one can readily find multiple references to community, societal, national and political forms of reconciliation. The concept is associated with multiple components, such as co-existence, peace, justice and truth, and can be described in terms that are primarily retrospective (referring to past-conflict) or, by contrast, language that is prospective (i.e. denoting a future vision of society). It is little wonder then, that there is such uncertainty about what reconciliation actually looks like, and many would simply resort to a response of ‘I know it when I see it.’⁴ This lack of conceptual clarity is problematic and requires consideration of the context in which reconciliation takes place.

¹ Erin Daly and Jeremy Sarkin, *Reconciliation in Divided Societies: Finding Common Ground* (UPP 2007) 4.

² Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 5.

³ See Bronwyn Leebaw, ‘The Irreconcilable Goals of Transitional Justice’ (2008) 30(1) *HRQ* 95, 106.

⁴ Lorna McGregor, ‘Reconciliation: I know it when I see it’ (2008) 9(2) *Contemporary Justice Review* 155.

Reconciliation is frequently raised in the context of divided societies i.e. those marked by group tensions after inter-group violence and/or the commission of identity-based crimes. These societies contain ‘affected communities’ (comprised of victims and those most affected by the crimes) that are distinguishable by attachments to particular identities e.g. ethnicity or political preference. An often-cited example is that of Northern Ireland — a society that endured intergroup violence and identity-based crimes during the ‘Troubles’⁵ To this day, the society in Northern Ireland remains marked by sectarian division and suspicion between the two main affected communities: Nationalists, who are mainly Roman Catholic, and Unionists, who are mainly Protestant.⁶

In this context, one needs to understand that the target audience for efforts at reconciliation are members of such affected communities. Individuals in these communities, should, ideally, be open and willing to reconcile with members of a community other than their own, in the course of their interactions or encounters with one another. For reconciliation to occur, these individuals are required to repair and restore their relationships, and eventually replace their old attitudes with new ones, thereby generating trust between one another.⁷ This, however, begs the logical question of, how do we get there, or what can contribute to reconciliation?

It has long been suggested that criminal prosecutions contribute to reconciliation. As discussed in the previous chapter, prosecutions are said to contribute by offering justice, and helping to establish the truth about past crimes. However, leaving aside the questions about the type or quality of justice and truth—a prosecution’s *actual* contribution depends entirely on the perceptions of affected communities. Those perceptions begin with those who are selected for prosecution, something that will then directly inform the perceived legitimacy of the respective Court or prosecuting body. Inevitably, in divided societies, the selection of defendants can lead to particular affected communities (or ‘sides’) feeling targeted,

⁵ The ‘Troubles’ is a term commonly used to refer to a violent conflict in Northern Ireland during the late 20th Century. The conflict concerned the constitutional status of Northern Ireland; Unionists and the overwhelming Protestant population desired to remain part of the United Kingdom, and were in opposition to Nationalists and the overwhelming Catholic population who wanted to become part of a united Republic of Ireland. Over the course of three decades, the conflict led to approximately 3,500 deaths. See David McCittrick and David McVea, *Making Sense of the Troubles: A History of the Northern Ireland Conflict* (Penguin 2012).

⁶ Ibid.

⁷ Herbert C. Kelman, ‘Reconciliation as Identity Change: A Social-Psychological Perspective’ in Yaacov Bar-Siman-Tov (ed.), *From Conflict Resolution to Reconciliation* (OUP 2004) 120.

and this can result in resistance to accept the authority of the court or prosecuting institutions. Hence, perceived legitimacy in these communities is essential to justice being *seen* to be done, and the eventual truth about the atrocities being *accepted*; each are indispensable if prosecutions are to, in fact, contribute to reconciliation.

In this light, the OTP's effectiveness depends on the Court's perceived legitimacy; they mutually reinforce one another.⁸ Put another way, the OTP can contribute to the goal of reconciliation, but, only if the Court is perceived to be legitimate by affected communities. The Court's perceived legitimacy is explained by objective factors that are rooted in its own features, but also subjective factors that are traced to an individual's underlying cognitive biases and psychological dispositions. These subjective factors can readily bind rational judgments about the Court, making the OTP's task immensely difficult.

In this context, the present chapter examines the goal of reconciliation and, offers a) clarity on the concept; b) specificity as to its context and audience and; c) detail on the notion of perceived legitimacy. The chapter fills a research gap as it offers the OTP a break-down of a single goal. This account also utilises findings from empirical research on the ICTY's impact on reconciliation in the Balkans. Despite the significant challenges, the chapter argues that the OTP can take (modest) steps to improve the Court's perceived legitimacy, and thereby, make a (more) effective contribution to reconciliation.

The chapter's breakdown of reconciliation adopts conflict resolution and social psychology perspectives. Conflict resolution and reconciliation are united by a common concern about the development of new attitudes and relationships between opposing parties.⁹ In addition, conflict resolution literature is useful in understanding the identity divisions of divided societies where reconciliation is required.¹⁰ The use of social psychology acknowledges that the essence of reconciliation is a psychological process, which consists of changes in beliefs, attitudes and emotions.¹¹

⁸ John T. Jost and Brenda Major, *The Psychology of Legitimacy; Emerging Perspectives on Ideology, Justice, and Intergroup Relations* (CUP 2001) 4.

⁹ Herbert C. Kelman, 'Reconciliation as Identity Change: A Social-Psychological Perspective' in Yaacov Bar-Siman-Tov (ed.), *From Conflict Resolution to Reconciliation* (OUP 2004) 120-1.

¹⁰ Ibid. Social psychology is a sub-discipline of psychology and concerns the formation of individual and group attitudes and behaviour.

¹¹ Daniel Bar-Tal and Gemma H. Bennik, 'The Nature of Reconciliation as an Outcome and as a Process' in Yaacov Bar-Siman-Tov (ed.), *From Conflict Resolution to Reconciliation* (OUP 2004) 17.

Indeed, psychological perspectives are increasingly used to understand the interaction of victims within criminal justice institutions — a sub-field known as ‘victimology.’¹² Most of all, social psychology provides more ‘explanatory power’ to understand the perceptions of international courts and is a critical lens to predict the perceived legitimacy of international tribunals in affected communities.¹³

The chapter proceeds in three sections. It considers the context and audience for reconciliation, namely, divided societies and affected communities, before detailing the significance of the Court’s perceived legitimacy. First, however, the chapter attempts to clarify the concept of reconciliation.

¹² Mina Rausenbach and Damien Scalia, ‘Victims and international criminal justice: A vexed question?’ (2008) 90(870) *International Review of the Red Cross* 441.

¹³ Stuart Ford, ‘A Social Psychology Model of the Perceived Legitimacy of the International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms (2012) 45 *Vanderbilt J.Transnat’l.L.*405, 475. Gideon Boas and Pascale Chifflet, *International Criminal Justice* (EEP 2017) 93, 122.

3.1 The Concept of Reconciliation

Reconciliation is an ‘essentially contested’ concept.¹⁵ It has been described as an ‘abstract and ambiguous term’¹⁶ and ‘a notoriously fuzzy...notion.’¹⁷ Unsurprisingly, finding consensus on its interpretation, has been hitherto elusive. One of the causes behind the absence of clarity is that the concept has complex philosophical and sociological roots, and thus, is an object (or term) of interest to multiple disciplines; theology, philosophy, psychology, peace studies, political science, law and even community studies.¹⁸ Reconciliation attracts a significant volume of literature resulting in the term being comprehensively interrogated; its application, components, degree, location, nature, and type, to name but a few aspects. And yet, one of the most recurring observations found in the literature is that it is almost impossible to describe what reconciliation *is*. Weinstein aptly describes this sentiment;

Is it peace, the end of violence; is it contented individuals and families; is it communities where it is safe to walk the streets, to shop, to go to the mosque or church or synagogue, where women do not fear rape and where men and women feel no pressure to take up arms; is it economic opportunity, education for the children and dignity in old age?¹⁴

In this context, proposing a general definition risks overlooking the reality that reconciliation is going to mean different things to differing groups or individuals. In light of a society’s particular historical and social context, competing understandings of reconciliation can emerge. All societies, and their past conflicts,

¹⁴ Harvey M. Weinstein, ‘Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor in Chief’ (2011) 5 *IJTJ* 1, 3.

¹⁵ Walter B. Gallie, ‘Essentially contested concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167.

¹⁶ Audrey Chapman, ‘Approaches to Studying Reconciliation’ in Hugo Van Der Merwe, Victoria Baxter and Audrey R. Chapman (eds.), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (USIP 2009) 144.

¹⁷ Pablo DeGrieff cited in Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014) 40.

¹⁸ Chapman, *supra* note 15, at 147.

are *sui generis*.¹⁹ The understandings of reconciliation that inevitably arise may be influenced by the nature, degree and scale of those conflicts, amongst other factors.²⁰ In these environments, interpretations of reconciliation may become conflated with criticisms of particular transitional justice mechanisms (e.g. non-punitive bodies such as truth and reconciliation commissions), such that the language of reconciliation can be taken as a short-hand for compromise, bargains, or simply something that caters for the apologists of atrocities.²¹

Be that as it may, this does not render the task of developing conceptual clarity futile. Instead, it underlines the importance of encouraging consistency in the meaning ascribed to the concept, and the use made of it. This search for clarity should avoid the minimalism that can make a concept devoid of substance, but, equally, avoid the broadness that can risk blurring ‘the boundaries between the prerequisites for reconciliation and its core components.’²² Without engaging in an extensive multi-disciplinary survey of the concept, this section illuminates its complexity before suggesting a definition that can be adopted by the OTP.²³

To begin, one must start with the term’s etymology; the Latin word ‘*reconciliare*’ has two components with ‘re’ denoting ‘back’, and ‘*conciliare*’ meaning the notion of ‘bringing together.’ This culminates in the following dictionary definition: ‘bringing (a person) into friendly relations ... after an estrangement or to reunite into concord and harmony.’²⁴ In this sense, the starting point in understanding reconciliation is to know that it is ‘first and last about people and their relationships’,²⁵ or in the words of Cassese, about the ‘restoration of peaceful and normal relations between people.’²⁶ This type of definition is often labelled as ‘thin’ and tends to retrospectively focus on repairing what was once

¹⁹ Latin for ‘of its own kind’. See Mahmoud Cherif Bassiouni, ‘Editorial’ (2014) 8(3) *IJTJ* 325.

²⁰ Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014) 41.

²¹ Leebaw, *supra* note 2, at 102; McGregor, *supra* note 4, at 157.

²² Chapman, *supra* note 15, at 151.

²³ For such a detailed conceptual analysis see Susan Dwyer, ‘Reconciliation for Realists’ (1999) 13(1) *Ethics and International Affairs* 81; Jens Meierhenrich, ‘Varieties of Reconciliation’ (2008) 33(1) *Law and Social Inquiry* 195; Eric Doxtader, ‘Reconciliation-a rhetorical concept/ion’ (2003) 89(4) *Quarterly Journal of Speech* 267.

²⁴ Angus Stevenson (ed.), *Oxford Dictionary of English* (3rd edn, OUP, 2010) 1471.

²⁵ Jean Paul Lederach cited in Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunals for the Former Yugoslavia* (Routledge 2014) 41.

²⁶ President of the ICTY Antonio Cassese, ‘The Tribunal welcomes the parties’ commitment to justice: Joint statement by the President and the Prosecutor’ (24 November 1995) CC/PIO/027-E <<http://www.icty.org/en/sid/7220>> accessed 31 July 2018.

harmed. Thin definitions generally describe people's mutual acceptance of one another (including tolerating opposing positions and views) in a way that avoids conflict and maintains stability.²⁷ It is about trying to 'get on' and finding a way to live alongside those that are (or were once) considered to be adversaries; 'not necessarily to love them, or forgive them, or forget the past in anyway, but to coexist with them, to develop the degree of cooperation necessary to share...society with them.'²⁸

Thin definitions of reconciliation are often countered by 'thick' interpretations; a division that mirrors differences in the expected quality of the relationships between people. Some critics argue that thin definition(s) of reconciliation are too minimalistic; to equate (or reduce) reconciliation to co-existence, is to remove the moral content of what it means to be reconciled with someone. This stripping of moral content can be illustrated by the comments of one Bosniak, in relation to their animosity towards their Serbian neighbours; 'We are all pretending to be nice and to love each other. But, be it known that I hate them and that they hate me.'²⁹ Presumably, this would satisfy a definition of reconciliation that only has a threshold of co-existence, but cannot, surely, be described as reconciliation in any meaningful sense. Consequently, the literature contains 'thicker' definitions that encompass co-existence, but also have a future-orientated focus on long-term relationships. For instance, Halpern and Weinstein advocate that reconciliation entails people both seeing the humanity of one another and the development of empathy with each other.³⁰ Archbishop Tutu described reconciliation as '[allowing] us to trust one another enough to work together, eventually to be friends and neighbours and, yes, even to forgive and love one

²⁷ Chapman, *supra* note 15, at 147; Ervin Staub, 'Reconciliation after Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps toward a General Theory' (2006) 27(6) *Political Psychology* 867, 867-8.

²⁸ David Bloomfield, 'Reconciliation: An Introduction' in David Bloomfield, Teresa Barnes and Luc Huyse (eds.), *Reconciliation after Conflict: A Handbook* (IDEA 2003) 12. Louis Kriesberg outlines that reconciliation is about 'developing a mutual conciliatory accommodation' between once antagonistic groups [and] moving towards cooperative relationships. See Louis Kriesberg, 'Reconciliation: Aspects, Growth, and Sequences' (2007) 12(1) *International Journal of Peace Studies* 2.

²⁹ Jodi Halpern and Harvey. M Weinstein, 'Re-humanising the Other: Empathy and Reconciliation' (2004) 26(3) *HRQ* 561, 561.

³⁰ *Ibid.* generally.

another.³¹ In summary, these thick definitions are concerned with constructive and meaningful relationships, and the re-building of trust between people, to enable them to move from past divisions to a shared and peaceful future.³²

A further difficulty in achieving conceptual clarity is identifying the precise level (or location) of reconciliation. The term has been traditionally understood as a phenomenon between individuals (often with one's adversary or wrong-doer), but there are several levels of reconciliation.³³ For instance, Murphy offers an account at a governmental or political level; reconciliation based on the unification of political antagonists and the collapse of ideological divisions.³⁴ Sarkin, however, characterises the sheer range of these levels;

There can be reconciliation at the level of the individual who strives to reconcile himself or herself to an event [i.e. a violent past]. There can be interpersonal reconciliation, as between a victim and perpetrator of political violence; here the aim might be anything from avoidance of revenge to the emergence of true friendship. Reconciliation might also occur within or among communities...At the national level, the government is likely to be the major actor.³⁵

Thus, one must find a label that can encompass all these potential levels of reconciliation. Arguably, the most appropriate label is one at the level of society; a level that recognises all actors (political, social and civil), and where all persons including victims, their adversaries, perpetrators, as well as 'mere spectators' to the violence, may partake in, and benefit from reconciliation³⁶ This form of 'societal reconciliation' captures its potential to occur 'at the level of the individual i.e. neighbour to neighbour, then house to house, and finally community to

³¹ Archbishop Desmond Tutu cited in Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014) 52.

³² Staub, *supra* note 27, at 867-8; Clark, *supra* note 20, at 45 and Bloomfield, *supra* note 28, at 12.

³³ Sarkin and Daly, *supra* note 1, at 41.

³⁴ Colleen Murphy, 'Political Reconciliation and International Criminal Trials' in Larry May and Zach Hoskins (eds.), *International Criminal Law and Philosophy* (CUP 2010) 224.

³⁵ Sarkin and Daly, *supra* note 1, at 42.

³⁶ Payam Akhavan, 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda' (1997) 7 *Duke J.Comp. & Int'l L* 325, 348.

community.³⁷ Societal reconciliation also reflects the spontaneity of when and where reconciliation can occur. As Sarkin argues,

Reconciliation can happen alone or it can happen with others ... It can happen on the streets, in schools, on the sports fields, in places of worship, or in Parliament. It can happen in a sitting room of a modest home. It can happen in a board room of a corporate giant. It can happen on national television, or in the privacy of one's mind.³⁸

Due to its society-wide location, this interpretation of reconciliation finds expression in a prospective or future-oriented account; one that enables society to move from a 'divided past to a shared future.'³⁹ It is said to be a process that can take considerable time and span generations. However, one should acknowledge, that, the breadth of societal reconciliation can make discrete assessments difficult. Put simply, if one considers reconciliation at this broad level, it is unavoidable that some individuals and subgroups may not be reconciled, and consequently, it can be challenging to discern whether or not reconciliation has actually happened.⁴⁰ However, those are questions about the difficulty of empirical measurement, and should not undermine the description of the concept. Indeed, there is nothing to prevent specific attention being focused towards more targeted communities where reconciliation is sought (discussed below).

This study defines reconciliation as a societal process that includes the repair and restoration of people's relationships, and the rebuilding of trust.⁴¹ The definition is based on the one adopted by Clark and focuses on interpersonal and inter-community reconciliation.⁴² This is neither a thin nor a thick interpretation; it retains a 'thin' focus on the restoration of people's relationships *and* includes a 'thick' component of trust. The notion of trust is readily ruptured in a context of identity-

³⁷ Jodi Halpern and Harvey. M Weinstein, 'Re-humanising the Other: Empathy and Reconciliation' (2004) 26(3) *HRQ* 561, 567.

³⁸ Sarkin and Daly, *supra* note 1, at 41-2.

³⁹ Bloomfield, *supra* note 28, at 12; Luc Huyse, 'The Process of Reconciliation' in David Bloomfield, Teresa Barnes and Luc Huyse (eds.), *Reconciliation after Conflict: A Handbook* (IDEA 2003) 19.

⁴⁰ Sarkin and Daly, *supra* note 1, at 42.

⁴¹ Clark, *supra* note 20, at 45

⁴² *Ibid.*

based violence, and critically needs to be rebuilt between communities (particularly that of victims), to enable meaningful interaction between people.⁴³ Crucially, it is a definition that emphasises reconciliation as a behavioural and psychological phenomenon i.e. one that is affective and requires changes in attitudes or perceptions towards one another.⁴⁴ The definition is preferable for, at least, three further reasons.

First, the definition reflects the fact that the process of reconciliation is fluid and can change over periods of time, and, in the end, possibly take decades to be realised.⁴⁵ This is significant, because like other goals such as equality or social justice, its achievement may require a long-term assessment that spans several generations.⁴⁶ Second, the definition implicitly recognises that ‘negative peace’ (i.e. the absence of conflict and violence)⁴⁷ is a pre-condition of reconciliation. It is accepted that peace or a ceasefire (i.e. post-conflict) is a necessary foundation for achieving reconciliation.⁴⁸ Finally, the definition acknowledges the concept’s roots in restorative justice and the concern for restoring people’s relationships with those deemed to be on the opposing side of society’s divisions.⁴⁹

For these reasons, it is suggested the OTP should adopt such a definition of reconciliation. That would allow the OTP’s goal of reconciliation to benefit from much-needed conceptual clarity. More widely, the Office would be in a better position to manage the frequently misplaced assumption that prosecutions are the only (or more preferable) transitional justice response that can claim to contribute to

⁴³ Dan Bar-On quoted in Martina Fischer ‘Transitional Justice: Theory and Practice’ in Beatrix Austin, Martina Fischer and Hans J Giessmann (eds.), *Advancing Conflict Transformation: The Berghoff Handbook II* (Barbara Budrich Publishers 2011) 416. In the words of Archbishop Desmond Tutu, it is trust that allows people ‘to work together, eventually to be friends and neighbours and, yes, even to forgive and love one another.’ See Archbishop Desmond Tutu quoted in Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014) 52.

⁴⁴ Clark, *supra* note 20, at 45.

⁴⁵ Louis Kriesberg, ‘Reconciliation; Aspects, Growth and Sequences’ (2007) 12(1) *International Journal of Peace Studies* 2

⁴⁶ William A Schabas, ‘Notes for remarks on ‘Reconciliation’ UN General Assembly Thematic Debate (10 April 2013) <<http://www.mediafire.com/view/?la3aek7de84g87>> accessed 31 July 2018. See also UN General Assembly Debate ‘Robust International Criminal Justice System Gives ‘Much-Needed Voice to Victims’ of Serious Crimes, Secretary-General Tells General Assembly’ Thematic Debate on International Criminal Justice GA/11355 <<http://www.un.org/press/en/2013/ga11355.doc.htm>> accessed 31 July 2018.

⁴⁷ The concept of negative peace is often attributed to Johan Galtung ‘An Editorial’ (1964) *Journal of Peace Research* 1, 2

⁴⁸ Reconciliation is often conceptualised as the final part of a conflict cycle. See Oliver Ramsbotham, Tom Woodhouse and Hugh Miall, *Contemporary Conflict Resolution* (2nd edn, Polity Press 2005) 9.

⁴⁹ See generally, ‘Reconciliation’ *Stanford Encyclopedia of Philosophy*. <<https://plato.stanford.edu/entries/reconciliation/>> accessed 31 July 2018.

reconciliation.⁵⁰ In addition, the OTP could specifically emphasise its contribution to the essential components of reconciliation; the two that are necessary to establish trust among people are ‘justice’ and ‘truth’ (as discussed in chapter two).⁵¹ However, the OTP is challenged by the fact that both justice and truth mean little in the abstract; for it to effectively contribute to reconciliation, it needs to ensure that justice is seen to be done, and that the truth is accepted. Understanding the extent of this challenge requires further specificity about the context of reconciliation and its main target audience, to which the chapter now turns.

⁵⁰ Dan Bar-On quoted in Martina Fischer ‘Transitional Justice: Theory and Practice’ in Beatrix Austin, Martina Fischer and Hans J Giessmann (eds.), *Advancing Conflict Transformation: The Berghoff Handbook II* (Barbara Budrich Publishers 2011) 415.

⁵¹ Clark, *supra* note 20, at 54-55; See Michael Humphrey, *The Politics of Atrocity and Reconciliation: From Terror to Trauma* (Routledge 2002) 125.

3.2 Divided Societies & Affected Communities

Reconciliation is inextricably linked to societies that have become fractured as a result of intergroup violence and identity-based crimes. It is acknowledged that the essence of the most serious crimes is the targeting of particular groups; for instance, the definitions of the crimes of genocide and crimes against humanity are constituted by the targeting of members of groups based on their identity.⁵² Identity-based crimes are based on a simple (and often pathological) understanding of individual identity; one that is rooted in, amongst other things, ethnicity, familial ties, culture, nationality, religion, or linguistic ties.⁵³ These crimes can be attached to particular political agendas or objectives, but nonetheless, produce divided societies, characterised by affected communities that are left split along, typically, ethnic or religious lines.⁵⁴ This section examines how prosecutions can contribute to those affected communities moving towards reconciliation.

To begin, one must be specific about the terms of enquiry, and the first of those, ‘divided societies’, is a concept that defies a simple or a single definition.⁵⁵ In straightforward terms, these societies contain two or more groups that have differences and/or disagreements with one another (typically producing a degree of tension).⁵⁶ Divisions can include, amongst others, ‘class, caste, religion, language, race, ethnicity, and clan...settler versus native; immigrant versus indigenous population.’⁵⁷ However, given that nearly all societies are to some extent, and in several ways, divided, the literature commonly refers to ‘*deeply* divided societies.’ The reference to ‘deep’ denotes that these societies face more acute or unique challenges in both degree and in kind than others.⁵⁸ These societies are almost

⁵² See for example the Art. 6 ICCSt and the definition of genocide noting it is ‘the intent to destroy, in whole or in part, a national, ethnical, racial or religious group’ and Art. 7 ICCSt defining the crimes as ‘acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.

⁵³ Cécile Aptel, ‘International and Hybrid Criminal Tribunals: Reconciling or Stigmatising?’ in Paige Arthur (ed.), *Identities in Transition: challenges for transitional justice in divided societies* (CUP 2011) 154.

⁵⁴ See generally Cécile Aptel, ‘International and Hybrid Criminal Tribunals: Reconciling or Stigmatising?’ in Paige Arthur (ed.), *Identities in Transition: challenges for transitional justice in divided societies* (CUP 2011).

⁵⁵ Adrian Guelke, *Politics in Deeply Divided Societies* (Polity Press 2012) 14-15.

⁵⁶ See, the definition of ‘division’ in Angus Stevenson (ed.), *Oxford Dictionary of English* (3rd edn, OUP, 2010) 513.

⁵⁷ See, ‘What are the chief characteristics of deeply divided societies?’ (4 April 2016) <<https://talesunscripted.wordpress.com/2016/04/04/what-are-the-chief-characteristics-of-deeply-divided-societies/>> accessed 31 July 2018.

⁵⁸ Chapman, *supra* note 15, at 144.

always defined by significant differences between group identities; often those that have a political salience that has enabled inter-group tensions to persist for a substantial period of time.⁵⁹ Crucially, these divisions of identity—often characterised by past injustice or oppression can span generations— and continue to influence individuals’ intergroup relationships.⁶⁰

In deeply divided societies the boundaries between opposing groups are often tangible, or simply, ‘sharp enough so that membership is clear and with a few exceptions, unchangeable.’⁶² To put it another way, identities take on a binary or relativist form (i.e. often in comparison to another). This has been described as a process of dichotomisation, which involves;

the construction of social and cultural understandings that render some potential dimension of identity so salient or even mandatory that others become peripheral...[the] classification and divisions mark and inform identity, but also emphasise differences.’⁶¹

Many deeply divided societies are characterised by such dichotomisation, leaving, what Gueleke suggests, is ‘a well-entrenched-fault line that is recurrent and endemic and which contains the potential for violence between the segments.’⁶³ The homogenisation of identity into determined groups can later become magnified (or manipulated) by social and political processes, and the influence of the media.⁶⁴ The phenomenon of identity dichotomisation has often been a pre-cursor to intergroup violence and identity-based crimes. These crimes have frequently been attached to a range of political agendas such as expansionism, racial supremacy, nationalist struggles, self-determination (including its suppression), or the preservation of power.

⁵⁹ Ian Lustick, ‘Stability in Deeply Divided Societies: Consociationalism Versus Control’ (1979) 31(3) *World Politics* 325, 325.

⁶⁰ Chapman, *supra* note 15, at 144.

⁶¹ Gideon Boas, *International Criminal Justice* (EEP 2017) 103.

⁶² Lustick, *supra* note 59, at 325.

⁶³ Guelke, *supra* note 55, at 30.

⁶⁴ Cécile Aptel, ‘International and Hybrid Criminal Tribunals: Reconciling or Stigmatising?’ in Paige Arthur (ed.), *Identities in Transition: challenges for transitional justice in divided societies* (CUP 2011) 154.

The course of international criminal justice reveals ample evidence of either intergroup violence or identity-based crimes. To name not all, these (prominently) include the Nazi Holocaust that targeted ‘the Jews’ during World War Two, to the genocide of the ‘Tutsis’ during the Rwandan Genocide, or the persecution of ‘Muslims’ during the conflict in the Balkans in the early 1990’s. In the case of the Balkans and Rwanda, there has been considerable evidence of identity-based crimes committed in reprisal.

Both intergroup violence and identity-based crimes continue to be a frequent phenomenon in the era of the ICC. For instance, in the *Situation in Darfur*, the OTP has investigated alleged crimes committed against the Black Sudanese population by ethno-nationalist Janjaweed militia—acting on behalf of the majority Arab Government.⁶⁵ The *Situation in Kenya* involved the investigation (and later prosecution of leaders such as Uhuru Kenyatta and William Ruto) for intergroup violence that reflected ethnic allegiances to respective Kikuyu, Luo or Kalenjin groups, during the post-election period in 2007. There are other examples too, where the specific ethnic or religious identities are subsumed under or encased in political struggles, as shown by the Court’s preliminary examinations in Palestine (for alleged crimes committed by Israeli forces) and in Nigeria (for alleged crimes committed in the context of armed conflict between members of Boko Haram and the Nigerian Security Forces).⁶⁶ Leaving the specific examples aside, what is significant in these societies is that the divisions caused by the commission of alleged crimes, do not automatically collapse when the atrocities cease.

Instead, divided societies are left with the presence of ‘affected communities.’ These communities are made up of individuals with particular identities or group affiliations that were, in some way, caught up in an intergroup conflict, or targeted by the commission of alleged crimes. In particular, these communities are comprised of victims; ‘direct victims’ (those that suffered harm as a result of the commission of the crimes), but also ‘indirect victims’ (those that have suffered harm as a result of the damage suffered by a direct victim due to the

⁶⁵ For an overview of the Situation in Darfur see <<https://www.icc-cpi.int/Pages/crm-refined.aspx?situation=ICC-02/05>>accessed 31 July 2018.

⁶⁶ For the latest updates see ICC OTP *Report on Preliminary Examination Activities 2017* (4 December 2017)

commission of the alleged crimes, e.g. being a relative).⁶⁷ However, there may be many other people that self-identify as victims; i.e. by way of being witnesses, or suffering harm as a later consequence of the alleged crimes. The numbers of these persons encompassed by victimhood are likely to be considerable because the notion of ‘harm’ is a broad one. Indeed, the UN interprets victims, individually or collectively as suffering harm; ‘including physical or mental injury, emotional suffering, economic loss or the substantial impairment of their fundamental rights.’⁶⁸ Under the Rome Statute the notion of harm is not defined, though the Appeals Chamber (albeit for the purpose of victim participation in the proceedings) has declared that ‘material, physical, and psychological harm are all forms of harm...suffered personally by the victim.’⁶⁹ Even in this light, affected communities are likely to be dominated by significant cohort of victims—broadly understood—that have been, in some way, affected by the commission of the alleged crimes.

The question that follows is: what do affected communities require before they would, in principle, be willing to reconcile? In most cases, victims need to see justice being done and to accept the truth that is established about the past atrocities.⁷⁰ To briefly refresh the discussion in chapter two, it has long been suggested that (retributive) justice is an essential component of reconciliation because it can discretely identify the ‘bad guys’ and cool the ardour for collective vengeance, thereby promoting reconciliation between communities.⁷¹ In removing deep-seated resentments, justice helps ‘people on different sides of the divide [to feel that a clean slate has been achieved].’⁷² Truth, or the establishment of a factual record, is said to be essential to acknowledge, and thus lessen the suffering of

⁶⁷ Rule 85 of the ICC Rules of Procedure and Evidence; (a) ‘Victims’ means natural person who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

⁶⁸ UN General Assembly ‘Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law’ Resolution 60/147 (16 December 2005) para 8.

⁶⁹ *The Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeals of The Prosecutor and the Defence against Trial Chamber I’s Decision on Victim Participation of 18 January 2008) ICC-01/04-01/06-1432 (11 July 2008) para 33.

⁷⁰ I leave aside accounts of reconciliation that are based (exclusively) on apology or absolute forgiveness.

⁷¹ Elin Skaar, ‘Reconciliation in a Transitional Justice Perspective’ (2012) 1(1) *Transitional Justice Review* 54, 72.

⁷² Kingsley Chiedu Moghalu, ‘Prosecute or Pardon?: Between Truth Commission and War Crimes Trials in Suren Pillay and Chandra Lekha Sriram (eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa* (University of Kwa-Zulu Natal Press 2009) 87.

affected communities (who may not know the full set of facts about past atrocities.)⁷³ It finds expression in meaningful reconciliation requiring the absence of falsehood and the presence of truth. As Archbishop Tutu argued, ‘truth [is] at the heart of reconciliation: the need to find out the truth about the horrors of the past, the better to ensure that they never happen again.’⁷⁴ Crucially, truth is said to be essential to reconciliation because it marginalises ‘the scourge of denial and revisionism.’⁷⁵

Notoriously, there are several criticisms about the kind (and quality) of justice and truth that international tribunals provide. For instance, it is argued that the dilemma of selectivity means that a prosecution’s contribution to justice is symbolic, because the many that are left un-indicted are effectively exonerated.⁷⁶ In addition, prosecutions are said to only offer an individualised account of justice that does not adequately address the institutional and structural causes of the crimes and the injustices that they leave.⁷⁷ Similarly, the truth (should an objective account be even possible) as established by tribunals is said to over-emphasise the role of individuals and is only based on establishing the facts that pertain to the narrow range of charges and the submitted evidence or testimony. As Drumbl argues, ‘the microscopic and logical process of the trial gives rise to selective story-telling and selective truths’.⁷⁸ Nonetheless, those criticisms do not mean that a tribunal’s rendering of justice and truth is futile.

Instead, the fundamental test for the quality of a tribunal’s dispensing of justice and truth are the perceptions of affected communities. It is affected communities that perceive (or see) justice being done and ultimately perceive (and thus accept) the truth of what happened during particular atrocities. Clark’s empirical research confirms that ‘justice can foster reconciliation only when it is perceived as such by affected communities, and truth can potentially aid reconciliation, but only

⁷³ Laurel E. Fletcher and Harvey M. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation (2002) 24(3) *HRQ* 573.

⁷⁴ Archbishop Desmond Tutu, ‘Foreword’ in David Bloomfield and others, *Reconciliation after Violent Conflict: A Handbook* (IDEA 2003).

⁷⁵ Clark, *supra* note 20, at 83.

⁷⁶ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000) 300.

⁷⁷ Mark A. Drumbl, *Atrocity, Punishment and International Law* (CUP) 1-10.

⁷⁸ Mark A. Drumbl, ‘Sclerosis: Retributive justice and the Rwandan Genocide’ (2000) 2 *Punishment and Society* 287, 294. See also, Erin Daly, ‘Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition’ (2008) 2 *IJTJ* 23.

when it is [perceived and] accepted as such by these communities.’⁷⁹ However, achieving such perceptions is, and has proven to be, a notoriously difficult challenge. To illustrate, one can consider affected communities in Balkans’ perceptions of the ICTY.

Perceptions of the ICTY in these communities is evidenced by rather pessimistic public survey data. Survey patterns across the communities in the Balkans (primarily within the societies of Serbia, Croatia, Bosnia, and Kosovo) have been consistent over a prolonged period of time. Polling figures tend to be (relatively) positive about the ethnic Bosnian Muslim (‘Bosniak’) and Kosovo Albanian populations; approximately between three and four-fifths of those surveyed are generally satisfied with the tribunal’s work.⁸⁰ However, in stark contrast, surveys conducted in Serbia found that 56% of respondents considered the ICTY to be partial and biased (with only 6% believing that this is not the case).⁸¹ Milanović’s discussion of various surveys conducted in 2010-2012 reveals that, on closer analysis, up to 76% of ethnic Serbs had a mainly or extremely negative attitude towards the ICTY, with up to 85% of Croats sharing the same view.⁸² At one stage, only 7% of Serbian citizens believed the ICTY was unbiased towards Serbians.⁸³ The established trends in the surveys invites questions about the factors that explain the trends.

The surveys generally reflect that identity (i.e. national/ethnic or religious) shapes perceptions of justice and truth. Individual perceptions are invariably modified by these identities and one’s allegiances to one’s own ethnic groups.⁸⁴ In environments of widespread denial, this finds expression in the gap between ‘knowledge’ and ‘acknowledgment’—between knowing something and accepting it

⁷⁹ Clark, *supra* note 20, at 155.

⁸⁰ Marko Milanovic, ‘The Impact of the ICTY on the former Yugoslavia: an anticipatory post-mortem’ (2016) 110(2) *AJIL* 233, 238-242.

⁸¹ Milica Kostić, ‘Public Opinion Survey Sheds Light on ICTY Legacy’ (22 January 2018) <<https://www.ejiltalk.org/public-opinion-survey-in-serbia-sheds-light-on-icty-legacy/>> accessed 31 July 2018.

⁸² For an excellent discussion of various empirical surveys conducted about the ICTY’s influence see Milanovic, *supra* note 80, at 238-242.

⁸³ See Mirko Klarin, ‘The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia’, (2009) 7 *JICJ* 89, 92.

⁸⁴ Laurel E. Fletcher and Harvey Weinstein, ‘A world unto itself: The application of international justice in the former Yugoslavia in Eric Stover and Harvey Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 30; Clark, *supra* note 20, at 54.

as being true.⁸⁵ Flowing from this observation, in the course of intergroup conflict or identity-based crimes, each member of an affected community is likely to have their own internal narratives about the course of the conflict and (strong) feelings about victimhood. Hagan and Ivković articulate it well: ‘perceptions of the justice that the ICTY is delivering are coloured by the degree to which each ethnic group is treated and viewed as ‘defended’ as opposed to ‘defeated’.⁸⁶ Inevitably then, the Tribunal’s dispensing of the truth was also going to be met with scepticism in some quarters of Serbia where it was felt they were persecuted during the war. Serbian, and to a lesser extent Croat, resistance to the ICTY’s account of the facts, or ‘truth’ about the commission of crimes has been a consistent (and persistent) survey pattern.⁸⁷ For instance, only 12% of those recently surveyed in Serbia accept the ICTY’s account of what happened at Srebrenica.⁸⁸ The surveys highlight that even where some affected communities may accept the justice and truth dispensed by a tribunal, ensuring that *all* communities do so is incredibly challenging.

Many examples of the ICTY’s eventual verdicts and acquittals illustrate that the perceptions of affected communities are zero-sum. In other words, positive perceptions from affected communities come at the expense of negative perception from other communities that feel targeted. Many Serbian communities remain in denial over the involvement of Radovan Karadžić and Ratko Mladić in the commission of crimes; instead, both are glorified as war heroes that were defending their people.⁸⁹ Many Croatian communities held candlelight vigils for Slobodan Praljak, a Croat general and convicted war criminal, when he committed suicide in open court, after his guilty verdict was upheld.⁹⁰ The incidents of acquittals, many high-profile, have also been met with incredulity. For instance, the acquittals in

⁸⁵ For more on the dichotomy between knowledge and acknowledgement, see Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Polity Press 2000).

⁸⁶ Sanja Kutnjak Ivkovic and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (OUP 2011) 52-3.

⁸⁷ Clark, *supra* note 20, at 83-105; Stuart Ford, ‘A Social Psychology Model of the Perceived Legitimacy of the International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms (2012) 45 *Vanderbilt J.Transnat’l.L.*405, 412-4

⁸⁸ Kostić, *supra* note 81.

⁸⁹ See, indicatively, ‘Bosnians Divided over Ratko Mladić guilty verdict for war crimes’ *The Guardian* (22 November 2017); ‘Mladic is facing 11 war crime charges, but some see him as a ‘hero’) *TRT World* (20 November 2017); ‘Convicted War Criminal Radovan Karadžić is a Hero in This Belgrade Bar’ *Vice News* (24 March 2016)

⁹⁰ See, indicatively, ‘Candle Vigil for Croat wartime criminal who drank ‘deadly’ poison’ *The Scotsman* (30 November 2017); ‘Thousands attend ceremony honouring Slobodan Praljak in Croatia’ *DW* (11 December 2017)

Prosecutor v Stanišić and Simatović were met by accusations of ‘sham justice’ in many Bosnian communities.⁹¹ The ICTY’s overturning of the acquittal of Vojislav Šešelj has done little to dim his popularity as either a leading nationalist politician or a regular TV commentator.⁹² Finally, the overturned convictions in *Prosecutor v Gotovina, Čermak and Markač*⁹³ were met by radically opposing perceptions. The decision was received rapturous applause from the thousands watching the proceedings live in Zagreb’s main square but sparked protests on the streets of Serbia’s Belgrade. The generals were greeted as heroes on their return to Croatia and were symbolic of a vindication of Croatia’s role in the conflict. By contrast, many Serbians saw the decision as further example that the ICTY was a political court that was pursuing ‘selective’ justice i.e. only targeting Serbians.⁹⁴

Of course, one might be cautious about the extent to which perceptions of the ICTY provide general lessons for the International Criminal Court. Principally, the ICTY operated in its own specific-context; the characteristics of the conflict, the crimes, the tribunal, the role of political elites and media, and the prevailing wave of nationalism, denialism and revisionism that still exists in the region, are all peculiar to that environment. In this regard, (and given the Court’s breadth of jurisdiction), the challenges that confront the Court interventions must be determined on a Situation-by-Situation and indeed, case-by-case basis. For instance, in the Court’s intervention in the *Situation in Kenya*, the general loss of domestic support was less to do with the identities of those indicted, and more to do with a complex range of factors. These included the handling of the cases (leading to their eventual collapse),

⁹¹ *Prosecutor v Stanišić and Simatović* (Judgment) IT-03-69-T Trial Chamber I (30 May 2013). The ICTY Appeals Chamber has since ordered a retrial in the *Prosecutor v Stanišić and Simatović* (Judgement) IT-03-69-A (9 December 2015). The case is currently being tried at the UNMICT and began on 13 June 2017.

⁹² See Balkans Transitional Justice Initiative, ‘Why is Serbia’s President Silent about Šešelj’s conviction?’ *Balkans Insight* (18 April 2018); Ivana Sekularac, ‘Ultra-nationalist resurgence could complicate Serbia’s EU path’ *Reuters* (18 April 2016). On the judgments see UNMICT in *Prosecutor v Šešelj* MICT-16-99-A Appeals Chamber (11 April 2018). The UNMICT decision partly overturned the acquittal by the ICTY in *Prosecutor v Šešelj* ICTY-03-67-T Trial Chamber III (31 March 2016).

⁹³ The case involved Croatian Generals who were accused of committing a joint criminal enterprise of ethnic cleansing against the Serbian population of Krajina in Croatia; *Prosecutor v Gotovina, Čermak and Markač* (Judgment) IT-06-90-T Trial Chamber I (15 April 2011); *Prosecutor v Gotovina and Markač* IT-06-90-A Appeals Chamber (16 November 2012)

⁹⁴ BBC News ‘Hague war court acquits Croat Generals Gotovina and Markac (17 November 2012) <<http://www.bbc.co.uk/news/world-europe-20352187>> accessed 31 July 2018; Bruno Waterfield ‘Croatian hero Ante Gotovina acquitted of war crimes’ *Daily Telegraph* (16 November 2012) <<http://www.telegraph.co.uk/news/worldnews/europe/croatia/9682855/Croatian-hero-Ante-Gotovina-acquitted-of-war-crimes.html>> accessed 31 July 2018; Ian Traynor, ‘Croatia’s ‘war crime’ is no longer a crime after UN tribunal verdict’ (16th November 2012) *The Guardian* <<https://www.theguardian.com/world/2012/nov/16/croatia-war-crime-analysis>> accessed 31 July 2018.

the conduct of the Prosecutor, the promotion of hostile anti-ICC narratives by the accused (including accusations of neo-colonial racism), and sustained attacks on the Court during the 2012-2013 election campaigns that saw two of the accused enter national government as, respectively, the country's President and Deputy.⁹⁵ That being the case, the Court has (and may do so in the future) encounter situations that are, at least, (but perhaps on a smaller scale) comparable to that found in the Balkans.

The *Situation in the Côte d'Ivoire* provides a good illustration. The relevant background for the most recent crimes was the refusal of the then President Laurent Gbagbo to accept the electoral victory of his opponent—current President Alassane Ouattara. The ensuing post-election violence between the opposing political sides culminated in the deaths of approximately 3,000 people. This violence was entangled in and mirrored ethnic and religious divisions; pro-Gbagbo forces and militia murdered ethnic northern Ivorians (primarily though not exclusively comprised of Muslims) and other West African immigrants⁹⁶; pro-Ouattara forces killed and raped men and women (primarily Christian) from ethnic groups aligned to Gbagbo.⁹⁷ The subsequent selection of cases were exclusively against former President Gbagbo, pro-Gbagbo youth leader Charles Blé Goudé, and ex-First lady Simeone Gbagbo.⁹⁸ The absence of arrest warrants issued against current President Ouattara and his forces has persistently led to accusations of one-side, selective and, certainly 'victors' justice'.⁹⁹ The perceptions of the Court in affected communities of the Côte d'Ivoire reflects such antipathy; A 2014 survey of residents in Abidjan suggested that 46% had negative impressions of the Court.¹⁰⁰ It is unsurprising then that it has led to 'perceptions among a sizable percentage of Ivorians that the ICC is acting like a tool of those in power that could further stoke political-ethnic tensions.'¹⁰¹ There are

⁹⁵ For a concise overview of the Court's intervention in Kenya see Yvonne M. Dutton, 'Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge' 56 *Columbia Journal of Transnational Law* 71, 97-117.

⁹⁶ HRW, 'They Killed Them Like It Was Nothing' (October 2011) 41-56.

⁹⁷ These included those from the Bété, Attié, Guéré, and Goro ethnic groups. See Ibid, 93-96.

⁹⁸ Brief History of Gbagbo including recent Amnesty.

⁹⁹ Sophie T. Rosenberg, 'The International Criminal Court in Côte d'Ivoire' Impartiality at Stake? (2017) JICJ 15(3) 471, 472-3.

¹⁰⁰ Cited in Human Rights Watch (HRW), Making Justice Count: Lessons from the ICC's Work in Côte d'Ivoire (August 2015) 42.

¹⁰¹ HRW, 'What will the ICC's Legacy Be in Côte d'Ivoire' (July 19 2012) <<https://www.hrw.org/news/2012/07/19/what-will-iccs-legacy-be-cote-divoire>> accessed 31 July 2018.

other Court situations that can be analysed in a similar way (e.g. Uganda) but the Côte d'Ivoire provides a good illustration of a divided society in which the Court has made an intervention.

In that regard, there is a key—generalizable—lesson concerning perceptions of justice and truth in affected communities. That lesson is simply this: affected communities' perceptions of the *Court* shape those of the justice and truth it dispenses. This is not to suggest that perceptions of the Court are distinct and separable from that of justice and the truth it dispenses. Instead, it is to suggest that perceptions of the Court are often triggered on the occurrence of an early and essential phenomenon: defendant selection. The issuing of an indictment or arrest warrant against particular persons is a frequent starting point for any perception of the Court; indeed the act of being indicted and then brought to trial attracts the greatest attention.¹⁰² Of course, perceptions of the Court are multi-dimensional and those in affected communities can, at any one time, perceive differing aspects of the Court; particular persons such as the Prosecutor, the conduct of the trials, or the eventual punishment on conviction. However, most of all, defendant selection (and the production of particular selection patterns e.g. by reference to defendant identities) has proven to be a particularly influential component of affected communities' perceptions of justice and truth.

This observation can be illustrated by returning to available survey data. To return to the ICTY, Klarin argued the 'popularity of the ICTY in the former Yugoslavia is inversely proportional to the number of accused that come from those [particular] ethnic communities.'¹⁰³ There were 161 people indicted by the ICTY, of which at least 94 were Serbian.¹⁰⁴ Perhaps it is not surprising that, according to the most recent survey, approximately 63% of Serbians were of the opinion that there were too many Serbian indictees.¹⁰⁵ The survey data on the perceptions of the Court

¹⁰² David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasiolous (eds.) *The Philosophy of International Law* (OUP 2010) 569-575.

¹⁰³ See Mirko Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia', (2009) 7 *JICJ* 89, 92.

¹⁰⁴ This number is an estimate given the amorphous nature of national and ethnic identity. For a break-down of numbers see Frederiek de Vlaming, 'The Yugoslavia Tribunal and the Selection of Defendants' (2012) *Amsterdam Law Forum* 89.

¹⁰⁵ The majority based its response on vague reasons such as repeating that the court is 'biased' (16%), 'political' (2%) or 'anti-Serb' (16%). See Milica Kostić, 'Public Opinion Survey Sheds Light on ICTY Legacy' (22 January

in the *Situation in the Côte d'Ivoire* is almost exclusively explained by the (one-sided) selections.¹⁰⁶ The following passage from civil society representatives is illustrative:

There is a silent section of society. They are on the pro-Gbagbo side. They feel victimised because only their people are being sought...The main perception is that the ICC is only working with people in power...All the victims are not satisfied by the ICC. The ICC is not working to take into account all the victims.... Victims that belong to the other side [i.e., victims of abuses by pro-Ouattara forces] do not believe in the ICC.¹⁰⁷

In summary, the way in which a tribunal is perceived is by and large determined by whom it prosecutes. One can also agree that 'indictments that conflict with the dominant internal narrative among the various groups will lead directly to lower perceptions of the court's legitimacy.'¹⁰⁸ Those 'internal narratives' are based on affected communities' understandings of the conflict and their beliefs as to where responsibility lies. Most significantly, these narratives are rooted in individuals' own direct and indirect experiences of the alleged crimes i.e. the victims (direct or indirect). The OTP's indictments that conflict with these narratives are thus likely to diminish the Court's perceived legitimacy in those communities.¹⁰⁹ However, it logically follows that if the OTP's selections can boost the Court's perceived legitimacy, then, prosecutions are more likely to lead to justice being seen to be done and the truth being accepted. Without doing so, one-sided or biased selection phenomena are likely to continue to limit the prospects for reconciliation.¹¹⁰ This being the case, the OTP's effectiveness in contributing to reconciliation lies, first and foremost, in producing the Court's perceived legitimacy and the following section now turns to detail this essential outcome.

2018) <<https://www.ejiltalk.org/public-opinion-survey-in-serbia-sheds-light-on-icty-legacy/>>accessed 31 July 2018.

¹⁰⁶ Netton Prince Tawa and Alexandra Engelsdorfer, 'Acceptance of the International Criminal Court in Côte d'Ivoire: Between the Hope for Justice and the Concern of 'Victor's Justice' in Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa (eds.), *After Nuremberg: Exploring Multiple Dimension of the Acceptance of International Criminal Justice* (Nuremberg Principles Academy 2017).

¹⁰⁷ HRW, *Making Justice Count: Lessons from the ICC's Work in Côte d'Ivoire* (August 2015) 42-3.

¹⁰⁸ Ford, *supra* note 87, at 405.

¹⁰⁹ *Ibid.* 474-5.

¹¹⁰ On this see, Owei Lakemfa, 'Laurent Gbagbo: ICC and Ivorian Reconciliation' *Premium Times* (14 February 2016); Kingsley Kobo, 'Ivory Coast struggles with reconciliation' *Al-Jazeera* (10 August 2014); Joe Bavier, 'Reuters Looks at Reconciliation in Côte d'Ivoire, Cites IRI Poll' *Reuters* (20 July 2015).

3.3 Perceived Legitimacy

Perceived legitimacy is concerned with an audience's subjective belief(s) in an institution's right to rule.¹¹¹ It is synonymous with sociological accounts of legitimacy; that legitimate institutions are those that are perceived as desirable, proper, and when appropriate, right to exert their influence and power.¹¹² These accounts are distinguishable from normative or neutral accounts of legitimacy, which tend to be focused on the legality or probity of its decisions or procedures.¹¹³ Of course, an institution's adherence to legality can inform its perceived legitimacy, but that might not always be the case, and indeed 'the public may deem the institution illegitimate for reasons that may seem unfair or arbitrary.'¹¹⁴ Simply put, the Court's perceived legitimacy, thus, refers, exclusively, to the audience's acceptance of its authority to rule and judge disputes.¹¹⁵ Nonetheless, the very notion of the Court's perceived legitimacy masks some unanswered questions. These include, first, what factors explain the formation of perceptions and second, if the Court's perceived legitimacy is boosted, then what does it actually look like. This section seeks answers to these crucial questions vis-à-vis the audience of affected communities.

Before addressing the first question, one must appreciate the most complex component of perceived legitimacy: perception. The dictionary defines perception in two ways; first, the ability to see, hear or become aware (principally by one's senses), and second, the way something is regarded or understood.¹¹⁶ These meanings are related as to have a perception is, first, an (individual) psychological process by which something from one's environment is interpreted, and second, the perception shapes how that something is regarded or understood. Underlying the notion of an individual's perception are their existing beliefs of an actual set of facts,

¹¹¹ Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) *Ethics and International Affairs* 405.

¹¹² Devon Johnson and others, 'Public Perception of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean' (2014) 48(4) *Law & Society Review* 947; Jackson and others cited in Kevin Kwok-Yin Cheng, 'Prosecutorial Procedural Justice and Public Legitimacy in Hong Kong' (2017) 57 *British Journal of Criminology* 94, 94

¹¹³ Erik Voeten, 'Public Opinion and the Legitimacy of International Courts' (2013) 14 *Theoretical Inquiries in Law* 411, 414.

¹¹⁴ *Ibid.*

¹¹⁵ Richard Fallon, quoted Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice; A Pluralist Process Approach' (2010) 32 *Mich.J.Int'l L.* 1, 12.

¹¹⁶ Angus Stevenson (ed.), *Oxford Dictionary of English* (3rd edn, OUP, 2010) 1318.

i.e. reality, and their beliefs about any other information that can, beyond reasonable doubt, be disproved i.e. their own personal or idiosyncratic reality.¹¹⁷ In this sense, it has been argued that perceptions encompass two major epistemological points of view; the objective and the subjective, with the former being a material reality as people know and see it, and the latter being more specific to the individual who is doing the perceiving.¹¹⁸ In combination, these points of view, help people to make sense of the world by forming their basic beliefs, ideas, emotions, attitudes, and opinions [that] strongly influence their actions.¹¹⁹ In this regard, perceptions are essential because they ‘spark social behaviour.’¹²⁰ For present purposes, this is important because positive perceptions are expected, eventually, to motivate individuals across society’s divisions to reconcile with one another.

The question that follows is: what factors influence the formation of an individual’s beliefs and/or perceptions of the Court. First, there are objective factors; namely those that are external, and generally beyond an individual’s control or their own dispositions.¹²¹ These factors are focused on the Court’s attributes and operations and they find expression in traditional models of perceived legitimacy; a model that tends to be focused *only* on the tribunal; its creation, structure, procedures, its proximity to the audience, and the quality of its outreach efforts.¹²² From an individual’s perspective, these objective factors are often interrelated but arguably a fundamental one is the individual’s distance from the Court. This distance, in turn, shapes their acceptance, experience and understanding of the Court.

To elaborate, the principle of distance often finds straightforward expression in the geographical detachment of the Court. The Court’s remoteness stands in contrast to domestic courts, with the latter being used as a standard for determining the legitimacy of the former. As Dutton explores, individuals that trust national courts may be more likely to distrust international tribunals, but individuals that distrust national courts may either transfer their negative feelings to the Court, or use

¹¹⁷ Cory S. Clements, ‘Perception and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win the War of Words’ (2013) 2 *Brigham Young University Law Review* 319, 325-6.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Kamari Maxine Clarke (ed.), *Africa and the ICC: Perceptions of Justice* (CUP 2016) 6

¹²¹ Marko Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (2016) 47 *Geo. J. Int’l L* 1321, 1331-1336.

¹²² Dutton, *supra* note 95, at 87.

it as a reason to be more confident in their work.¹²³ Either way, as a working rule, the Court starts from a deficit because of its general unfamiliarity in relevant divided societies. There are more reasons for people to resist an international court (with more Western-style concepts of retributive justice and/or alien procedures¹²⁴) than a domestic criminal court; the latter enjoying a popular legitimacy as being part of the State and the implementation of the domestic rule of law.¹²⁵ This being the case, individuals may, consequently, have to rely on little-used third party sources for information, requiring time and resources to adequately absorb and discriminate differing sets of information.¹²⁶ The notion of distance is further underlined by a lack of participation opportunities that limit the potential for individuals to become satisfied with the Court. However the literature has recently emphasised that these objective factors do not, in and of themselves, comprehensively explain the perceptions of affected communities.¹²⁷ Both Milanović and Ford both make clear that one needs to consider an accompanying set of subjective factors.

Subjective factors are internal i.e. they lie within an individual's psychological make-up. Broadly speaking, these factors concern how people struggle to 'live up to the ideal of [a] rational actor',¹²⁸ one that can weigh up all the available evidence, before forming their own attitudes and judgements. Instead, one's perceptions are often produced by a range of psychological dispositions and cognitive biases that can exist on an unconscious level (i.e. in spite of one's assertion that one's beliefs are products of objective and rational judgment.)¹²⁹ These include 'confirmation bias': 'the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis at hand.'¹³⁰ This can often lead to a propensity to take confirming evidence at face value as the most relevant and

¹²³ Ibid. 96

¹²⁴ See Oko Elechi, Sherill V C. Morris and Edward J. Schauer, 'Restoring Justice (Ubuntu): An African Perspective' (2010) 20(1) *International Criminal Justice Review* 73, 82.

¹²⁵ Marlies Glasius, 'Do International Criminal Courts Require Democratic Legitimacy' (2012) 23(1) *EJIL* 43, 45-8; Armin von Bogdandy and Ingo Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23(1) *EJIL* 7, 7-12; Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 *Mich.J.Int'l L.* 79

¹²⁶ Marko Milanović, 'Courting Failure: When are International Criminal Courts likely to be believed by local audiences?' in Kevin Jon Heller and others (eds.), *The Oxford Handbook of International Criminal Law* (OUP 2018) (Forthcoming) 2-3 available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887090> accessed 31 July 2018.

¹²⁷ Ford, *supra* note 87, at 412.

¹²⁸ Ibid. 419.

¹²⁹ Milanović, *supra* note 121, at 1336.

¹³⁰ Ibid. 1338.

reliable, and presuming the opposite for any contradictory evidence, including giving it sceptical or hypercritical treatment.¹³¹ Closely related, is ‘motivated reasoning’: that people arrive at conclusions that they want to arrive at (often achieved by conducting selective searches for information that are consistent with their existing views) and thus people are seduced by what is, in truth, an ‘illusion of objectivity.’¹³² In addition, individuals often use heuristics; cognitive short-cuts that allow them to arrive at conclusions without engaging in an exhaustive effort to process detailed information or evidence (e.g. how people make judgments about risks, statistics and probability).¹³³ Finally, a further cognitive bias that is especially intractable in divided societies: ‘in-group/out-group’ biases. Milanović describes this phenomenon as;

favouritism towards one’s own group (in-group positivity) and derogation or rejection of other groups (out-group negativity) ...this bias is most intense especially when it comes to outgroup derogation, when the group classification relates to...identity and causes strong emotions...This is perhaps most obviously the case when the in-group/out-group dichotomy is on the basis of perceived racial, ethnic or religious differences.¹³⁴

In summary, both objective and subjective psychological factors are crucial in understanding perceptions of the Court. On the one hand, a straight-forward analysis of objective factors is still illustrative. For instance, an individual’s typical remoteness from The Hague, the biases and relative credibility of third party sources upon which they rely, their lack of time and access to resources to form accurate judgements, and, ultimately, their lack of direct contact or participation can all, individually, or in combination, delegitimise the Court in the eyes of affected communities. On the other hand, even if those objective limitations were not present, subjective factors are, inevitably, likely to play a significant part in perception

¹³¹ Ford, *supra* note 87, at 434-5.

¹³² Milanović, *supra* note 129, at 1342.

¹³³ *Ibid.*

¹³⁴ *Ibid.* 1341.

formation. These psychological dispositions may even be exacerbated in domestic contexts where political elites or the media preserve their authority by strongly espousing anti-Court sentiment.¹³⁵ In short, these subjective factors considerably limit positive perceptions of the Court's legitimacy.

What, then, does the existence of such subjective factors mean for the Court's perceived legitimacy? First, Milanović is correct when he argues that subjective factors enable one to be 'realistic about the causal factors that drive public perceptions of the work of international criminal tribunals.'¹³⁶ His analysis helps to predict the likelihood of certain perceptions being produced, and thus, to accurately diagnose the challenge of enhancing the Court's perceived legitimacy. It is true, in his words, that we need to be realistic about the causal factors that contribute to public perceptions of the Court, but, as he acknowledges, we have not reached the stage of cynicism.¹³⁷ There needs to be, instead, a more nuanced and sophisticated account of the Court's perceived legitimacy. This account should, first, distinguish the potential objective and subjective factors that form individual perceptions, but second, explore how changes in objective factors can still recognise and then seek to tackle the existence of subjective factors. In so doing, one can develop more effective strategies to boost the Court's perceived legitimacy.

The Court's perceived legitimacy is complex and multi-dimensional. The OTP, however, is one critical organ that can help to boost it. This argument is strengthened because of the eventual result of perceived legitimacy i.e. what it looks like and/or produces. Perceived legitimacy is said to result in 'diffuse support': a reasonable and stable support of the continued functioning of the Court, even when there may be disagreement or dissatisfaction with its particular decisions.¹³⁸ This type of support can be distinguished from specific support — the positive approval

¹³⁵ Milanović, *supra* note 121, at 1336.

¹³⁶ Marko Milanović, 'Courting Failure: When are International Criminal Courts likely to be believed by local audiences?' in Kevin Jon Heller and others, *The Oxford Handbook of International Criminal Law* (OUP 2018) (Forthcoming) 35 Chapter accessed on SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887090 > accessed 31 July 2018.

¹³⁷ *Ibid.* 36-7

¹³⁸ Yonathan Lupu, *International Judicial Legitimacy: Lessons from National Courts* (2013) 14 *Theoretical Inquiries in Law* 437, 441; Vanessa A. Baird, 'Building Institutional Legitimacy: The Role of Procedural Justice' (2001) 54 *Political Research Quarterly* 333, 339.

and or attitudes to particular institutional decisions or policies.¹³⁹ Baird offers a more detailed elaboration;

Diffuse support is the belief that...the institution itself ought to be maintained...trusted and granted its full set of powers. [Its development] suggests that people maintain a 'running tally' that increases over time with pleasing policy decisions. Over time, the running tally develops into a reservoir of good will that serves to insulate support from later disagreeable decisions.' Satisfaction with particular decisions, though at one time the primary source of diffuse support, become over time, separable from a willingness to support an institution. One can be dissatisfied with a recent decision and yet maintain a relatively strong level of diffuse support.¹⁴⁰

In this regard, the Court's perceived legitimacy is evidenced by the existence of diffuse support. The OTP's role in boosting the Court's perceived legitimacy is dictated by its selections, particularly that of cases. It may be true that in divided societies selections will be zero-sum i.e. they will attract support in some affected communities, but, simultaneously cause animosity in others and thus can inhibit reconciliation. However, the challenge for the OTP, is to ensure it continues to target perceived legitimacy, because, over a period of time, (diffuse) support for the Court is detached from particular selections and can eventually become stable irrespective of changes or the varying distributions of those selections. In doing so, the OTP can lay a firmer foundation for justice to be seen to be done and for the truth to be accepted, which by implication, can make a more effective contribution to reconciliation.

¹³⁹ Sanja Kutnjak Ivkovic and John Hagan, 'The Legitimacy of international court: Victims' evaluations of the ICTY and Local Courts in Bosnia and Herzegovina' (2017) 14(2) *European Journal of Criminology* 200, 202-3.

¹⁴⁰ Vanessa A. Baird, 'Building Institutional Legitimacy: The Role of Procedural Justice' (2001) 54(2) *Political Research Quarterly* 333, 334.

Conclusion

Writing more than a decade ago, Sarkin argued that:

Reconciliation is so easily invoked, so commonly promoted, and so immediately appealing that few policy-makers [stop] to consider the scores of serious questions that its language can trigger. Scant attention is being paid to the specifics of advancing reconciliation.¹⁴¹

This chapter, by contrast, focused on those specifics by examining the goal of reconciliation. It offered clarity on the concept and specificity as to its context and audience. In that regard the chapter offers the OTP a blueprint to breakdown individual goals that avoids ambiguity in the debate. Furthermore, in doing so, it shed light on how the OTP can effectively contribute to the goal of reconciliation.

There is always likely to be disagreement about what reconciliation actually is and the form it takes. Indeed, for some, reconciliation is inevitably going to be attached to certain mechanisms and practices that may attract their own criticism. The OTP, however, must proceed with a clear-headed approach as to its meaning. For several reasons, the chapter suggested that an appropriate definition to adopt would be: a societal process that includes the repair and restoration of people's relationships, and the rebuilding of trust. This, in turn, requires a clearer grasp as to the context and audience for reconciliation i.e. particular societies and the sets of people within them. The Court's interventions (and the history of international criminal justice) present the recurring context of divided societies (those that are marked by group tensions after intergroup violence and the commission of identity-based crimes). The OTP's core audience in these societies are affected communities; comprised of victims and those affected by the alleged crimes, in whose name prosecutions are conducted. It is this audience, ideally, that must be willing to reconcile with those deemed on the other side of a society's divisions (typically in terms of ethnicity and/or religion). When the Court's dispensing of justice and truth is, respectively, seen and accepted then a small step towards reconciliation is made.

¹⁴¹ Sarkin and Daly, *supra* note 1, at 4.

However, the Court must be perceived to be legitimate if that is to occur. The OTP's selection of cases, particularly the choice of defendants, is the first and most significant trigger for those perceptions.

Flowing from this observation, the closing section of the chapter detailed that the OTP's effectiveness rests on it boosting the Court's perceived legitimacy. In doing so, it has made the case for renewed thoughtfulness about this essential outcome. There is little doubt about its broad significance; put simply, 'tribunals must be seen as legitimate by those on whose behalf they operate in order for their work to be accepted.'¹⁴² However, the attention placed on reconciliation, has revealed, that individual perceptions of the Court are nuanced and can be shaped by sets of objective and subjective factors. The former set are based on objective features of the Court, but the latter set, are based on identity affiliations (e.g. ethnicity) and can lead to a range of cognitive biases and/or psychological dispositions.¹⁴³ The chapter, in this regard, has added to the much-needed literature on the relationship between international criminal justice and social psychology.

The question that follows is to ask how the OTP can go about the quest of improving the Court's perceived legitimacy. This task is, no doubt, 'a challenging enterprise [and] one that is highly context-specific and subject to contestation across time and space.'¹⁴⁴ However, the starting point for an agenda for change is at an objective institutional level. The following three chapters turn to narrowly analyse the effectiveness of three distinct, and yet under-researched, features; selection procedure, rhetoric, and the attempt at performance measurement. Taken collectively, such features have been largely overlooked in the literature. The choice of these features not only fills a research gap but is in line with the study's focus; each of the chapters concentrates on developing the OTP's effectiveness. The following chapters all share the same analytical theme: the Court's perceived

¹⁴² Laurel E. Fletcher and Harvey Weinstein, 'A world unto itself: The application of international justice in the former Yugoslavia in Eric Stover and Harvey Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (CUP 2004) 30.

¹⁴³ Ford, *supra* note 8 475.

¹⁴⁴ Quoted in Yvonne M. Dutton, 'Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge' (2017) 56 *Columbia Journal of Transnational Law* 71, 87 (at footnote 75).

legitimacy in affected communities. In doing so, all make the case for some incremental change(s). These changes may, albeit modestly, help the OTP boost the Court's perceived legitimacy and thereby make an effective contribution to reconciliation. The following chapter signals the beginning of this case, and revisits selection procedure.

Chapter Four

The International Criminal Court's Office of the Prosecutor & Procedural Justice

The Prosecutor's selection of cases — whom to try and for what — provides the earliest and most visible measure of whether and how the Court will bring justice to the victims of grave international crimes in the situations before the Court ... [The] ability of the ICC to have a positive impact in communities affected by the crimes to be tried — that is, for the court's delivery of justice to be accessible, meaningful, and perceived as legitimate — will be closely linked to its selection of cases.¹

The International Criminal Court's Office of the Prosecutor (OTP) is the Court's 'engine-room'. Its investigations and prosecutions are pivotal to the operation and ultimate effectiveness of the Court.² The OTP's primary focus is prosecuting cases i.e. seeking convictions but — in the process — it is also concerned with influencing the perceptions of target audiences.³ For instance, the OTP requires co-operation and support from domestic audiences such as governments, civil society, victims, and communities affected by the commission of crimes.⁴ In this regard, the OTP's selection of situations and cases makes the initial and most dramatic contribution to the Court's perceived legitimacy: an acceptance or belief in the Court's authority.⁵ The selections and the Court's perceived legitimacy mutually reinforce one another; the former can either enhance or diminish the Court's perceived legitimacy.

For the past ten years, confidence in those selections has undergone a gradual malaise — particularly on the African continent.⁶ The general trend of criticism has focused on the fact that investigations and indictments have almost exclusively

¹ Human Rights Watch (HRW), 'Comments on the ICC Office of the Prosecutor Draft Policy Paper on Case Selection and Prioritisation' (3 May 2016) 1.

² Yuval Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' in *Legitimacy and International Courts* (CUP 2018) 354.

³ See OTP, *Strategic Plan 2016-2018* (6 July 2015) para 104; OTP *Policy Paper on Case Selection and Prioritisation* (15 September 2016) para 33.

⁴ ICC, *Strategic Plan 2013-2017* (interim update 24 July 2015), at 6 (Judicial and Prosecutorial Goal 1.7); *Strategic Plan for Outreach of the International Criminal Court* ICC-ASP/5/12 (29 September 2006), at 3, paras. 26, 56.

⁵ Yvonne M. Dutton, 'Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge (2017) 56 *Columbia Journal of Transnational Law* 71, 84-7.

⁶ André M Mangu, 'The International Criminal Court, Justice, Peace and the Fight against Impunity in Africa: An Overview' (2015) 40(2) *Africa Development* 7-32;

targeted nationals of African states.⁷ There have also been long-standing complaints about the UNSC's role in referring cases to the Court, and objections to prosecution selectivity in general.⁸ Against this backdrop, and as identified in previous chapters, patterns of selectivity have also emerged intra-situation. These patterns, as demonstrated in the *Situation in Côte d'Ivoire*, *Situation in Uganda* or the *Situation in Libya* expose a one-sidedness that, is balanced in favour of the State and against the Government's opponents. In other instances, governments that have come under the Court's scrutiny have become persistent critics, such as those of Uganda, Sudan and Kenya.⁹ The widespread opposition on the continent has been such that South Africa and Gambia attempted to withdraw from the Rome Statute before Burundi, recently, became the first State to do so.¹⁰ In summary, a 2017 African Union (AU) strategy aptly expressed the consequences of prosecution selectivity by declaring the Court is 'riddled with... struggles over its perceived legitimacy.'¹¹

In response, the OTP has defended its selections in several ways. The OTP frequently cites jurisdictional restrictions, objective legal criteria and the role of self-referrals to the Court. Furthermore, the OTP stresses its commitment to the principles of independence, objectivity and impartiality.¹² Just as frequently, and in expectation of antipathy from governments, the OTP distinguishes the significance of 'affected communities' (comprised of victims and those most affected by the

⁷ At the time of writing, the investigations in Georgia and Afghanistan are the only investigations beyond the African continent. See ICC 'Situations under Investigation' <www.icc-cpi.int/pages/situations.aspx> accessed 31 July 2018.

⁸ Many governments cite prosecution selectivity as evidence that the ICC is neo-colonial or racist. For examples see David Hoile, 'Is the ICC a tool to recolonise Africa?' (31 March 2017) <<http://newafricanmagazine.com/icc-tool-recolonise-africa/>> accessed 31 July 2018; Mücahid Durmaz, 'Is the International Criminal Court racist?' (1 November 2016) <<https://www.trtworld.com/in-depth/is-the-international-criminal-court-really-racist-218836>> accessed 31 July 2018.

⁹ Note the *Situation in Uganda* was a self-referral. See, indicatively, Conor Gaffey, 'Uganda: Museveni Calls ICC 'Useless'...' 13 May 2016 <www.newsweek.com/uganda-museveni-prompts-western-leaders-walkout-icc-useless-459605> and generally A. Taylor, 'Why so many African leaders hate the International Criminal Court' 15 June 2015 <www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?utm_term=.782bf65a4c89>

¹⁰ Burundi's withdrawal from the Rome Statute took effect on 27 October 2017. The South African government retracted their intention to withdraw from the Rome Statute after a legal challenge about the constitutionality of withdrawal. The Government is currently considering alternative options. See BBC News, 'South Africa Revokes ICC Withdrawal after Court ruling (8 March 2017) <http://www.bbc.co.uk/news/world-africa-39204035>> accessed 31 July 2018; The President of Gambia reaffirmed the country's commitment to the Rome Statute after the previous incumbent of the Presidency declared an intent to withdraw. Pap Saine and Lamin Jahateh, 'Gambia announces plans to stay in International Criminal Court' (13 February 2017) <[www.reuters.com/article-us-gambia-justice-icc/gambia-announces-plans-to-stay-in-international-criminal-court-idUSKBN15S2HF](http://www.reuters.com/article/us-gambia-justice-icc/gambia-announces-plans-to-stay-in-international-criminal-court-idUSKBN15S2HF)> accessed 31 July 2018.

¹¹ For the original draft AU strategy see 'Withdrawal Strategy Document' (Draft 2)' (12 January 2017) <www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf> accessed 31 July 2018.

¹² OTP, *Policy Paper Case Selection and Prioritisation* (15 September 2016) paras 17-23.

commission of the crimes).¹³ In doing so, the OTP defends its selections on the basis that prosecutions will ultimately deliver justice to affected communities.¹⁴ Nevertheless, justice does not exist in the abstract but must be *seen* to be delivered.¹⁵ And so, the Court must first be perceived to be legitimate if justice — whenever it comes — is to be seen to be done by affected communities.¹⁶ In this key respect, the effectiveness of the OTP's selections depends on the Court's perceived legitimacy in these communities.¹⁷

Perceptions in affected communities are a complex, multi-layered and psychological phenomenon.¹⁸ No single affected community is a *tabula rasa* but is comprised of individuals with their own socially conditioned beliefs and convictions.¹⁹ Individuals are often shaped by their 'anchors' (e.g. ethnic, political, religious or social affiliations) which produce cognitive and emotional biases. These have the effect of hardening individual perceptions, and hence make them resistant to change.²⁰ Nonetheless, tackling entrenched or hostile perceptions is an integral part of international criminal justice as a project.²¹ In any event, tackling perceptions is not insurmountable because the threshold of perceived legitimacy is 'diffuse support' — a reasonable and stable recognition of an institution (i.e. the Court) and a willingness to accept (rather than always be satisfied) with its decisions i.e. selections.²² This type of support can be described as a 'favourable affective

¹³ 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: justice will ultimately be dispensed for LRA crimes. < <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-02-2015-ug> > accessed 31 July 2018; Fatou Bensouda, 'Our Resolve to Create a More Just World Must Remain Firm' (3 September 2015) <www.ictj.org/debate/article/our-resolve-create-more-just-world-must-remain-firm> accessed 31 July 2018. See generally The International Criminal Court, 'Interacting with Communities Affected by Crimes' <<https://www.icc-cpi.int/about/interacting-with-communities>> accessed 31 July 2018.

¹⁴ Ibid.

¹⁵ *R v Sussex Justices, Ex Parte McCarthy* [1924] 1 KB 256, 259 as per Lord Hewart.

¹⁶ Jaya Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) 32(1) *Mich.J.Int'l L.* 1, 15.

¹⁷ Ibid.

¹⁸ See, generally, Kamari M. Clarke and others (eds.), *Africa and the ICC: Perceptions of Justice* (CUP 2016)

¹⁹ John Locke, *An Essay on Human Understanding* (Penguin 1997) 105.

²⁰ See Chapter 3.3. One example is the phenomenon of 'in-group/out-group' bias. A social group that an individual psychologically identifies as belonging to is an 'in-group.' A social group that an individual does not psychologically identify as belonging to is termed an 'out-group.' Being a member of the in-group can lead to favouritism and partiality towards those within the in-group and to discrimination or prejudicial feelings against members of out-groups. See originally, Michael Billig and Henri Tajfel, 'Social categorisation and similarity in intergroup behaviour' (1973) 3(1) *European Journal of Social Psychology* 27-52.

²¹ Carsten Stahn, 'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?' (2012) 25 *LJIL* 251, 279.

²² Yonatan Lupu, 'International Judicial Legitimacy: Lessons from National Courts' (2013) 14 *Theoretical Inquiries in Law* 437, 440-1.

orientation'.²³ Recent empirical evidence suggests there may be reasons to be optimistic about the Court's perceived legitimacy among affected communities.²⁴ However, institutional efforts are required to maintain the Court's perceived legitimacy because its existence is neither total, nor permanent and is highly vulnerable to change.

In this context, this chapter examines selection procedure; understood as the manner or way of deciding upon a selection.²⁵ The chapter's focus is on selection procedure from the perspective of affected communities — including victims and those generally affected by the commission of crimes (e.g. witnessing crimes and/or suffering material, physical or psychological harm in the aftermath).²⁶ Specifically, the chapter analyses the role of prosecutorial discretion in selecting cases for investigation or prosecution. To date, the literature on procedure has tended to focus on the legitimacy and transparency of prosecutorial discretion.²⁷ There are several accounts that have considered the case for prosecutorial guidelines in helping to illuminate the exercise of discretion.²⁸ Other accounts have offered comparative reflections on prosecutorial discretion between differing international criminal tribunals and national courts.²⁹ Most frequently, the literature predominantly tended

²³ On the use of this expression see Tom R. Tyler, *Why People Obey the Law* (YUP 1990) 28.

²⁴ A recent survey in Kenya of 507 randomly selected individuals found only 34.3% agreed with the statement 'The International Criminal Court, ICC, or The Hague is biased against Africa.' In particular, victims — defined as those who suffered or observed violence revealed 60% disagreed with the statement that the Court is biased. See T. Alleblas and others, 'Is the International Criminal Court biased against Africans? Kenyan Victims don't think so' *The Washington Post* (6 March 2017); Yvonne Dutton and others, 'Collective Identity, Memories of Violence and Belief in a Biased International Criminal Court: Evidence from Kenya' (22 August 2017) <www.ssrn.com/sol3/papers.cfm?abstract_id=3014844> accessed 31 July 2018.

²⁵ See chapter 1: To reiterate: Procedure is defined as an established or official way of doing something, or a series of actions conducted in a certain order or manner. The term can be distinguished from the word 'process' which means a series of actions or steps taken in order to achieve a particular end and does not denote the method through which the end is to be reached. Angus Stevenson (ed.), *Oxford Dictionary of English* (OUP 2010) 1415.

²⁶ Many persons in affected communities self-identify as 'victims' but cannot satisfy the legal thresholds that would classify them as direct or indirect victims under the ICCSt. (currently confined to those who have suffered harm arising out of damage suffered by a direct victim as a result of the commission of the alleged crimes e.g. being a relative, or those who have intervened to prevent a crime that is alleged against the accused). The OTP supports a broad interpretation of victim and in its policy, has committed to exploring the concept of indirect victims further. See Art 68(3) ICCSt. See also Rule 85 (Definition of Victims) of the Rules of Evidence and Procedure; OTP, *Policy Paper on Victim Participation* (April 2010) 11.

²⁷ See, indicatively, Alison M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97(3) *AJIL* 510.

²⁸ James A. Goldston, 'More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court' (2010) 8 *JICJ* 383; Brian D. Leppard 'How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles' (2010) 43 *J. Marshall L.Rev.* 535, 553; Alexander K. A. Greenawalt, 'Justice without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) 39 *New York University Journal of International Law and Politics* 583.

²⁹ Matthew R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) *JICJ* 2 71; Luc Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 *JICJ*

to criticise the politicised nature of prosecutorial discretion and the production of problematic selection patterns.³⁰ However, there has been very little literature on selection procedure from the perspective of affected communities.³¹ This research gap is surprising and significant for, at least, two reasons.

First, selection procedure helps to illuminate the Court's 'audience-goal' dilemma. It is a well-known fact that the Court lacks a defined audience i.e. a primary constituency to whom it is accountable and responsive.³² The Court is expected to simultaneously 'speak to' a range of audiences from abstract constituencies (such as the 'international community') to those of a more concrete nature (such as potential perpetrators, states parties, civil society, donors, victims and crime-affected populations in general).³³ This lack of audience specificity also contributes to the Court's goal dilemma. The Court is expected to contribute to a range of often conflicting goals e.g. deterrence, peace, reconciliation, and there is ample uncertainty as to which goals are to be privileged, when, and whether those goals should reflect global and/or local priorities.³⁴ Such uncertainty includes the extent to which a decision about whether to prosecute should give priority to, 'affected local communities, *or* [to give voice] to norms of the international community.'³⁵ Therefore, the procedure by which such decisions are made can help to identify the preference given to particular goals. In this regard, the analysis reveals that selection procedure give too little preference to goals with local priorities, such as reconciliation.³⁶

Second, selection procedure has a fundamental connection to affected communities. The OTP's selections are made on their behalf and for their benefit: in the words of Fatou Bensouda, to prosecute is to 'stand up for the victims and

162; Daniel N. Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals' (2005) 3 *JICJ* 124.

³⁰ William A. Schabas, 'Victor's Justice: Selecting 'Situations at the International Criminal Court' (2010) 43 *J. Marshall L.Rev.* 535.

³¹ The only literature on prosecutorial discretion and victims/affected communities is focused on their right to a remedy and their access to justice. See Cécile Aptel, 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap' (2012) 10(5) *JICJ* 1357.

³² Margaret DeGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33(2) *Mich.J.Int'l L.* 265, 276.

³³ See, indicatively, Mirjan R. Damaška 'What is the Point of International Criminal Justice' (2008) 83 *Chi-Kent L. Rev* 329, 347-9.

³⁴ *Ibid.* See also Margaret DeGuzman, 'The Global-Local Dilemma and the ICC's Legitimacy' in Nienke Grossman and others (eds.), *Legitimacy and International Courts* (CUP 2018) 62, 67.

³⁵ *Ibid.* 67.

³⁶ See also Miriam J. Aukerman, 'Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice' (2002) 15 *Harv.Hum.Rts.J.* 39, 43.

affected communities.’³⁷ However, prosecutorial decisions are made opaque because The Hague is thousands of miles away, physically and morally remote from affected communities. Thus, there is a convincing case, in the words of Goldston, to bridge the gap between the Court and affected communities and respond to ‘their hopes for justice against their often-uncertain knowledge of the Court’s operations and limitations’³⁸ There is a role for the Court’s communication and outreach strategies in helping to explain the OTP’s selections but this can only go so far. Fundamentally, outreach and public information can cover or mask the fact that the procedure should be *inherently* satisfactory to those most affected by the commission of crimes.³⁹ If the procedure is deemed satisfactory, then affected communities are more likely to accept the selection and generate diffuse support (even if, in the end, the *decision* is deemed to be unfavourable to their interests). From this perspective, the analysis reveals why selection procedure is limited in helping to generate such support among affected communities.

The present analysis takes research on selectivity in the novel direction of procedural justice.⁴⁰ The analysis focuses on the (subjective) perceptions of fair procedure(s). The chapter uses three essential components of procedural justice; consistency (similarity of treatment); impartiality (removing the risk of bias) and representation (giving voice to those affected). In summary, the analysis exposes the limits of selection procedure’s contribution to the Court’s perceived legitimacy. I begin with a discussion of the significance of procedural justice.

³⁷ BBC Hardtalk Interview with Zeinab Badawi, ‘Fatou Bensouda: Prosecutor of the International Criminal Court’ (3 July 2017) <<http://www.bbc.co.uk/programmes/n3ct2kky>> accessed 31 July 2018.

³⁸ Goldston, *supra* note 28, at 402-3.

³⁹ Richard Dicker, ‘Making Justice Meaningful for Victims’ in Morten Bergsmo (ed.), *Criteria for Prioritising and Selecting Core International Crimes Cases* (Torkel Opsahl 2010) 268.

⁴⁰ See, indicatively, T. R. Tyler and E. Allan Lind, *The Social Psychology of Procedural Justice* (Plenum Press 1988); Tom R. Tyler, ‘What is Procedural Justice? Criteria Used By Citizens to Assess the Fairness of Legal Procedures’ (1988) 22(1) *Law and Society Review* 103; Tom R. Tyler, ‘Procedural Justice and the Effective Rule of Law (2003) 20 *Crime and Justice* 283; Tom R. Tyler, ‘Future Challenges in the Study of Legitimacy and Criminal Justice’ in Justice Tankebe and Alison Lieblich (eds.), *Legitimacy and Criminal Justice* (OUP 2013) 83.

4.1 Procedural Justice & Prosecution Selectivity

According to Thirlway, ‘procedure, by definition, is no more than a way of getting somewhere.’⁴¹ It follows that procedural justice is getting to somewhere that is just, or a procedure calculated to produce a just decision.⁴² The question of whether those decisions are, in fact, just, is commonly assessed against the principles of distributive (or substantive) justice. These principles are based on fairness and often refer to the division of burdens, punishments, benefits, rewards or shares across society.⁴³ By contrast, procedural justice is concerned with whether the procedure itself is fair.⁴⁴ In legal contexts, such fairness is based on how norms, principles or rules are applied in any given case (because the law generally aims to achieve outcomes through its application).⁴⁵ Therefore, procedural justice requires procedural fairness, and this is often assessed against objective criteria (see below). Both procedure and decision are linked because, broadly speaking, the fairer the procedure, the more likely the decision will be deemed to be fair too.⁴⁶ However, this relationship begs two essential questions; a) do procedures that lead to fair decisions exist; and b), can one know whether a decision is itself fair?

These questions were contemplated by Rawls in *The Theory of Justice*. He distinguished three types of procedural justice: perfect, imperfect and pure.⁴⁷ Perfect procedural justice is rare and occurs when an independent standard can help determine whether a decision is fair, *and* a procedure exists that is guaranteed to produce one. Imperfect procedural justice is where there is an independent standard to help determine whether a decision is fair, but there is no feasible procedure that

⁴¹ Cited in Filippo Fontanelli and Paolo Busco, ‘The Function of Procedural Justice in International Adjudication’ (2016) 15 *The Law and Practice of International Courts and Tribunals* 1, 2.

⁴² For the purpose of this chapter, and to avoid confusion, I have replaced the word outcome with ‘decision’. Literature on procedural justice refers to ‘outcome’, but, in reality, a procedure’s outcome is the final decision (i.e. a selection but also a non-selection e.g. a decision not to prosecute). To repeat, this study, has interpreted the term outcome with an external perspective i.e. an empirical phenomenon (reconciliation) that the decision can produce. See Colin Kaufman, ‘The Nature of Justice: John Rawls and Pure Procedural Justice’ (1980) 19 *Washburn Law Journal* 197, 197.

⁴³ John Rawls, *A Theory of Justice* (Revised Edition, HUP 1999) 3-40; See also, John Rawls, ‘Justice as Fairness: Political not Metaphysical’ (1985) 14(3) *Philosophy and Public Affairs* 223. The relationship between justice and fairness finds expression in the definition of fair — i.e. based on principles of justice and equality of treatment/non-discrimination. See Angus Stevenson, (ed.), *Oxford Dictionary of English* (OUP 2010) 627.

⁴⁴ See generally, Neil Vidmar ‘The Origins and Consequences of Procedural Fairness’ (1988) *Law & Social Inquiry* 877.

⁴⁵ Lawrence B. Solum, ‘Procedural Justice’ (2004) 78 *Southern California Law Review* 181, 237.

⁴⁶ John Rawls, *A Theory of Justice* (HUP 1999) 75.

⁴⁷ *Ibid.* 74-6.

can be sure to lead to such an end. Finally, pure procedural justice is where there is no independent standard to determine a fair decision, but by following the fairest possible procedure, one will produce a ‘correct’⁴⁸ decision, whatever it happens to be. This final type of procedural justice leads to a fair decision by the virtue of scrupulously observing an infallible procedure.⁴⁹ These three accounts are useful in specifying the nature of the immediate enquiry.

To begin, the present question is not about the fairness of the results of the OTP’s procedure i.e. the fairness of the eventual selection. It remains difficult to establish a consensus on an independent standard that can determine a particular selection’s fairness e.g. in terms of an equitable or geographical distribution (allowing for other variables such as jurisdiction and the location and intensity of the crimes). By contrast, the present starting point is, the prevailing criticism that those selections are indeed unfair, and thus, then, to enquire about the fairness of selection procedure. This enquiry is all the more relevant because of the OTP’s commitment to *pure* procedural justice. This commitment can be evidenced by the following two sets of reasons.

First, the OTP frequently commends the fairness of its selection procedure for being guided by the principles of impartiality and objectivity. According to the OTP, it observes the latter principle by adopting an evidence-driven process and a ‘standard analytical methodology’⁵⁰ to evaluate the selection of a case, and only arrives at a selection that it deems can be successfully investigated and/or prosecuted with a reasonable prospect of conviction.⁵¹ Closely related to objectivity, the OTP describes its commitment to impartiality as the ‘fair-minded and objective treatment of persons and issues, free from any bias or influence.’⁵² As touched upon in the opening chapter, the OTP’s Selection Policy considers that its impartiality means ‘the Office will apply the same processes, methods, criteria and thresholds for members of all groups to determine whether the crimes allegedly committed by them

⁴⁸ Ibid; William Nelson argues that Rawls must have meant ‘correct’ by his reference to ‘fair’ because to pronounce on fairness would — on Rawls’ own terms — be inconsistent with his account of pure procedural justice. See William Nelson, ‘The Very Idea of Pure Procedural Justice’ (1980) 90(4) *Ethics* 502, 509-510.

⁴⁹ For further elaboration on this point see Martin Gustaffson, ‘On Rawls’s Distinction between Perfect and Imperfect Procedural Justice’ (2004) 34(2) *Philosophy of the Social Sciences* 300, 301.

⁵⁰ This methodology includes methods for source evaluating and using consistent rules of measurement and attribution in its crime pattern analysis. See OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) para 23.

⁵¹ Ibid. para 21-23.

⁵² OTP, *Code of Conduct for the Office of the Prosecutor* (5 September 2013) s 6, no. 29.

warrant investigation and prosecution. This may in fact lead to different ‘outcomes’⁵³ for different groups.⁵⁴ Indeed the Office declares that it will not seek an ‘appearance of parity’ within a situation between rival parties by selecting cases that would not otherwise meet its legal selection criteria.⁵⁵ In this regard, the OTP confirms that its procedure is solely concerned with the application of criteria and is not concerned with producing a particular pattern of selections e.g. by reference to even-handedness or egalitarian principles, or by taking into account conflict, geographical or political considerations.

Second and relatedly, the OTP frequently explains that its selection procedure is based on strict principles of legalism i.e. that conduct, and decision-making are guided solely by rule-application and rule compliance.⁵⁶ The ideology of legalism conforms to the principle that it is only by rule application and rule-following that the fairest possible decision will be produced. Thus, legalism is about a technical exercise and permits no space for any assessment about the fairness of the decision itself (or its consequences). The OTP frequently expresses such legalism. I turn to consider this in the following chapter but for a brief introduction, the Prosecutor has, in many speeches, been keen to declare she makes no decisions out of fear or favour and that ‘politics and political considerations have no place and play no part in the decisions taken by the Office and in the execution of its independent and impartial mandate.’⁵⁷ The Prosecutor, in person and in press releases, stresses she is solely guided by the Rome Statute and she often cites the Preamble to further elaborate and explain her aims.⁵⁸ In short, the OTP subscribes to

⁵³ I.e. prosecution selections.

⁵⁴ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) para 20.

⁵⁵ Ibid.

⁵⁶ See chapter 5.3.

⁵⁷ See ‘The Determination of the Office of the Prosecutor on the communication received in relation to Egypt’ (8 May 2014) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1003>> accessed 31 July 2018. See indicatively, Fatou Bensouda, Speech at the 52nd Munich Security Conference (15 February 2014); <<https://www.securityconference.de/en/activities/munich-security-conference/msc-2016/speeches/speech-by-fatou-bensouda/>> accessed 31 July 2018; Fatou Bensouda Speech at a seminar hosted by the Attorney General of the Federation and Ministry of Justice of Nigeria International Seminar (24 February 2014) <<https://www.icc-cpi.int/iccdocs/otp/SpeechProsecutor-AbujaNigeriaFra.pdf>> accessed 31 July 2018 Shehzad Charania ‘Without Fear or Favour-An Interview with the ICC Prosecutor Fatou Bensouda’ (15 October 2015) <<http://justiceinconflict.org/2015/10/15/without-fear-or-favour-an-interview-with-the-icc-prosecutor-fatou-bensouda/>> accessed 31 July 2018; Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: ‘The Public Deserves to know the Truth about the ICC’s Jurisdiction over Palestine’ (2 September 2015) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-st-14-09-02.aspx> accessed 31 July 2018.

⁵⁸ The Preamble of the Rome Statute cites two main goals; ‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’ There are innumerable examples of rhetoric that

the fairness and integrity of its procedure and the scrupulousness with which it is observed. This is hardly surprising because rule-following is a community and managerial practice that is repeatedly exercised by domestic and international lawyers.⁵⁹ However, the more relevant question that follows is what is the nature of its selection procedure?

The OTP's selection procedure crucially rests on the exercise of prosecutorial discretion. The procedure and the exercise of discretion was discussed in detail in chapter one. However, by way of brief summary, the steps from a preliminary examination to an investigation and subsequent prosecution is connected by a series of legal thresholds that permit the exercise of considerable prosecutorial discretion. First, the OTP selects situations after a State referral to the Court, a UNSC referral in accordance with Chapter VII of the UN Charter, or after the Prosecutor's initiation of investigations *proprio motu* (on his/her own initiative).⁶⁰ Even at this stage, the OTP exercises prosecutorial discretion, deciding, for example, whether to accept those referrals or selecting those situations that are of sufficient gravity. Second, and principally under Article 53(1) (a)-(c) of the Rome Statute, the Prosecutor must consider admissibility (including the tests of 'complementarity' and 'gravity'),⁶¹ as well as having the discretion to decline to proceed with an investigation or prosecution 'in the interests of justice'.⁶² However, the admissibility assessment and the option to decline to proceed are judgements that cannot be based on legalistic criteria, but are shaped by discretionary factors such as political sensitivities.⁶³ These factors are incorporated in the final choice of defendant, who, in principle, ought to reflect 'the greatest responsibility' for the most serious crimes.⁶⁴ Selecting the 'best' individual to prosecute requires a blend of objective and subjective determinations

refers to the Rome Statute and/or the Preamble; See for example in speeches; Fatou. Bensouda, 'Local Prosecution of International Crimes: Challenges and Prospects' (4 November 2014) Opening Remarks 7th Colloquium of International Prosecutor(s) < <https://www.icc-cpi.int/iccdocs/otp/otp-statement-141105.pdf>>accessed 31 July 2018 and in press releases; 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' (16 January 2015) ICC Press Release <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>>accessed 31 July 2018.

⁵⁹ See Jean d' Aspremont, 'The Professionalisation of International Law' in Jean d' Aspremont and others (ed.), *International Law as a Profession* (CUP 2017) 30.

⁶⁰ Art. 14 (Referral of a Situation by a State Party) ICCSt; Art. 13(b) (Exercise of Jurisdiction) ICCSt. See Art. 15 (Prosecutor) ICCSt.

⁶¹ Art. 17(1) (a-d) (Admissibility) ICCSt.

⁶² Art. 53(1) (c) (Initiation of an Investigation) and Art 53(2) (c) ICCSt.

⁶³ OTP, *Interests of Justice Policy Paper* (1 September 2007) p. 4.

⁶⁴ *Situation in the Republic of Côte d' Ivoire* (Request for authorisation of an investigation pursuant to article 15) (23 June 2011) para. 45-46 and generally Richard J. Goldstone, *For Humanity: Reflections of a war crimes investigator* (YUP 2000) 105-6.

that reconciles available evidence, enforcement capability, and other prosaic questions such as how limited resources should be directed.⁶⁵ In summary, the driving force of selection procedure rests on the unpredictable exercise of discretion. In this light, the question for the present analysis is what makes this selection procedure fair?

Before one can answer this question, one must consider the general components of procedural fairness. Researchers began to meaningfully discuss these principles in the 1970's and 1980's. First, Thibaut and Walker suggested procedural fairness requires affected persons to be able to influence the procedure, and thus exert a degree of control over the eventual decision.⁶⁶ Later, Leventhal speculated that procedural fairness required six components: 1) its consistency across circumstances, persons and over time; 2) impartiality/a suppression of bias in a key decision-maker; 3) to be based on a full range of accurate information; 4) to permit an ability to correct or appeal the final decision; 5) to respect the importance of representing the interests of groups affected by the procedure, and, finally, ethicality — to be in conformity with commonly held ethical and moral values.⁶⁷ These principles paint procedural fairness as an objective or normative question — simply based on complying with standards and safeguards.⁶⁸ However much of the research interprets procedural fairness to be a subjective and psychological response i.e. based on the perception of those affected or involved e.g. disputants (defendants or victims).⁶⁹ In this regard, objective principles retain their significance only insofar as they establish benchmarks that indicate what individuals are *likely* to accept as a fair procedure.

Research suggests that perceptions of procedural fairness are psychologically distinct from perceptions of the fairness of eventual decisions.⁷⁰ It is precisely because of this separation that individuals are more accepting of unfavourable

⁶⁵ See OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) para. 12.

⁶⁶ See John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum 1975).

⁶⁷ Gerald S. Leventhal, 'What should be done about Equity Theory?' in Kenneth. J Gergen and others (eds.), *Social Exchange Advances in Theory and Research* (Springer 1980) 40-45.

⁶⁸ Objective procedural fairness finds expression in the concept of 'natural justice'. This concept generally describes duties to act fairly. Natural justice has become recognised within an individual's procedural rights e.g. the right to a fair hearing and the right to representation. In common law legal systems, these procedural rights have often formed the basis for judicial review of administrative decisions. See, indicatively, *CCSU v Minister for the Civil Service* (or the GCHQ case) [1983] UKHL 9.

⁶⁹ Tyler, *supra* note 23, at 5.

⁷⁰ *Ibid.*

decisions when they, nonetheless, perceive the procedure to be fair e.g. accepting the result of tossing a coin to decide upon an advantage in a sporting contest. Indeed, the more unfavourable the decision, the more important those perceptions of procedural fairness are held to be.⁷¹ However, it logically follows from this observation that a higher degree of procedural fairness is likely to contribute to an acceptance of the decision (without pronouncing on its final fairness).⁷²

This chapter turns to analyse the OTP's selection procedure against three essential components of procedural justice: consistency, impartiality and representation. This is by no means an exhaustive analysis and no special weight is ascribed to the components against one another. For those in affected communities, the components are not, in themselves, likely to be decisive in the acceptance of a given selection. Indeed, at differing times, different components can be relevant and other political, or conflict factors are always at play. Ultimately, only empirical assessments (that would control the context and other individual variables) could provide forensic answers about perceptions. Nonetheless, such components represent a broad consensus about fair procedures and decision-making, and also reflect widely-shared 'intuitions of justice'.⁷³ These three components emerge as the foremost indicators of procedural fairness across a range of studies.⁷⁴ In the words of Tyler, 'people care about the decision-making process [and] they consider evidence about representation...bias [and] consistency.'⁷⁵ In so doing, the analysis helps to understand the perceptions of affected communities because even when comprised of a diverse range of people, there is a tendency for groups — by way of the socialisation of their beliefs — to understand procedural fairness in the same way.⁷⁶ The analysis begins with the first component: consistency.

⁷¹ Lind and Tyler, *supra* note 40, at 70.

⁷² Nonetheless, a high degree of procedural fairness does not guarantee a fair outcome, but such a decision is more likely to be fair. See Josh Bowers and Paul H. Robinson, 'Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility (2012) 47 *Wake Forest Law Review* 211, 214.

⁷³ *Ibid.* 218.

⁷⁴ See, indicatively, John Thibaut and Lauren Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum 1975); E. J. Barrett and Tom R. Tyler, 'Procedural Justice as a criterion in allocation decisions' (1986) 50 *Journal of Personality and Social Psychology* 296; Blair H. Sheppard and Roy J. Lewicki, 'Toward general principles of managerial fairness' (1987) 1 *Social Justice Research* 161.

⁷⁵ Tyler, *supra* note 23, at 175.

⁷⁶ *Ibid.* 171-8.

4.2 Consistency

The idea of consistency denotes similar behaviour, performance or treatment, often over a period of time.⁷⁷ A consistent procedure demands the equal application of principles or rules to every instance of a decision. The concept of consistency is commonly traced to an Aristotelian principle of justice, that, namely, ‘like cases should be treated alike, and unlike cases should be treated un-alike in proportion to their difference.’⁷⁸ This principle — pithily described as ‘treating like cases alike’ — has gained an axiomatic status, particularly in the context of non-discrimination and equal treatment.⁷⁹ In legal settings the relevant ‘like cases’ all begin by being partially identical insofar as they share a certain description; one that can be determined by rules.⁸⁰ Nonetheless, there is considerable uncertainty as to how the maxim is applied, and that includes the degree of difference between cases that would justify different treatment.⁸¹ Indeed, how does one even decide what cases are sufficiently alike or unlike? Following on from this question is another one, namely, whether any criteria for determining the likeness or difference between cases exists and is otherwise satisfactory. In turning to the OTP, the present analysis suggests affected communities are equally likely to see procedure treat like cases *unlike* rather than like cases alike.

To begin, one must acknowledge that the selection procedure rests on highly discretionary judgments. Discretion, by nature is uncertain, because although decision-makers are asked to implement rules, they are given significant leeway as to their application. To briefly refresh the discussion in chapter one, the exercise of discretion is not a mechanical process, but ultimately relies on subjective human judgement.⁸² The Prosecutor’s judgement is especially called upon because she is a ‘minister of justice’ and some subjectivity is both inevitable and necessary to enable

⁷⁷ Stevenson (ed.), *supra* note 25, at 372.

⁷⁸ See Aristotle, *Nicomachean Ethics* (H. Rackham Harris Translation) (Wordsworth 1996) 1131a-1131b. See also H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) *Harvard Law Review* 593, 624.

⁷⁹ See Lord Walker of Gessinhorpe, ‘Treating like cases alike and unlike cases differently: some problems of anti-discrimination law’ (16 August 2010) 1 < https://www.supremecourt.uk/docs/speech_100809.pdf> accessed 31 July 2018

⁸⁰ Kenneth I. Winston, ‘On Treating Like Cases Alike’ (1974) 62(1) *California Law Review* 1, 16.

⁸¹ *Matadeen v Pointu* [1999] 1 AC 98, 109 as per Lord Hoffmann.

⁸² Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 31.

justice to be done.⁸³ The Prosecutor may need to make moral evaluative judgements about whether a case deserves to be exempt from normal treatment e.g. strong considerations of blameworthiness, capacity, gravity, mercy or simply resources might temper the impulse to prosecute.⁸⁴ Furthermore, discretion is shaped by organisational priorities e.g. funding pressures and by the Prosecutor's personality, rather than solely resting on objective legal criteria.⁸⁵ In this light, one could argue that consistency is the price to be paid for the exercise of prosecutorial discretion.

However, the exercise of prosecutorial discretion does not automatically sacrifice the principle of consistency. It is certainly true that every case should be judged on its own facts, and so rules may apply differently, and different selections will eventually be made. For this reason, it is correct that *absolute* consistency is unlikely to be achieved. In any event, absolute consistency would require equality of outcome i.e. making selections consistent by way of uniform treatment *or* by way of openly differential treatments. If this were the rule for consistency, then the exercise of prosecutorial discretion would be unduly fettered. Furthermore, a strategy to pursue absolute consistency might even invite a legal challenge on the basis of a demonstrable 'selective prosecution' and/or improper motive.⁸⁶ This cannot be the standard by which consistency is to be judged.

By contrast, the starting point of consistency is equality of treatment, i.e. that all cases are given the same treatment. The degree of consistency should then depend on *how* cases are to be treated before a selection is finally made. Here, 'like' cases should receive the same *type* of treatment and different cases receive a proportionately different type of treatment. In this regard, selection procedure has demonstrated a lack of consistency in the type of treatment it gives to a range of situations and cases, that has, as of yet, not been adequately explained by the differences between them. This is best evidenced from three features of selection treatment: duration, deference, and its relativity.

⁸³ *Prosecutor v Barayagwiza* (Decision on Prosecutor's Request for Review or Reconsideration) Separate Opinion of Judge Shahabuddeen ICTR-97-19-AR72 (31 March 2000) para 68. See also, *Randall v The Queen* [2002] UKPC 19, para. 10 and *Boucher v The Queen* [1955] SCR 16, 24-25.

⁸⁴ Stephanos Bibas, 'The Need for Prosecutorial Discretion' (2010) 19 *Temple Political & Civil Rights Law Review* 369, 372.

⁸⁵ Maria Varaki, 'Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court' (2016) 27(3) *EJIL* 769, 774.

⁸⁶ *Prosecutor v Delalic and others* (Čelebići case) (Judgment in the Appeals Chamber) IT-96-21-A (20 February 2001) para 602.

First, there is considerable inconsistency in the duration of preliminary examinations between situations. On the one hand, the disparities in time are to be expected given the context-specific complexities of the crimes and the accompanying challenges of evidence-gathering and management of capacity/resources.⁸⁷ Nevertheless, that does not mean that inconsistency is inevitable, because a commitment to consistency requires efforts to harmonise differences of treatment *or* a willingness to explain the need for differential treatment. The Rome Statute contains no specific provision that regulates the length of preliminary examinations and the Prosecutor has argued that the statutory silence was a deliberate choice on the part of the drafters to afford her flexibility.⁸⁸ However, as Pues discusses, the drafting history does not necessarily support such a conclusion and there would need to be compelling evidence to justify what has transpired to be a limitless discretion regarding the duration of preliminary examinations.⁸⁹ This degree of discretion has led to significant variation.

A brief overview of the duration of a range of preliminary examination demonstrates the inconsistency. The preliminary examination(s) lasted one week in the *Situation in Libya*; over two years in the *Situation on the Registered Vessels of Comoros*, more than three years in the *Situation in Palestine* (before it was decided that Palestine was not a 'state'), approximately ten years in the situation in Afghanistan and more than thirteen years (and still ongoing) in the situation in Colombia. There may indeed be legitimate and valid reasons for the time such examinations have taken, including, principally, the time it takes to identify cases for investigation. The OTP releases annual reports on its preliminary examinations and these explain the background and contexts of differing situations, but these reports offer little by way of explanation as to why each situation has required such *differing* times. Put another way, there is no attempt to explain why the time differed by

⁸⁷ See the OTP, *Policy Paper on Preliminary Examinations* (November 2013) paras. 78-83 that listed some indicative factors that would determine the duration of preliminary examinations including the availability of information, the nature, scale and frequency of the crimes, and the existence of national responses to alleged crimes.'

⁸⁸ The only reference to preliminary examinations are in Art. 15(6) ICCSt; See also OTP Prosecution's Report Pursuant to Pre-Trial Chamber's II 30 November 2006 (Decision Requesting Information on the Statute of the Preliminary Examination of the Situation in the Central African Republic) ICC-01/05/07 (15 December 2006) para 10; OTP *Report on Preliminary Examination Activities 2017* (4 December 2017) para. 13 ('There are no timelines provided in the Statute for a decision on a preliminary examination').

⁸⁹ Anni Pues, 'Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations (2017) 15(3) *JICJ* 434, 443-4.

reference to the distinctions between preliminary examinations. The uncertainty has left even former staff members at a loss to explain why, in the Colombian situation, some cases have not reached the investigation stage.⁹⁰ The OTP has been unable to fully justify the differential treatment. This omission leaves fertile ground for affected communities to believe inconsistency in time is a means of avoiding politically contentious investigations, and prolonged delays are a way for certain cases never to be selected.⁹¹

Second and relatedly, further evidence of inconsistency can be located in the differing degrees of deference afforded to national legal responses. The display of deference finds its greatest expression in one of the assessments of admissibility — complementarity.⁹² The OTP's selection procedure entails a subjective determination of whether the State is sufficiently 'unwilling' or unable 'genuinely' to carry out an investigation/prosecution.⁹³ Crucially, the Office can evaluate the admissibility thresholds for however long is necessary.⁹⁴ Such uncertainty of time is compounded by the OTP's policy of 'positive complementarity', by which the OTP actively endorses and promotes national criminal proceedings.⁹⁵ The policy is either understood as part of the Court's shadow effect that can lead to catalysing national proceedings (and promoting deterrence of future crimes), or it is understood as an indirect means of supporting domestic judicial capacity.⁹⁶ Either way, several aspects remain unclear: *when* is such a policy adopted among all current and potential situations/cases, what is the rationale for pursuing the policy at any given time, and, ultimately, how does such a policy influence the exercise of discretion?

⁹⁰ Paul Seils, 'Putting Complementarity in its Place' in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 323-6.

⁹¹ HRW, 'Comments on the ICC Office of the Prosecutor Draft Policy Paper on Case Selection and Prioritisation' (3 May 2016) 2. See also David Bosco, 'Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations' (2017) 111 *AJIL* 395.

⁹² The Court only exercises secondary jurisdiction with primacy given to national legal systems. See Art 17. ICCSt

⁹³ Bertram Kloss, *The Exercise of Prosecutorial Discretion at the International Criminal Court: Towards a More Principled Approach* (Herbert Utz Verlag 2017) 20.

⁹⁴ OTP Regulation 29 (4) (Initiation of an investigation and prosecution) of the Regulations of the OTP ICC-BD/05-01-09 (April 2009).

⁹⁵ Rod Rastan, 'Complementarity: Contest or Collaboration?' in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl 2010) 106.

⁹⁶ Chandra L. Sriram and Stephen Brown, 'Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact' (2012) 12 *Int.C.L.R.* 44; William B White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2008) 19 *Crim.L.F.* 59-85; Olympia Bekou, 'The ICC and Capacity Building at the National Level', in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 1245-1258.

Leaving these questions aside, the inconsistency in positive complementarity is best illustrated by a direct comparison between the OTP's respective interventions in the *Situation in Kenya* and the *Situation in Colombia*. The Office's policy of positive complementarity in the Kenya situation was evidenced by the early encouragement and patience it demonstrated towards the Kenyan authorities, before, eventually, deadlines were imposed — these were then missed — and then indictments finally issued.⁹⁷ In Colombia, the Prosecutor sought to use positive complementarity as a tool to catalyse national prosecutions and otherwise monitor domestic proceedings like a watchdog.⁹⁸ The impression of inconsistency is produced because the OTP has failed to rationalise the differing approaches to positive complementarity between the respective situations. Furthermore, the policy's influence on the final selection decision i.e. the exercise of discretion is inherently uncertain when one considers former Prosecutor Luis Moreno-Ocampo's now notorious declaration: that the *absence* of cases would demonstrate the Court's effectiveness because it would imply national authorities were undertaking their own prosecutions.⁹⁹ In summary, selection procedure can be rendered arbitrary by the variation in deference afforded by the policy of positive complementarity.

Third and finally, there is arguably the greatest inconsistency in the selection procedure's determination of the gravity of a situation and/or potential cases. The Rome Statute fails to illuminate the discretion in selecting situations, and so, in recognition of its limited resources, the OTP selects situations based on their relative gravity, i.e. a choice made in comparison to others.¹⁰⁰ The OTP also uses relative gravity as a criterion for case selection, given its objective is to focus on the most serious crimes that are of concern to the international community.¹⁰¹ The OTP has declared that satisfying the threshold requires an assessment of both quantitative and qualitative considerations that relate to the scale, nature, manner of commission and

⁹⁷ For a detailed overview of the OTP's policy of positive complementarity in the Situation in Kenya, see Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer 2015) 29-46.

⁹⁸ See James Stewart, 'Transitional Justice in Colombia and the Role of the International Criminal Court' (13 May 2015); R. Urueña, 'Prosecutorial Politics: The ICC's Influence in the Colombian Peace Processes 2003-2017' (2017) 111(1) *AJIL* 104-125.

⁹⁹ Luis Moreno-Ocampo, 'Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor' (16 June 2003) p. 3 <<http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>> accessed 31 July 2018.

¹⁰⁰ The Office's early Draft Regulations appeared to suggest just that all admissible situations would proceed to an investigation—a position that William Schabas describes as 'the height of absurdity.' See Schabas, *supra* note 30, at 547; See generally, Kevin J. Heller, 'Situational Gravity Under the Rome Statute' in Carsten Stahn and Larissa van den Herik (eds.), *Future Directions in International Criminal Justice* (CUP 2009).

¹⁰¹ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) para. 35.

impact of the crimes.¹⁰² These factors are not strictly applied but are only indicative in a holistic assessment. Thus, gravity — a notion that is itself ‘vague, nebulous and quintessentially subjective’¹⁰³ — is made more uncertain by its relative application to each set of facts. The relative application inherently invites the identification of the most marginal differences to justify differing selections, and so, it is of little surprise that the procedure is vulnerable to arbitrariness.

One prominent way that the procedure permits arbitrariness is by way of blurring the distinction between situations and cases. At the preliminary examination stage, gravity is examined against a backdrop of the likely set of *potential* cases that would arise from an investigation.¹⁰⁴ Notoriously the Situations in Uganda and the DRC when selected were described as the ‘gravest admissible situations under the jurisdiction of the Court’¹⁰⁵ and their selections were used to justify *not* selecting the situation in Iraq (concerning the alleged conduct of British troops during the Iraq War). The cited reason was that in the Iraq referral the numbers of victims of willful killing and inhuman treatment were in the tens, compared with the Ugandan and DRC situations where there were ‘thousands of willful killings as well as the intentional and large-scale sexual violence against, and abduction ... [and] displacement of more than 5 million people.’¹⁰⁶ However, the comparison was flawed for its conflation between situations and potential cases; a comparison that Schabas argued was akin to that between apples and oranges.¹⁰⁷ The Prosecutor’s comparison of the Situations in Uganda and the DRC with the specific alleged acts of British troops in Iraq overlooked the relevant comparison — to the Iraq war *in its entirety* (entailing potential widespread human rights violations, internal displacement and crucially the significance of the war to the international

¹⁰² Ibid. paras. 37-41.

¹⁰³ William A. Schabas, *An Introduction to The International Criminal Court* (CUP 2017) 241.

¹⁰⁴ See *Situation in the Côte D’Ivoire*, (Decision Pursuant to Article 15 of the Rome Statute...) ICC-02/11 Pre-Trial Chamber III (3 October 2011) paras. 202-204; *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute...) ICC-01-09 Pre-Trial Chamber II (31 March 2010) paras. 48, 50.

¹⁰⁵ OTP, *Report on the Activities Performed During the First Three Years* (June 2003-June 2006) (12 Sep 2006) 6-7.

¹⁰⁶ Luis Moreno-Ocampo, Letter (9 Feb 2006) < <https://www.legal-tools.org/doc/5b8996/pdf/>> accessed 31 July 2018.

¹⁰⁷ William A. Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (OUP 2012) 85.

community).¹⁰⁸ The selection risked creating an early, but stubborn, impression in affected communities that certain situations/cases do not receive conventional treatment, not because of legitimate differences, but for ostensibly political reasons.

In a more recent example, the OTP declined to proceed to an investigation in the *Situation on Registered Vessels of Comoros, Greece and Cambodia*.¹⁰⁹ The Office argued that the number of victims were limited and drew a comparison with the case of *Prosecutor v Abu Garda and others* where there was a comparable number of victims (twelve). The Prosecutor argued the latter case was distinguishable by its nature and its impact; in the latter case attacks were intentionally directed against AU peacekeepers, including the attempted killing of another eight peacekeepers and that such attacks on peacekeepers ‘strike at the very heart of the intentional legal system established for the purpose of maintaining international peace and security.’¹¹⁰ However, the same criticism in respect of not selecting the *Situation in Iraq* has been made with respect to the *Situation on the Comoros*: failing to make a distinction between the Situation as a whole and potential cases.¹¹¹ Longbardo is correct in arguing the OTP should adopt a lower threshold in opening an investigation (i.e. on the basis of finding at least one *potential case* that is sufficiently grave), rather deciding on the basis that an *actual case* is sufficiently grave (which should be reserved to deciding to initiate a prosecution).¹¹²

Indeed, upon review in the Comoros Situation, the Pre-Trial Chamber (PTC) disagreed with the OTP’s gravity analysis and stated the assumption should be that if events are unclear and conflicting accounts exist, then these factors militate in favor of sufficient gravity, rather than the opposite — and — only a full investigation can

¹⁰⁸ The flawed nature of the comparison was confirmed when the defendant in *The Prosecutor v Thomas Lubanga* was charged (only) with the recruitment of child soldiers during the DRC’s civil war, a charge that was not, relatively speaking, more grave than the alleged war crimes during the Iraq War.

¹⁰⁹ In 2010, Israeli Defence Forces (IDF) forcibly boarded a convoy of vessels (‘Gaza Freedom Flotilla’) that were intending to breach an Israel-imposed naval blockade and deliver humanitarian aid to the Gaza Strip. The IDF’s interception— principally on a Comorian-registered vessel called the *Mavi Marmara*—led to the death of ten people and alleged abuses against detained passengers.

¹¹⁰ OTP, *Situation on Registered Vessels of Comoros, Greece and Comoros Article 53(1) Report* (6 November 2014) para 144.

¹¹¹ Marco Longobardo, ‘Everything is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations and the Mavi Marmara Affair’ (2016) 14 *JICJ* 1011, 1021-6.

¹¹² See Art. 53(1) and Art. 53(2) (Initiation of Investigation) ICCst.

determine the events that unfolded.¹¹³ Put simply, there is little agreement on how gravity is to be judged even within the Court and this exposes its application as lacking any clear or principled reasoning.¹¹⁴ Even if one could defend the use of gravity to select cases, one is unlikely to find agreement about the need for differing treatments when the objective differences between situations/cases in terms of gravity are — for all intents and purposes — so contested and tenuous.

To summarise, selection procedure lacks consistency by way of the type of treatment given to situations/potential cases. This conclusion is evidenced in terms of the duration of preliminary examinations, deference in the policy of positive complementarity and the reliance on assessments of relative gravity. Consistency may not, by itself, be a prominent factor in how affected communities perceive the Court. However, evidence of inconsistency can readily be pounced on and cast as something worse, particularly when information trickles down — via the unsympathetic filters of political elites or media coverage — into affected communities. This is not to say that affected communities are unwilling to accept different treatment because research suggests that communities may do so, provided they clearly know and accept the justification for different treatment.¹¹⁵ Leaving aside the fact that communities might not have access to sufficient (accurate) knowledge to judge consistency for themselves, the fact remains that there are no clear justifications for the different treatments in regard to duration, deference and relativity. In this light, there remains an (unnecessary) risk that affected communities will be equally likely to suspect selection procedure treats cases inconsistently rather than consistently.

¹¹³ *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and The Kingdom of Cambodia*, (Decision on the request of the Union of the Comoros to review the Prosecutor's Decision not to initiate an investigation) ICC-01/13 Pre-Trial Chamber I (16 July 2015) paras. 26, 36.

¹¹⁴ Schabas, *supra* note 107, at 86.

¹¹⁵ Tyler, *supra* note 23, at 153.

4.3 Impartiality

From consistency closely flows the principle of impartiality: treating parties or rivals to a conflict equally.¹¹⁶ In most instances, impartiality refers to the ‘state of mind’ or virtue of a decision-maker who is overseeing a procedure between, typically, two parties.¹¹⁷ Impartiality is a fundamental principle because it expresses fairness and public confidence in justice being seen to be done.¹¹⁸ The term is distinguishable from ‘neutrality’ which describes the absence of *any* position in support of one party or ceasing to express a view for either side.¹¹⁹ Therefore, being impartial does not necessitate neutrality, because the former permits taking a position provided that the parties receive equal treatment.¹²⁰ In addition, the concept of impartiality can be distinguished from the notion of independence but, nevertheless, both terms share a crucial relationship.¹²¹ One can still act independently but not necessarily act impartially, but, a lack of independence will, invariably, provide grounds to question one’s adherence to impartiality.¹²² However, to fully understand impartiality one must grasp the meaning of its antagonistic and directly opposing principle.

The antithesis of impartiality is the concept of bias: being unfairly prejudiced against particular individuals or groups, or unduly concentrating an interest towards an exclusive target or range of subjects.¹²³ Frequently, therefore, impartiality finds its greatest expression in one of the principles of natural justice, specifically, the ‘rule against bias’, which is based on the maxim of *nemo iudex in sua causa* (no one

¹¹⁶ Stevenson (ed.), *supra* note 25, at 876.

¹¹⁷ Impartiality is often cited in the context of a fair hearing/trial; See Art 6(1). European Convention on Human Rights (Right to a Fair Trial); Luc Côté, ‘Independence and Impartiality’ in Luc Reydams and others (eds.), *International Prosecutors* (OUP 2012) 357-9.

¹¹⁸ See, for example, *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577, 599 as per Lord Denning (‘Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: The judge was biased’)

¹¹⁹ Stevenson (ed.), *supra* note 25, at 1194.

¹²⁰ By contrast, being neutral necessarily requires or subsumes a state of impartiality because both parties are treated equally by virtue of no position being taken.

¹²¹ Both impartiality and independence are often used interchangeably. Independence denotes acting on one’s own free will (i.e. without a dependence on others or free from external interference). Independence also refers to a freedom or detachment in affiliation or relationship to other bodies or institutions. See Stevenson, *supra* note 25 at 888. See also Baroness Hale in *Gillies v Secretary of State for Works and Pensions* [2006] UKHL 2 para 38 (‘Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal’s approach to deciding the cases before it. Independence is the structural or institutional framework which secures this impartiality.’).

¹²² William Schabas states that ‘while independence is desirable in and of itself, its importance really lies in the fact that it creates conditions for impartiality.’ Cited in Côté, *supra* note 117, at 358.

¹²³ The dictionary defines bias as an inclination or prejudice for or against one person or group, especially in a way considered to be unfair, or the concentration of interest in one particular (and exclusive) area or subject. Stevenson, *supra* note 25, at 161.

may be a judge in his or her own cause).¹²⁴ An impartial procedure is one that demonstrates an absence of bias towards either relevant party. In this light, the present analysis explains why affected communities are more likely to see the procedure's treatment of parties as biased rather than impartial.

To begin, the concept of bias can be broken down into its two main types: actual and apparent.¹²⁵ Actual bias is the conscious and demonstrable prejudice in favour or against a party. This type of bias is difficult to prove as office-holders are generally presumed to be impartial, unless, there is evidence brought forward to the contrary.¹²⁶ On the other hand, most concerns about bias relate to 'apparent bias'. This type concerns the *risk* of actual bias, by virtue of ascertainable facts such as a lack of independence, pre-disposed interests or simply based on discernible behaviour or conduct.¹²⁷ Self-evidently, the question of apparent bias is based on perception so as to not tarnish the image of justice in the eyes of the public.¹²⁸ The European Court of Human Rights have emphasised that this determination is about whether there are ascertainable facts that may raise doubts as to impartiality and this encompasses impressions.¹²⁹ More pithily, and in words of the late Justice Scalia of the US Supreme Court, 'what matters is not the reality of bias or prejudice, but its appearance.'¹³⁰ In this sense, impartiality depends on the absence of apparent bias and therefore the question to ask is whether affected communities would apprehend such bias in the selection procedure.

To answer this question, one must use a standard to determine whether there is sufficient apparent bias — an assessment that is judged from the perspective of an on-looker or observer. In the context of judicial disqualifications, many jurisdictions

¹²⁴ This principle has a long tradition in English Common Law. See, indicatively, *Day v Savadge* (1614) Hob 85; 80 ER 235.

¹²⁵ I leave aside the category of cognitive biases such as unconscious or implicit bias e.g. the extent to which one's own background, culture, experiences and pre-dispositions can psychologically influence conduct and decision-making.

¹²⁶ The burden to prove actual bias is a heavy one as it requires evidence of the subjective mind-set of the decision-maker. See Matthew Groves, 'The Rule Against Bias.' (2009) 39(1) *Hong Kong Law Journal* 485, 493-6.

¹²⁷ See, indicatively, *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte* (No 2) [1999] 1 All ER 577; *Daktara v Lithuania*, App no 42095/98, EctHR, Judgment of 10 October 2000, para 30.

¹²⁸ See, indicatively, *Davidson v Scottish Ministers* [2004] UKHL 25; *Wewaykum Indian Board v Canada* [2003] SCC 45, 66.

¹²⁹ *Hauschildt v Denmark* (1989) 1 E. H. R. R 266, at para 48. ('Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect, even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public...').

¹³⁰ *Liteky v US*, (1994) 127 L. Ed. 2d. 474, at 486;

have developed tests that use a hypothetical device e.g.; whether ‘the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [decision-maker] was biased.’¹³¹ However, such tests, are also used as the basis for reviewing the conduct of other public administrative bodies such as a prosecutor’s decision to proceed or decline with a prosecution.¹³² Hence, a similar test has been confirmed by the ICC’s Appeals Chamber in relation to the Court’s Prosecutor: whether there could be an appearance of bias ‘based on the perspective of a reasonable observer, properly informed.’¹³³ The use of such a construct is a heuristic device to determine whether, looking in from the outside, the commitment to impartiality is outweighed by an appearance of bias i.e. from the perspective of a member of public concerned in seeing justice being done. In this light, it is appropriate to begin by asking whether there is an appearance of bias from the perspective of ‘reasonable observers, properly informed’ within affected communities. Using such a standard, one needs to ask two questions: a) what is a reasonable observer, and b), what knowledge makes an observer ‘properly informed’?

First, reasonable observers have reasonable apprehensions of bias i.e. justified on an objective basis.¹³⁴ The reasonableness of their apprehensions finds expression in the observer’s fair-mindedness: someone who ‘always reserves judgment on every point until she has seen and fully understood both sides of the argument’,¹³⁵ ‘someone who is not unduly sensitive or suspicious’,¹³⁶ or prone to making snap judgments or reaching hasty conclusions based on...an isolated episode.¹³⁷ Second, informed observers have ‘taken the trouble to inform themselves of all matters that are relevant within [their] overall social, political or geographical context.’¹³⁸ However, she or he, cannot be taken to have a detailed knowledge of the law that ordinary experience would not acquire, but equally they are not wholly

¹³¹ *Porter v Magill* [2001] UKHL 67, para 103 as per Lord Hope.

¹³² See, indicatively, *R v DPP, ex p. Jones (Timothy)* [2000] Crim LR 858; *R (on the application of Joseph) v DPP* [2001] Crim LR 489; *R (on the application of Peter Dennis) v DPP* [2006] EWHC 3211; *R v Christopher Killick* [2011] EWCA Crim 1608.

¹³³ *Prosecutor v. Gaddafi and Al-Senussi* (Decision on the Request for Disqualification of the Prosecutor) ICC 01/11-01/11-175 Appeals Chamber (12 June 2012) para 20.

¹³⁴ *Davidson v Scottish Ministers* [2004] UKHL 34, at 47 as per Lord Hope.

¹³⁵ *Helow v Secretary of State for the Home Department* [2008] UKHL 62, at para. 2 as per Lord Hope.

¹³⁶ *Johnson v Johnson* (2000) 201 CLR 488, 509, para. 53 as per Justice Kirby.

¹³⁷ *Ibid.* paras 14, 53.

¹³⁸ Lord Hope, *supra* note 134, at para. 3.

uninformed about the law in general¹³⁹ and may be expected to be aware (but not uncritical) of legal traditions and culture.¹⁴⁰

In turning to the Court, reasonable observers in affected communities would be expected to put their subjective preferences (including any motivated reasoning and cognitive prejudices such as confirmation bias) firmly to one side.¹⁴¹ Those observers would also require an equally critical attitude to negative political and media messages about the Court's prosecution selectivity. Assuming that they could, the question to then determine is the extent of the observer's knowledge of selection procedure before an appearance of bias could be objectively justified. The ICC Appeals Chamber has confirmed that 'a reasonable observer, properly informed is aware of the functions of the Prosecutor.'¹⁴² These functions, presumably, refer to a basic knowledge of her activities — investigating and prosecuting individuals — but also the way those activities are to be carried out.¹⁴³ In this sense, observers would know that the Prosecutor is expected to act impartially at all times and dispense treatment of persons and issues, free from any bias or influence.¹⁴⁴ These observers would know the Prosecutor should act independently and know the significance of independence to her impartiality.¹⁴⁵ However, the 'reasonable observer, properly informed,' would be making a judgment against a background of ascertainable facts about the Prosecutor and the selections made to date. In this light, an observer is likely to objectively justify bias for the following five reasons.

First, an observer would reasonably apprehend bias on the grounds of the Prosecutor's own lack of independence. The OTP has institutional independence

¹³⁹ Justice Kirby, *supra* note 136, at para. 53.

¹⁴⁰ *Taylor v. Lawrence* [2002] EWCA Civ 90 para 61 as per Lord Woolf C. J; For an excellent discussion on the reasonable and informed observer see Abimbola Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to Gough (2009) 68 (2) *C.L.J.* 388, 393-6.

¹⁴¹ Motivated reasoning is when people arrive at a conclusion they are already intent on. Such people may selectively recall or search for particular information or memories or use their own evidentiary standards to arrive at a pre-determined conclusion. Confirmation bias is when people search, interpret and recall information to help confirm an existing belief, and by implication reducing their ability to accept an opposing view. For a concise discussion see Stuart Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms (2012) 45 *Vanderbilt J.Transnat'l.L.*405, 420-2, 433-5.

¹⁴² *Prosecutor v. Gaddafi and Al-Senussi* (Decision on the Request for Disqualification of the Prosecutor) ICC 01/11-01/11-175 Appeals Chamber (12 June 2012) para. 34.

¹⁴³ This finds expression in the dictionary definition of 'function' as a verb i.e. to work or operate in a particular way.

¹⁴⁴ Art 45. ICCSt ('the Prosecutor shall make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.');

Art. 42(7) ICCSt; OTP Code of Conduct for the Office of the Prosecutor (5 September 2013) section 6, no. 29.

¹⁴⁵ Art 42(1). ICCSt.

from the Court, but it is inseparably attached to the Court's other organs including the Chambers and the Registry, and generally, cannot escape the political realities of the Court's jurisdiction.¹⁴⁶ Furthermore, the OTP's functional independence, i.e. its freedom in decision-making, is tainted by embedding the UNSC as one method of triggering the Court's jurisdiction.¹⁴⁷ For instance, the UNSC has triggered jurisdiction in the situations in Libya and Sudan and helped to underline the criticism that the Prosecutor lacks independence and is subject to the vagaries of global geo-power politics.¹⁴⁸ Finally, even the Prosecutor's individual independence has been brought into question, particularly that of former Prosecutor Luis-Moreno Ocampo. Evidence of this can be found in the former Prosecutor's pursuit of the Court's first self-referrals by Uganda and the DRC;¹⁴⁹ the Prosecutor was bound up in institutional self-interest; putting runs on the board by seeking cases that would be 'easy wins.'¹⁵⁰ The Prosecutor's independence can also be reasonably suspected on the basis of having a less than robust commitment to professional ethics.¹⁵¹ These grounds, alone, are sufficient to objectively justify an appearance of bias.

Second, an observer would reasonably apprehend bias on the grounds of discernible selection patterns i.e. the 'equality of final impact.'¹⁵² The OTP has brought twenty-five cases before the Court against a range of defendants from sitting Heads of State, leaders of rebel groups, and commanders of armed forces.¹⁵³ The concentration of attention on African situations is only one identifiable pattern, but, another pattern emerges within individual situations (i.e. intra-situation). The OTP's selection of cases within situations has often overlooked alleged crimes committed by Government forces in favour of targeting Government opponents. For example,

¹⁴⁶ Côté, *supra* note 117, at 326-7.

¹⁴⁷ *Ibid.*, 327.

¹⁴⁸ For an overview of the 'politics' of prosecution decisions see Alana Tiemessen, 'The International Criminal Court and the politics of prosecutions' (2014) 18 *I.J.H.R.* 444.

¹⁴⁹ Phil Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda' in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008) 37-46.

¹⁵⁰ *Ibid.* Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Intervention in Ending Wars and Building Peace* (OUP 2016) 167-8.

¹⁵¹ The moral conduct and probity of an individual decision-maker finds expression in another of Leventhal's components of procedural justice, 'ethicality'. See Leventhal, *supra* note 67, at 40-45; On the former Prosecutor, See 'Revealed: ICC Prosecutor Luis Moreno-Ocampo's Link to Friend of the Gaddafi's' *The Sunday Times* (1 October 2017) <<https://www.thetimes.co.uk/article/revealed-icc-prosecutor-luis-moreno-ocampo-s-link-to-friend-of-the-gadaffis-37kdkb0gr>> accessed 31 July 2018; The Black Sea, 'Secrets of the International Criminal Court: The Kenya U-Turn' <<https://theblacksea.eu/stories/article/en/icc-ocampo-kenya>> accessed 31 July 2018.

¹⁵² William Lucy, 'The Possibility of Impartiality' (2005) 25(1) *OJLS* 3, 11

¹⁵³ These cases are currently at differing stages; pre-trial, trial, appeals, reparations and in the case of some closed, as charges have been vacated, withdrawn, not confirmed and in one instance a defendant acquitted.

only members of the Lord's Resistance Army were indicted in the Situation in Uganda, despite credible evidence of abuses committed by Government forces.¹⁵⁴ In the *Situation in the CAR*, Jean Pierre-Bemba's indictment (that led to a conviction that was later overturned by the Appeals Chamber) has been unaccompanied by any charges brought against his (current government) opponents, despite evidence of war crimes.¹⁵⁵ These government-skewed patterns are not necessarily confined to self-referred situations; The Prosecutor's *proprio motu* investigations in the *Situation of the Côte d'Ivoire*, led to the indictment(s) of the ousted Laurent Gbagbo (and his supporters) but the alleged crimes committed by rival supporters of current President Alassane Ouattara have not been prosecuted.¹⁵⁶ In the *Situation in Libya*, referred to the Court by the UNSC, the OTP has only indicted members of the past Gaddafi regime, but has hitherto not pursued allegations against anti-Gaddafi forces.¹⁵⁷ The OTP's selection patterns are, by no means, universal or predictable, and can depend on situation and case-specific factors.¹⁵⁸ However, when its past record indicates what Hansen describes as a general absence of 'even-handed justice',¹⁵⁹ there are grounds for reasonable apprehensions of bias.

The apprehensions are likely to remain even if the one-sidedness or imbalance is, claimed to be temporary. The OTP insisted its selection of cases in the *Situation in the Côte d'Ivoire*, was 'sequenced' i.e. that it would investigate alleged crimes committed by one group (the pro-Gbagbo faction) before examining the potential of investigations (and subsequent rolling-out of case against other groups (the pro-Ouattara faction)). This 'sequencing policy' was conveyed in the OTP's first

¹⁵⁴ See Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide* (CUP 2015), 187-197.

¹⁵⁵ See, indicatively, HRW, 'I Can Still Smell the Dead—The Forgotten Human Rights Crisis in the CAR' (September 2013) 64-70.

¹⁵⁶ For an overview see, Sophie T. Rosenberg, 'The International Criminal Court in Côte d'Ivoire: Impartiality at Stake?' (2017) 15(3) *JICJ* 471 and Giulia Piccolino, 'Côte d'Ivoire, Victor's Justice, the Gbagbos and the Mega-Trial' (25 March 2015) <<http://africanarguments.org/2015/03/25/cote-divoires-victors-justice-icc-the-gbagbos-and-the-mega-trial-by-giulia-piccolino/>> accessed 31 July 2018.

¹⁵⁷ Those indicted in the Situation in Libya (Saif-al Islam Gaddafi, Abdullah Senussi, Al-Tuhamy Mohamed Khaled and Mahmoud al-Werfalli) were all once loyal members of the Gaddafi regime. For evidence of alleged crimes committed during the Libyan uprising, see, indicatively, Amnesty International (AI), 'The Battle for Libya: Killings, Disappearances and Torture' (13 September 2011) <<https://www.amnesty.org/download/Documents/32000/mde190252011en.pdf>> accessed 31 July 2018.

¹⁵⁸ For example, the indictments of Uhuru Kenyatta (belonging to the Kikuyu) and William Ruto (belonging to the Kalenjin group) represented charges from 'both sides' of the alleged crimes committed in the aftermath of the Kenyan elections in 2007-8.

¹⁵⁹ Thomas Hansen, 'The International Criminal Court in Kenya: Three Defining Features of a Contested Accountability Process and Their Implications for the Future of International Justice' (2012) 18(2) *Australian Journal of Human Rights* 187, 189.

prosecutorial strategy.¹⁶⁰ The selection of the ‘first’ investigation might be precipitated by a range of factors such as deemed gravity, preventative impact, resources or as Rosenberg argues, in the Côte d’Ivoire situation, the need for state co-operation (including access to witness and evidence) for the investigation.¹⁶¹ However, the problem with sequencing is that, owing to other factors such as a lack of resources, the subsequent rolling out of cases against the other side can be delayed, not temporarily, but indefinitely. Indeed, at the time of writing, and despite assurances from the OTP declaring its intent to do so, there have been no investigations against Ouattara-allied forces.¹⁶² In the meantime, domestic opinion in the communities of the Côte d’Ivoire is likely to be highly polarised. For most observers in affected communities the notion of impartiality means *simultaneous* impartiality.¹⁶³ This finds expression in the famous aphorism: ‘justice delayed is justice denied’.¹⁶⁴ To summarise, in the absence of immediate parallel selections, observers in affected communities have perfectly reasonable grounds to apprehend bias.

Third and relatedly, such apprehensions of bias would still occur even when an observer is armed with legal or technical knowledge. The OTP has frequently sought to convey such knowledge by explaining its selections e.g. by way of its rules such as gravity. However, the expectation that the reasonable (lay) observer in an affected community would understand the technical application of such rules (not least as rules such as gravity are contested and highly nebulous) is highly optimistic. Furthermore the very expectation that such knowledge *should* be considered effectively circumvents and misunderstands the problem of apparent bias. When more knowledge is attributed to those reasonable observers, the standard is made increasingly subjective. Put another way, the standard is rendered meaningless if

¹⁶⁰ OTP *Report on Prosecutorial Strategy* (14 September 2006) p.5-6

¹⁶¹ Rosenberg, *supra* note 156, at 485-6.

¹⁶² See Marc Perelman, ‘Investigations against pro-Ouattara camp to begin mid-2015, says ICC Chief Prosecutor’ *France 24* <<http://www.france24.com/en/20150331-interview-fatou-bensouda-icc-chief-prosecutor-investigations>> accessed 31 July 2018; See also the remarks of Deputy Prosecutor James Stewart (‘The Prosecutor, for example in the case of Cote D’Ivoire, has always made it clear that she intends to look at all sides of the conflict.’) in Mark Kersten, ‘In the ICC’s Interest: Between Pragmatism and Idealism’ <<https://justiceinconflict.org/2013/07/16/in-the-iccs-interest-between-pragmatism-and-idealism/>> accessed 31 July 2018.

¹⁶³ Rosenberg, *supra* note 156, at 484.

¹⁶⁴ William Gladstone cited in Lord Dyson, Master of the Rolls ‘Delay Too Often Defeats Justice’ *The Law Society* (22 April 2015) para 15 <<https://www.judiciary.uk/wp-content/uploads/2015/04/law-society-magna-carta-lecture.pdf>> accessed 31 July 2018.

one insists that observers should take into account knowledge they *ought* to have rather than the knowledge they would ordinarily be expected to have.¹⁶⁵ In so doing, the OTP — by seeking to continually explain away and deflect suspicions of bias by legalistic explanations — is simply ‘holding up a mirror to itself’¹⁶⁶ and reflects its inability to tackle reasonable apprehensions of bias held by those ‘looking in’ from the outside.

Fourth, and in any event, even with specialist knowledge, the selection procedure ultimately rests on the exercise of prosecutorial discretion that is, by nature, opaque. The recent attempts by the OTP to enhance transparency have done little to address the underlying uncertainty about its decision-making. The Office’s Policy Paper on Case Selection was issued in 2016 and set out selection criteria that, nonetheless, retained flexibility so that the OTP would have the potential to apply them to all potential situations and cases.¹⁶⁷ The policy in that sense was capable of ‘dynamic application’ but did not create an ‘unnecessary straight-jacket.’¹⁶⁸ However, in trying to maintain such a balance, the policy simply justified its own past selection practice but shed very little light on why particular cases — among those that *could* have been selected — were, in fact, chosen instead of those that were not.¹⁶⁹ In the context of several eligible situations/cases, all selections entail a choice ahead of another alternative. The Policy stresses that its final selections can be explained by objective criteria (e.g. the criteria under Article 53(1) (a-c)) but to maintain that objective criteria do explain *all* choices is either to beg the question (because surely the alternative would be chosen) or it is to completely fetter the discretion. To momentarily digress, the policy arguably demonstrates that no amount of rather defensive explanation(s) can conceal the fact that discretion exists. Either way, at best, observers, would at least need to know the full reasons behind the choice of situations/cases relative to those not chosen. In the absence of that, it is

¹⁶⁵ See Groves, *supra* note 131, at 501.

¹⁶⁶ Lord Rodger, ‘Bias and Conflicts of Interests—Challenges for Today’s Decision-Makers’ <http://www.sultanazlanshah.com/pdf/2011%20Book/SAS_Lecture_24.pdf> accessed 31 July 2018.

¹⁶⁷ Helen Brady and Fabricio Guariglia, ‘An Insider’s View: Consistency and Transparency While Preserving Prosecutorial Discretion’ (15 December 2016) <<https://www.international-criminal-justice-today.org/arguendo/an-insiders-view/>> accessed 31 July 2018.

¹⁶⁸ *Ibid.*

¹⁶⁹ William A. Schabas, ‘Feeding Time at the Office of the Prosecutor’ (23 November 2016) <<https://www.international-criminal-justice-today.org/arguendo/icc-prosecutors-perpetuation-of-the-fiction-of-objectivity/>> accessed 31 July 2018.

unsurprising that observers in affected communities would be more likely to reasonably apprehend bias than impartiality.

To summarise, it has been commonly assumed that affected communities determine impartiality in distributive terms i.e. the final distribution of prosecutions between differing states, regions or sides to a conflict. This finds expression in an ideology of impartiality based on perceived equal benefits and burdens to differing groups.¹⁷⁰ Indeed, it is an instinctively human response to judge bias by looking at whether an opposing group or side has been targeted.¹⁷¹ The fact that individuals may detect bias on the basis of one-sided selections is, however, not the complete picture of impartiality. If it were, an explicit strategy of selection even-handedness (similar to the one adopted by Carla Del Ponte in the case of the ICTY¹⁷²) might be the only route to inspiring confidence in impartiality. However, as Mégret argues, impartiality cannot be about ‘dolling out blame to both sides’ otherwise it would lead to a ‘stultifying and paralysing policy of not discontenting anyone.’¹⁷³ This section demonstrated, by contrast, that one should first pay attention to reasonable apprehensions of bias that the selection procedure creates. Indeed, if a reasonable and properly informed observer would apprehend bias, then it would strongly indicate that individuals living in affected communities today, with a range of cognitive biases and psychological dispositions, are certainly likely to have such apprehensions.

¹⁷⁰ Frédéric Mégret, ‘What is International Impartiality?’ (26 October 2011) 13-4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1949613> accessed 31 July 2018.

¹⁷¹ Andrew Clapham likens this to ‘when you have two small children and you give one of them a sweet and the other child says, ‘what about my sweet?’, and you say, ‘you do not get a sweet’ and they then say, ‘that is not fair!’ Now, it is not the same kind of fairness as fairness in a courtroom; it is a different sort of fairness. It asks: why did that person get treated in that way and I am treated in a different way? See Andrew Clapham in ‘Discussion’ (2009) 7(1) *JICJ* 97, 102.

¹⁷² Carla Del Ponte pursued an explicit even-handed selection strategy seeking indictments on all sides of the conflict in the Balkans and attempted (unsuccessfully) to pursue indictments against the Tutsi leadership for alleged crimes committed during the Rwandan Genocide in 1994. See Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity* (Other Press 2007) 7, 371.

¹⁷³ See Mégret, *supra* note 170.

4.4 Representation

The concept of representation means acting or speaking on behalf of someone or portraying someone or something in a particular way.¹⁷⁴ For Pitkin the concept of representation is an act i.e. *re-presentation* and involves making someone, or something, present when 'not being present literally or fully in fact.'¹⁷⁵ In this regard, representation is understood to give a voice to an absent constituency and thus reflects a basic intuition of justice — the right to be heard.¹⁷⁶ In practice, this right requires a 'representative' to act effectively on behalf of the constituency.¹⁷⁷ Representation, then, is built on a set of presumptions about the very capabilities of a representative or an institution, to act on behalf of a constituency so as to further their interests.¹⁷⁸ These presumptions require attention to be paid to formal representation; namely ensuring there are procedural arrangements that permit the representative to be genuinely responsive to constituency interests.¹⁷⁹ Furthermore, there needs to be consideration of the extent to which those arrangements permit, substantively, the input and participation of the constituency so as to ensure their interests are truly heard and thus represented.¹⁸⁰ In this context, this concluding section explains why affected communities are unlikely to deem selection procedure to be sufficiently representative of their interests. The discussion begins with selection procedure's formal representation vis-à-vis affected communities.

First, the selection procedure lacks any arrangements that manage the involvement of affected communities. The OTP has declared that it welcomes direct interaction with victims and victim associations at the earliest stages of its work, to help define the focus of investigations and develop an assessment of the impact of crimes i.e. as part of its gravity assessment.¹⁸¹ These include engagements and meetings with civil society as well as information about crimes received under

¹⁷⁴ Stevenson (ed.), *supra* note 25, at 1508.

¹⁷⁵ Hanna Pitkin, *The Concept of Representation* (University of California Press 1972) 8.

¹⁷⁶ *Ridge v Baldwin* [1964] AC 40 at 132.

¹⁷⁷ The representative and the represented are thus mutually constitutive; the former relies on the represented conferring authority, and the latter relies on the representative to adequately give expression to their interests. See Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2013) 76 *LCP* 235, 236.

¹⁷⁸ *Ibid*, 237.

¹⁷⁹ Pitkin, *supra* note 175, at 97, 209.

¹⁸⁰ Gerald Leventhal cited in Lind and Tyler, *supra* note 40, at 107.

¹⁸¹ OTP *Policy Paper on Case Selection and Prioritisation* (15 September 2016) paras 9, 38-41.

Article 15(2) of the Rome Statute.¹⁸² However, there are no formal rules that govern this crucial interaction, and even the OTP admits there is a need to develop best practice to enable victims to make representations to the Office.¹⁸³ This deficit is brought into sharp focus when one considers the arrangements vis-à-vis victims (drawn from affected communities) that are formally recognised under the Rome Statute.

The OTP's selection procedure manages the involvement of recognised victims based on established principles outlined in the Rome Statute, the Court's Strategy, OTP Policy and Regulations and significant jurisprudence from the Chambers.¹⁸⁴ These arrangements have consolidated victims as actors (rather than passive subjects) of prosecutions and confirmed a range of procedural rights.¹⁸⁵ This formalised regime, notwithstanding the challenges of victim participation,¹⁸⁶ highlights a gap in the selection procedure: there are no rules and no meaningful policy to manage the interaction with affected communities. This is not to argue that selection procedure should contain equivalent arrangements to that of the procedure recognising victims. It would not be legitimate for affected communities to be given a status *en masse* that is akin to that of victims, and indeed such an arrangement would be practically unworkable. However, one should acknowledge the reality that only a small fraction of the total number of victims gain such a formal status. Thousands of victims remain wholly unrepresented because of jurisdictional restrictions, technical ineligibilities, an inability or unwillingness to apply for recognition of victim status, or due to the bureaucratic hurdles established by the Court.¹⁸⁷ Instead, the point is, that the selection procedure's lack of arrangements for affected communities, is likely to lead to their interests being insufficiently represented. This argument can be demonstrated by reference to one crucial stage in

¹⁸² Ibid.

¹⁸³ OTP *Policy Paper on Victims Participation* (April 2010) 9.

¹⁸⁴ See, indicatively, Art 68(3). ICCSt, ICC *Court's Revised Strategy in Relation to Victims* ICC-ASP/11/38 (5 November 2012); OTP *Policy Paper on Victims' Participation* (April 2010); OTP Regulation 16, 37 and 52; *Prosecutor v Thomas Lubanga Dyilo* (Decision on the applications by victims to participate in the proceedings) ICC-01/04-01/06-1556 Trial Chamber I (15 December 2008); *Prosecutor v Jean-Pierre Bemba Gombo* (Fourth Decision on Victims' Participation) ICC-01/05-01/08-320 Pre-Trial Chamber III (12 December 2008).

¹⁸⁵ Principally these rights include a formal right to participate in trial proceedings via their legal representative who can question witnesses, and otherwise affirming a right to express their concerns (where their personal interests are affected) at all stages beginning with the commencement of a preliminary examination. See, indicatively, OTP *Policy Paper on Victim Participation* (April 2010) 5.

¹⁸⁶ Luc Walley, 'Victims' Participation in ICC Proceedings: Challenges Ahead' (2016) 16 *Int.C.L.R.* 995; Mariana Pena, 'Is the ICC Making the Most of Victim Participation?' (2013) 7(3) *IJTJ* 518.

¹⁸⁷ Kendall and Nouwen, *supra* note 177, at 241-252.

the selection procedure, specifically, the discretion to decline to investigate or prosecute in the ‘interests of justice.’

The OTP has declared that reliance on the interests of justice provisions, under Article 53(1) (c) and Article 53(2) (c), is exceptional and there is a general presumption in favour of an investigation or prosecution. Nonetheless, the provisions explicitly require ‘the interests of victims’, including the views of affected communities, to be given due consideration.¹⁸⁸ This is a considerable challenge and the OTP declares that it conducts a dialogue with the victims themselves, local community representatives, and other actors who can help determine the impact of investigations or prosecutions on those interests.¹⁸⁹ Furthermore, to understand those interests comprehensively, the OTP seeks the views of established intermediaries such as local leaders, civil society and international NGO’s.¹⁹⁰ The impulse to listen to a broad range of persons and groups is, of course, positive; representation requires all relevant voices to be heard. However, by that same token, it is inevitable that a diverse set of views will emerge, and these will tend to conflict and/or be based on sectional preferences.¹⁹¹ In this context, the OTP’s representation of affected communities is limited for two reasons.

First, the OTP’s representation does not adequately permit affected communities to exert an influence *prior* to a decision being made. On the one hand, this challenge can be traced to the basic premise of representation, that of ‘speaking for others’, and the resulting tendency to collate and homogenise voices, so as to make them easier to represent.¹⁹² However, this collation overlooks the diversity of constituency experiences and excludes minority voices, and — at worst — reduces these constituencies into passive objects.¹⁹³ This has been particularly evident with the Prosecutor frequently deploying the rhetoric of ‘the victims’ in an abstract and de-politicised fashion to legitimate and justify its prosecutions.¹⁹⁴ It is, of course, not

¹⁸⁸ OTP *Policy Paper on the Interests of Justice* (September 2007) 5.

¹⁸⁹ *Ibid.* 5-6.

¹⁹⁰ *Ibid.* 6.

¹⁹¹ Luke Moffett, ‘Elaborating Justice for Victims at the International Criminal Court: Beyond rhetoric and The Hague’ (2015) 13(2) *JICJ* 281, 285-6.

¹⁹² Rachel Killean and Luke Moffett, ‘Victim Legal Representation before the ICC and ECCC’ (2017) 15 *JICJ* 713, 730-1,

¹⁹³ Kendall and Nouwen, *supra* note 177, at 258-262.

¹⁹⁴ For instance, Luis-Moreno Ocampo’s opening statement in the Court’s first trial, the case against Thomas Lubanga, focused on the conscription and recruitment of child soldiers, including that of young girls. In his

going to be possible to fully represent *all* the interests of all of those in affected communities (particularly given the numbers of individuals that may comprise them), but, the impression that can all too easily be left is that only select (and often articulate) voices are re-presented to fit a pre-determined agenda i.e. decision.¹⁹⁵ This latter point finds greatest expression in Christie's concept of the 'ideal victim', insofar as victims are granted the power to exert influence, but only to a degree that does not threaten the criminal justice system's institutional interests.¹⁹⁶ The effect of this is that affected communities have little agency (autonomy and freedom) to exert any proper influence on the selection procedure.

Second and relatedly, the OTP's representation does not permit affected communities to exert an influence on selection procedure *after* a decision has been made. In public administrations, those affected by a decision are nearly always given the opportunity to appeal or seek a challenge; often by requesting a review of the decision 'with a view to procuring its modification.'¹⁹⁷ This finds expression in another component of procedural justice, namely, 'correctability': using an appeal mechanism to review a particular decision.¹⁹⁸ Under Article 53(1) (c) and Article 53(2) (c), the decision to prosecute or to discontinue should, as far as possible, respect 'the concrete community that is the victim of the crime and that will have to live with the consequences of the decision.'¹⁹⁹ However, the OTP's respect is limited because there is no mechanism for affected communities to review a decision i.e. one not to prosecute.²⁰⁰ The absence of such a mechanism limits the quality of representation of affected communities, because it excludes them from entering a dialogue that is known to be 'value-expressive.'²⁰¹ By this notion, such a dialogue enables the voices of affected communities to be amplified (and their status to be elevated) and crucially increases the likelihood of members of the community being satisfied with the final decision (even if it later remains unchanged).

opening statement, the Prosecutor emphatically expressed, 'In this International Criminal Court, the girl soldiers will not be invisible'. For a detailed survey of such examples see *ibid*.

¹⁹⁵ Kieran McEvoy and Kirsten McConnachie, cited in Killean and Moffett, *supra* note 192, at 717.

¹⁹⁶ For a discussion on this point see Joris Van Wijk, 'Who is the little old lady' of international crimes? Nils Christie's concept of the ideal victim reinterpreted (2013) 19(2) *International Review of Victimology* 159.

¹⁹⁷ *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 560 as per Lord Mustill.

¹⁹⁸ Leventhal, *supra* note 67, at 40-45; Tyler, *supra* note 23, at 119.

¹⁹⁹ Adam Branch cited in Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Books 2006) 24.

²⁰⁰ Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court (2015) 26 *Crim.L.F.* 255, 268-273.

²⁰¹ Tyler, *supra* note 23, at 175-6.

To illustrate, the OTP does not have a mechanism comparable to that found in domestic criminal justice systems such as the Victims Right to Review Scheme operating in England and Wales.²⁰² Since June 2013, the scheme has enabled a victim to request a review of a decision not to prosecute before any recourse to court action by way of judicial review. This mechanism includes a local resolution where another prosecutor will review the correctness of the decision and can offer further information or explanation in either confirming or reversing the original decision. Furthermore, in the event that the decision is still judged to be unsatisfactory, the victim is entitled to request an independent review by a differing body (an Appeals and Review Unit) that will look at whether the original decision was wrong, and whether a prosecution should be brought to maintain confidence in the criminal justice system.²⁰³ Although not immune from criticism or practical difficulties, the existence of such a mechanism can improve the quality of an institution's procedure by building in an opportunity to learn, reflect and ultimately correct mistaken decisions.²⁰⁴ Overall, this is likely to render decisions as better reasoned and the enhanced transparency can develop victims' confidence in the procedure.

Indeed, the establishment of a review mechanism tends to produce instrumental benefits for the victims. Such a mechanism would elevate victims' participation at the pre-trial stage — something that would be a more formalised mode of *consultative* participation. This mode of participation is in contrast to, say, those of the traditional 'information-provision' (e.g. being asked to provide the evidence upon which the charges are based, or describing the impact of the crimes).²⁰⁵ In practical terms, this would mean the specific requests of victims would now be institutionally taken into account (quite apart from the prosecutor's existing fulfilment of their duties). In short, the review mechanism can help to develop the agency of victims so that they can now commence a formal dialogue that allows

²⁰² See the CPS, Victims Right to Review Guidance (Issued by the Director of Public Prosecutions) (Revised Strategy 2016) <https://www.cps.gov.uk/sites/default/files/documents/publications/vrr_guidance_2016.pdf> accessed 31 July 2018. The policy was issued in furtherance of a Court of Appeal Judgment in *R v Killick* [2011] EWCA Crim 1608 para 49 and the (eventual) Article 11 of an EU Directive on 'Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime 2012/29/EU (25 October 2012).

²⁰³ The Unit is still attached to the Crown Prosecution Service (CPS) and is comprised of senior CPS Prosecutors e.g. the Chief Crown Prosecutor.

²⁰⁴ See generally, Marie Manikis, 'Expanding participation: victims as agents of accountability in the criminal justice process' (2017) 1 *Public Law* 63, 79-80.

²⁰⁵ This finds expression in one of Edward's models of victim participation. See Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 *British Journal of Criminology* 967, 975.

them to, directly or via their own representatives, seek further explanation and hold decision-makers to account.²⁰⁶

This is not simply to suggest that the OTP should reproduce such a scheme in its selection procedure. Rather, the present argument is that the absence of a comparable review mechanism indicates how the OTP's representation of affected communities is likely to be insufficient. Admittedly, one could argue that the OTP's representation of affected communities will — on one level — *always* fall short. It is never possible to represent all the interests of all of those within affected communities. However, the Court has set the bar high by claiming that 'people most affected by the crimes should have the right to understand, to participate in, but also to have a *sense of ownership* of the justice process.'²⁰⁷ To date, the selection procedure does not adequately create a sense of ownership for affected communities and, if anything, readily reduces them to spectators i.e. a symbolic constituency — one that is simply the 'triggerer-off of the whole thing'.²⁰⁸ The evidence compellingly leads one to the conclusion that affected communities are unlikely to deem the representation of their interests as adequate.

²⁰⁶ Ibid.

²⁰⁷ The International Criminal Court, 'Interacting with communities affected by crimes' <<https://www.icc-cpi.int/about/interacting-with-communities>> accessed 31 July 2018.

²⁰⁸ Nils Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1, 3.

Conclusion and Recommendations

Prosecution selectivity has been described as the ‘greatest problem of international criminal justice.’²⁰⁹ This chapter contributed to the literature by way of its concentration on selection procedure from the perspective of affected communities. The preceding analysis explained the limitations of selection procedure in being sufficiently consistent, impartial and representative. In combination, this lack of procedural fairness may modestly reduce the likelihood of selections being accepted within affected communities — particularly at a time when governments are so keen to frequently attack those selections. In culmination, the OTP’s selection procedure is currently doing little to boost the Court’s perceived legitimacy.

The question that follows is how can selection procedure be improved? It is not suggested that selection procedure can be improved by marginalising matter-of-fact considerations such as evidence, capacity or resources. Indeed, it is not proposed that selection procedure can be improved by encroaching upon or fettering the exercise of prosecutorial discretion. The Prosecutor’s discretion helps to protect her independence and its exercise is inevitably more art and judgment rather than scientific method.²¹⁰ There are always likely to be a myriad of complex but legitimate factors involved, in making, what are context and case-specific judgments.²¹¹ Hence, suggested procedural improvements should be based on the need to maintain the integrity of prosecutorial discretion.

It has been suggested that procedure should be improved by taking into account considerations of distributive justice. For example, some commentators have recommended the incorporation of distributive principles.²¹² These include principles such as equal dignity of human beings, that no single individual is above the law, or the morality of observing humanitarian principles during military conflicts.²¹³ The implications of such principles would be to motivate selections that are more geographically representative of alleged crimes across the world, and so,

²⁰⁹ Mirjan Damaska, ‘Discussion’ (2009) 7(1) *JICJ* 87, 104.

²¹⁰ Côté, *supra* note 117, at 350-7.

²¹¹ Goldston, *supra* note 28, at 404.

²¹² Jonathan Hafetz, ‘Fairness, Legitimacy and Selection Decisions in International Criminal Law’ (2017) 50 *Va.J.Int’l L.* 1133, 1165-1169; Lepard, *supra* note 28, at 558-563.

²¹³ *Ibid*, Hafetz, 1165-1169, Lepard, 558-561.

contribute to ‘an alternative narrative about selection patterns and counteract the perception that international criminal justice merely tracks the preferences of the strong and powerful.’²¹⁴ However, such suggestions may encourage the Prosecutor to undertake an artificial endeavour to create an ‘appearance of parity’, something that would be of highly dubious value. Put another way, it would encourage the Prosecutor to fetter her discretion in a way that would make a pre-conceived selection ‘fit’ the legal criteria. Even if greater selection parity was desirable, this approach to selections is hazardous because it would open the Prosecutor up to charges of illegitimate motives or selective prosecutions. There are considerable risks to adopting a strategy that incorporates distributive justice principles in this way.

Instead, this chapter has made a case for the OTP to fully exhaust its commitment to procedural justice. Notions of procedural justice are readily identifiable and would attract greater consensus across a range of affected communities. Accordingly, the most principled basis for improvements should be the development of its selection procedure (and the culture of its decision-making) that better tracks public intuitions of justice.²¹⁵ In view of the above, the OTP should fully maximise the psychological effect of selection procedure by a strong alignment towards procedural justice, and this endeavour may be assisted by adopting the following recommendations.

First, the OTP should commit to more consistency in its treatment of situations e.g. in the duration of preliminary examinations and its policy on positive complementarity. To clarify, this does not mean the OTP should self-impose a proscribed time limit for preliminary examinations or maintain a strictly uniform approach to its policy of positive complementarity.²¹⁶ Indeed, the OTP is certainly not compelled to do so because as no decision is made, the PTC has no judicial oversight (despite the Chamber’s early attempt to pressure the OTP into completing an examination within a reasonable time irrespective of its complexity, and to extract

²¹⁴ Ibid, Hafetz, 1165.

²¹⁵ Stephanos Bibas, ‘The Need for Prosecutorial Discretion’ (2010) 19(2) *Temple Political and Civil Rights Review* 369, 372-3.

²¹⁶ Pues, *supra* note 89, at 451.

a timetable for its conclusion.²¹⁷) There is, in any event, a strong case for retaining some temporal flexibility during the preliminary examination phase e.g. to avoid a premature closure that would subsequently invite pressures to re-open the examination should atrocities re-commence (resulting in more uncertainty) or for the management of scarce funds and resources.²¹⁸

Instead, the point is to move the OTP towards more consistent treatment, by requesting it to frequently and fully explain the differences of its treatment(s). In that regard, Pues is correct in the observation that ‘where those situations differ, the differences in treatment needs to be proportional to the degree of the distinction.’²¹⁹ The OTP could explain such differences with the use of benchmarks or indicators by which the progress of all preliminary examinations can be readily compared, contrasted and ultimately judged.²²⁰ A concise set of indicators would not provide a complete picture, but it would establish transparent standards that can harmonise the internal assessments of preliminary examinations. The information would then complement the qualitative yearly reports on preliminary examinations and provide a clearer picture for external audiences such as affected communities. The longer the preliminary examination lasts, the greater the imperative to fully explain the assessment being made. Taking such steps may help the OTP demonstrate consistency of treatment, particularly as the demand for doing so is only likely to increase the more examinations that it undertakes.

Second and relatedly, the OTP could develop more consistency by avoiding an over-reliance on gravity as the basis for its selections. The concept is highly elastic in that, in the words of DeGuzman, it ‘simply does not have enough agreed content to provide convincing justifications for selection decisions.’²²¹ The OTP’s application of relative gravity exacerbates its arbitrariness, and its use has already become tainted with politicised decisions that do not inspire confidence. In this

²¹⁷ *Situation in the Central African Republic* (Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic) ICC-01-05 Pre-Trial Chamber III (30 November 2006) 3. The OTP offered the PTC some information about its progress but confirmed that it was not establishing a legal precedent to do so. Since then, the PTC has not attempted to manage the preliminary examination process. See William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016) 401.

²¹⁸ David Bosco, ‘Putting the Prosecutor on a Clock? Responding to Variance in the Length of Preliminary Examinations’ (2018) *AJIL Unbound* 158, 161.

²¹⁹ *Ibid.* 434, 449.

²²⁰ See generally Carsten Stahn, ‘Damned If You Do, Damned If You Don’t: Challenges and Critiques of Preliminary Examinations at the ICC’ (2017) 15(3) *JICJ* 413-34.

²²¹ DeGuzman, *supra* note 32, at 289.

regard, the OTP could anchor its steps towards consistency by articulating its goals and priorities across and within each of its respective situations. This would require seeking consensus on those goals and priorities, but once established, it would help to guide later case selections.²²² Put another way, there is a need to acknowledge the following question, ‘what does the OTP seek to achieve, once its case selection decisions are added up together?’²²³ Establishing situation-specific goals and priorities (such as reconciliation) would provide a more transparent basis for explanations as to any differences in treatment.

Third, the OTP should incorporate the ‘reasonable observer, properly informed’ test to develop its commitment to impartiality. The test would provide a normative standard that would direct the OTP towards meaningful self-evaluation of its procedure and even enable it to ‘check’ the internal and often unconscious biases of its individual personnel.²²⁴ The test would lend a personal and humanising touch to its selection procedure and although only a legal construct, it would help to ‘bring the public into the room.’²²⁵ By doing so the OTP can use the test to express respect for the every-day opinions of outsiders, i.e. the public at large²²⁶ and, acknowledge its own ‘blindness ... to the faults that outsiders can so easily see.’²²⁷ The OTP should not, however, automatically de-select or not proceed with a selection on the basis that the test would be satisfied. Indeed, there is a risk that a reasonable observer might always apprehend bias, e.g. individuals may continuously apprehend bias in relation to the Court’s lack of structural independence in the light of its connection to political bodies such as the UNSC. However, procedure, to a small degree, matters and an integral part of it must meaningfully acknowledge the risk of apparent bias. The change will be modest, but by placing it as an express criterion in its Policy Paper on Case Selection it would trigger a more meaningful internal deliberation about the perceptions of affected communities.

²²² See generally DeGuzman, *supra* note 34.

²²³ HRW, *supra* note 1, at 3.

²²⁴ This is a challenge for all judicial decision-makers See Lord Neuberger, ‘Fairness in the Courts: the best we can do’ Address to the Criminal Justice Alliance (10 April 2015) <<https://www.supremecourt.uk/docs/speech-150410.pdf>> accessed 31 July 2018.

²²⁵ Raymond J. McKoski, ‘Giving up Appearances; Judicial Disqualification and the Apprehension of Bias.’ (2015) 4 *British Journal of American Legal Studies* 35, 53.

²²⁶ Justice M. Kirby in Anne Richardson Oakes and Haydn Davies, ‘Justice Must Be Seen To Be Done: A Contextual Reappraisal’ (2016) 36 *Adelaide Law Review* 465, 479.

²²⁷ *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, para 39.

Finally, and most importantly, the OTP should commence steps to introduce a right to review scheme in its selection procedure. Ideally, such a review mechanism should be extended for all selection decisions including both decisions not to prosecute *and to* prosecute; commencing investigations and issuing arrest warrants or summonses can equally have detrimental consequences on affected communities (e.g. on local stability or the incidence of crimes). However, initially these steps could be confined to developing a mechanism to request a review of decisions not to investigate or prosecute on the basis of evidence or in the ‘interests of justice’ — the latter of which has not formally been relied upon by the Prosecutor. In respect of reviewing the latter decision, such a mechanism would not encroach on the PTC’s review powers under Article 53(3) (b) because its own non-mandatory review would only occur after any review has been exhausted (or any established time-limit to exercise the right to review has elapsed, as is the case with the Victim Right to Review in England and Wales).

The review mechanism would be of significant procedural benefit. Its establishment would boost transparency by providing further reasons for its selection decisions, e.g. by reference to its declared selection policy.²²⁸ Indeed, the mechanism would be likely to maximise the probability of the correct result and thus improve standards of administration.²²⁹ In the long-term, and in light of a culture of improvement, the review mechanism could inform the future development of the OTP’s prosecutorial strategy.²³⁰ Ultimately, the selection procedure would signal the interests of affected communities are of utmost consideration; it would provide them with a proper vehicle to exert influence and thereby become a meaningful ‘agent of accountability’ that can help to boost the OTP’s effectiveness.²³¹

Critics of such a proposal may argue that the PTC offers a more effective or robust review of prosecution decisions. However, leaving aside the prospect of

²²⁸ OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) para(s) 47-51.

²²⁹ *R v Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941 (CA), per Donaldson MR at 945; This objective finds expression in a ‘duty of candour’: an obligation on a public body to be open and frank and disclose all relevant materials because ‘the vast majority of cards’ are in their hands. The duty is underpinned by a commitment to ensure that lessons are learnt and that standards subsequently improve. See, particularly in the context of healthcare, General Medical Council, ‘Openness and Honesty when things go wrong: The professional duty of candour’ June 2015 <https://www.gmc-uk.org/-/media/documents/DoC_guidance_englsih.pdf_61618688.pdf> accessed 31 July 2018.

²³⁰ Redress Policy Paper, ‘A victim-centred prosecutorial strategy to respect victims’ right and enhance prosecutions’ (July 2014) <<http://www.refworld.org/pdfid/53d612994.pdf>> accessed 31 July 2018.

²³¹ See Manikis, *supra* note 204.

additional costs and delays, the PTC can only offer a limited review on its own initiative. Indeed, the victims that can come before the Court (inherently restricted) do not have automatic standing to trigger a review but can ‘prompt the Chamber to consider exercising its *proprio motu* review powers with respect to a specific issue affecting the victims’ personal interests.’²³² Most of all, the PTC would be likely to offer a very deferential standard of review.²³³ Hitherto, the Chamber has not accepted victims’ submissions seeking a review of a decision not to proceed by conservatively interpreting its review powers. For instance, the PTC has rejected requests on the basis of a general principle of law (e.g. internationally recognised human rights norms that protect a victims’ right to such a review),²³⁴ or simply accepted the Prosecutor’s assurances that no relevant decision under Article 53(1) or 53(2)(c) has been made.²³⁵ In other cases, the PTC has confirmed that it does not have the competence (for fear of encroaching on the OTP’s functional independence) to undertake a review of independent investigative functions e.g. it has refused to review whether the Prosecutor took appropriate measures to ensure the effective investigation and prosecution of crimes.²³⁶ In such cases, the Chamber has evasively declared that the ‘appropriate addressee of victims’ concerns about investigation

²³² *Situation in the Republic of Kenya* (Decision on the “Victims’ request for review of Prosecution’s decision to cease active investigation) ICC-01/09 (5 November 2015) para 7; See originally, *Situation in the Democratic Republic of Congo* (Judgment on Victim Participation in the investigation stage of the proceedings....) ICC-01/04 Appeals Chamber (19 December 2008) para 56

²³³ See generally Moffett, *supra* note 200, at 272.

²³⁴ The Pre-Trial Chambers have also rejected submissions on the basis of Art. 68(1) ICCSt. (‘The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses... The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.’).

²³⁵ *Situation in the Democratic Republic of Congo*, (Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed) 4-5 ICC-01/04 Pre-Trial Chamber I (25 October 2010); *Situation in the Republic of Kenya* (Decision on the Victims’ request for review of Prosecution’s decision to cease active investigation) ICC-01/09 Pre-Trial Chamber II (5 November 2015) para 25. Notably in the latter case, the ‘victims’ had made the argument that in light of the Chambers having the power to review on its own initiative, the Prosecutor’s notification of a decision under Article 53(2)(c) was not a pre-requisite for a review under Article 53(3)(b). Thus, the victims argued, the Chamber could exercise its review when it decided the Prosecutor had taken a decision not to proceed in the interests of justice. See *Situation in the Republic of Kenya*, ‘Victims’ response to Prosecution’s application to dismiss *in limine* the Victims’ request for review’ ICC-01/09 (15 September 2015) para 11.

²³⁶ See Art 54(1)(b) ICCSt. *Situation in the Republic of Kenya* ‘Decision on the “Victims’ request for review of Prosecution’s decision to cease active investigation” (5 November 2015) ICC-01/09 para 13; *Situation in the Republic of Kenya*, (Decision on the “Request by the Victims’ Representative for authorisation to make a further written submission on the views and concerns of the victims) ICC-01/09-01/11 Pre-Trial Chamber II (9 December 2011) para. 16-7.

flaws should be the Prosecutor.²³⁷ In culmination, the very extent of the PTC's limitations strengthens the case for the OTP to establish a review mechanism.

Several other arguments can also be advanced against establishing a review mechanism, but, many of those can be rebutted. First, that such a scheme could interfere with prosecutorial independence and discretion. It is correct that the Prosecutor is an independent minister of justice but, nonetheless, her statutory duties include a clear obligation to take into account the interests of victims. Besides, the purpose of a review mechanism is not in any way to fetter discretion so as to represent a narrow set of victims' interests, but to represent victims in a communitarian sense i.e. as a subset of society, and, more generally, improve organisational decision-making. Second, that such a mechanism would be practically difficult because of a lack of resources or that it would lead to considerable implications for efficiency and timeliness. Albeit true, this does not counter the normative argument to avoid taking steps to improve the accuracy of a fundamental decision that enables victims to see justice being done.²³⁸ Indeed, the desirability of such a mechanism should motivate the use of resources and the development of a cost-effective scheme that has reasonable time deadlines. Third, that potentially every victim in an affected community would want to exercise the right to review. However, the decision not to investigate or prosecute is not a frequent occurrence and it is not suggested that a sole group of victims alone could trigger the review. Indeed, it is the affected community at large (including the victims) that is entitled to desire prosecutions; one solution could be to satisfy a particular threshold number of persons affected to trigger the review with the support of empirical evidence e.g. via opinion polls, surveys, NGO research and even civil

²³⁷ *Situation in the Republic of Kenya*, (Decision on the Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims) ICC-01/09-01/11 (9 December 2011) para. 17.

²³⁸ The evidence suggests that the victims' right to review a decision not to prosecute, has proven demonstrably successful. For instance, in the first year of its operation, the Victims Right to Review scheme in England and Wales received 1186 appeals with 162 of those upheld—a success rate of 13.7%. Of these 146 suspects were later charged for offences that had initially be un-issued or withdrawn. See Danny Shaw, 'Victims' right of review scheme see 146 charged' BBC News (19 July 2014) <<http://www.bbc.co.uk/news/uk-28377445>> accessed 31 July 2018. The latest available figures for 2015/2016 indicate that 1809 appeals were received and 168 of those were upheld. Of those upheld 160 cases were recommenced leading to at the time of publication 93 convictions. Victims Right to Review (VRR) Conviction Rates 2015/16 (30 November 2017) <<https://www.cps.gov.uk/sites/default/files/documents/publications/2015-16-VRR-conviction-rates.pdf>> accessed 31 July 2018.

society petitions.²³⁹ Fourth, that any potential review would lack meaning and be similar to ‘rubber-stamping exercise.’²⁴⁰ Admittedly, the mechanism would encourage reaching a correct decision the first time, but it does not follow that a later review of its correctness would be scrutinised any less. The review would still require a re-consideration that may need further explanation and, in any event, potential proceedings in the PTC, however limited, would mitigate the risk that a review would be less well examined. In summary, there is a compelling case for the creation of a review mechanism in the selection procedure.

Perceptions of the Court will always be contested, fluid and subject to various influences. Affected communities’ acceptance of prosecution selections is likely to depend on a complex array of factors. Nonetheless, the procedure by which situations and cases are selected is one key constituent of the Court’s perceived legitimacy. In this respect, the OTP’s effectiveness would be improved by modestly aligning its selection procedure towards greater procedural justice. The alignment will not be sufficient, but it may well be necessary.

* * *

To briefly return to the study’s main research question, the preceding analysis demonstrates how — by one means — the OTP’s effectiveness is limited in its contribution to reconciliation. Simply put, the OTP could develop its effectiveness by aligning towards procedural justice. This would help to recognise that individuals in affected communities are active participants in the quest for justice, and that — in the terms of the Court’s Strategy on victims — this would be ‘one step in the process of healing for individuals and societies.’²⁴¹ Principally, the analysis has also identified a way of increasing the likelihood of affected communities’ perceiving a prosecution selection as fair; something that, in turn, is likely to boost the Court’s perceived legitimacy. This outcome is a pre-requisite if justice is to be seen to be done, and the truth it declares is to be accepted; the two components that help

²³⁹ To illustrate one such a model, the UK Parliament has a mechanism where a British Citizen or UK Resident can issue a petition to the Government. If the petition receives 10,000 signatures, then the Government will issue a response. If the petition receives 100,000 signature the petition will be considered for a debate in Parliament. See UK Government and Parliament, ‘Petitions’ <<https://petition.parliament.uk/help>> accessed 31 July 2018.

²⁴⁰ This expression refers to a person or organisation automatically approving or endorsing a policy decision without evaluating its merits. See Stevenson (ed.), *supra* note 25, at 1553.

²⁴¹ ICC, *Court’s Revised Strategy in Relation to Victims* ICC-ASP/11/38 (5 November 2012) para 10.

affected communities reconcile with those they deem to be on the ‘opposing side’ of divided societies.

More generally, the chapter’s recommendations are likely to have wider implications. The recommendations, though ends in themselves, may have instrumental effects on the OTP’s final selections. In respect of consistency, the desire to demonstrate consistency is likely to exert pressure to ensure minimum thresholds of treatment are given to all open preliminary examinations.²⁴² Indeed, it may be that the obligation to explain and rationalise differences in treatment is a burden that indirectly encourages more standardised treatment (I leave aside the latter’s desirability). Alternatively, the obligation may trigger different incremental steps towards more uniform treatment. These steps include a re-consideration of; the number of preliminary examinations it undertakes and their parameters (‘the width v. depth dilemma’), the use of relative gravity to decide the cases that proceed to investigations (rather than a context-based assessment), and the ‘exit’ criteria that should inform the currently opaque decision to close a preliminary examination.²⁴³ In summary, the attempt to demonstrate consistency is likely to invite renewed conversation about the requisite treatment that every situation is being given.

In relation to impartiality, the introduction of a test for apparent bias (a ‘reasonable observer, properly informed’) could also have instrumental consequences. A prosecutorial policy that is perceived to be one-sided can undermine a tribunal’s legitimacy, but it does not follow that cases from all sides should be selected (there can be perfectly sound reasons why such parity is not possible). The introduction of the test, nonetheless, will influence the practices of ‘sequencing’ and ‘prioritisation’. To clarify terms, the OTP’s Selection Policy envisages prioritisation — necessary due to practical constraints and evidentiary requirements — to take place after all ‘selectable’ cases have been identified both within and across the various situations.²⁴⁴ This process precedes the possibility of ‘sequencing’ in a given situation (i.e. the selection of one case that is completed before selecting another one). As HRW argue, prioritization is nearly indistinguishable from sequencing, with the same public result; ‘long time delays in

²⁴² On this general point see Bosco, *supra* note 218, at 162.

²⁴³ See Carsten Stahn, ‘Damned If You Do, Damned If You Don’t: Challenges and Critiques of Preliminary Examinations at the ICC’ (2017) 15(3) *JICJ* 413, 424-32.

²⁴⁴ OTP, *Policy on Case Selection and Prioritisation* (15 September 2016) para. 49.

between cases, with consequences for perceptions of the court's impartiality and legitimacy.'²⁴⁵ In spite of that fact, the OTP's policy on the prioritisation of cases leaves the door open to their later sequencing as, amongst other things, it declares it will consider 'the impact and ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis'.²⁴⁶ The operation of the new test, is likely to add another layer to the prioritisation criteria. It almost certainly is going to tilt the balance towards parallel investigations (all else being equal) and make the option of sequencing investigations/prosecutions a genuine last resort e.g. in situations where there are multiple armed groups that make parallel investigations impossible.²⁴⁷

Finally, the chapter's main recommendation — to establish a victim review mechanism — triggers a fundamental and long-term question for the OTP. Put succinctly, what should be its relationship to affected communities? On the one hand, the OTP's relationship must respect its independence; the Prosecutor does not act for victims' in an equivalent manner to how a defence lawyer acts for their client i.e. on their instructions. On the other hand, the OTP must foster a close relationship to victims in order to adequately represent their interests; it has committed to 'systematically address the interests of victims in the work of the Office, [seek] their views at an early stage and continue to assess their interests on an on-going basis.'²⁴⁸ The difficulty faced by the OTP in accommodating a 'happy' medium between these two imperatives reflects the tension between prosecutorial discretion and victim's rights.²⁴⁹ Indeed, sitting beneath this tension is a fundamental battle, long described in the criminological literature: the 'struggle for ownership' i.e. the degree to which the victims can own — or should be made to feel as if they own — their 'conflict' with their alleged wrong-doer.²⁵⁰ This strikes at the plain observation that without

²⁴⁵ HRW, 'Comments on the ICC Office of the Prosecutor Draft Policy on Case Selection and Prioritisation (3 May 2016) < <https://www.hrw.org/news/2016/05/03/human-rights-watch-comments-icc-office-prosecutor-draft-policy-paper-case-selection> > accessed 31 July 2018.

²⁴⁶ OTP, *Policy on Case Selection and Prioritisation* (15 September 2016) para 50.

²⁴⁷ HRW, 'Comments on the ICC Office of the Prosecutor Draft Policy on Case Selection and Prioritisation (3 May 2016) < <https://www.hrw.org/news/2016/05/03/human-rights-watch-comments-icc-office-prosecutor-draft-policy-paper-case-selection> > accessed 31 July 2018.

²⁴⁸ OTP, *Policy on Victim Participation* (April 2010) p.3.

²⁴⁹ On this see Carla Ferstman, 'Prosecutorial Discretion and Victims' Rights at the International Criminal Court: Demarcating the Battle Lines (2016) 1 *Acta Juridica* 17.

²⁵⁰ Nils Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1, 3. See, more recently, Christine M. Englebrecht, 'The Struggle for 'Ownership of Conflict': An Exploration of Victim Participation and Voice in the Criminal Justice System (2011) 36(2) *Criminal Justice Review* 129.

the victims there is, for all intents and purposes, no prosecution; the victims are its *raison d'être*. Against this backdrop, it has been said that victims are 'at the heart' of the Court.²⁵¹ The challenge, then, that faces the OTP is how far should it go to accommodate, respect and act upon those interests of victims.

Furthermore, a review mechanism would also renew debate on another fundamental question: how should the OTP interpret the 'interests of justice'? Under the Rome Statute, the OTP's assessment of the interests of justice, in deciding not to proceed with an investigation/prosecution must reconcile with its assessment of the interests of victims.²⁵² Leaving aside the inherent indeterminacy of justice, if significant numbers of those victims in affected communities exercise the right to review then it is likely to invite attention as to how those 'interests' of victims are being reconciled. One can accept that the OTP's assessment of the interests of victims might not necessarily correlate with victims' desires or wants. Indeed, it is not the role of the Prosecutor to represent the personal or private sets of victim interests because those victims are granted their own representation in Court i.e. through the Victims Participation and Reparations Section.²⁵³ However it remains the Prosecutor's responsibility to represent and promote the 'collective' interests of all victims (including those that do not qualify for formal participation) not least because the Prosecutor is seen as (and regularly claims to be) the victim's primary agent.²⁵⁴ In that regard, a request for a review would trigger several underlying questions about the means by which the OTP should determine the interests of victims. At the very least one can say that the creation of the mechanism would develop the OTP's ability to ascertain the interests of victims in their own situation-specific contexts.

²⁵¹ See, indicatively, Judge Silvia Fernandez de Gurmendi, 'Statement of the President of the International Criminal Court' (10 December 2016) <<https://www.icc-cpi.int/Pages/item.aspx?name=161209-stat-pres-hrd>> accessed 31 July 2018.

²⁵² OTP, *Policy Paper on the Interests of Justice* (September 2007) 5.

²⁵³ For an overview see ICC 'Victims' <<https://www.icc-cpi.int/about/victims>> accessed 31 July 2018.

²⁵⁴ See, indicatively, Fatou Bensouda, 'Statement on the Recent Judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo' (13 June 2018) <<https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat>> accessed 31 July 2018; Fatou Bensouda 'Statement at the conclusion of her visit to the DRC..' (4 May 2018) <<https://www.icc-cpi.int/Pages/item.aspx?name=180405-otp-stat>> accessed 31 July 2018. International criminal prosecutors have long invoked victims. See Carla Del Ponte, in arguing for a review of an appellate decision advanced, 'I am the only person here to represent the victims, and on their behalf I pray you to allow the prosecution to institute proceedings against Barayagwiza... In the name of justice, genuine justice, for the sake of victims, for the sake of survivors.' See *Madame Prosecutor: Confrontation with Humanity's Worst Criminals and the Culture of Impunity* (Other Press 2008) 82.

To illustrate, the OTP would benefit if, in the exercise of the right to review, it became clear that affected communities were expressing that a selected prosecution was critical to justice being seen to be done. It is not suggested that the review mechanism be a vehicle for affected communities to direct or control the exercise of prosecutorial discretion. Instead it would be about ensuring that those communities are given the optimal emancipatory potential to influence (but not dictate) the course of selection procedure.²⁵⁵ In the long-term, the review mechanism can develop to be a learning tool to allow the Prosecutor to make a more informed assessment of how a selection (or any potential reliance on the interests of justice) would have an impact on the ground in affected communities.²⁵⁶ This assessment would, then, be fulfilling a key legitimisation function as it would require weighing up how selections are going to be received and determining their likely effects on domestic perceptions.

The study, now, continues to consider another method of enhancing the OTP's effectiveness. All organisations are concerned by the perceptions of their essential audiences. This concern, however, necessarily, makes them a participant in a dialogue. Put simply, the organisation listens to the general concerns of an audience, but then engages in persuading the audience to come to an agreement or position that is favourable to the organisation.²⁵⁷ It follows that the organisation, with its capacity and resources, is a power-holder in this dialogue and can use persuasive language, i.e. rhetoric, to influence the perceptions of its audiences.²⁵⁸ In this regard, the study turns to the OTP's rhetoric in its dialogue with affected communities. This rhetoric is used to explain and defend its selections, and thereby seeks to boost the Court's perceived legitimacy. As the next chapter identifies, the OTP's rhetoric often does this by way of defending its own (and the Court's) independence; something that, by implication, also defends the principle of impartiality. Against this backdrop, the following chapter considers one ever-

²⁵⁵ See generally, Kai Ambos, 'Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive strategy?' (2013) 58 (4) *Crime, Law and Social Change* 420, 431-2.

²⁵⁶ Maria Varaki, 'Revisiting the 'Interests of Justice' Policy Paper (2017) 15(3) *JICJ* 455, 468.

²⁵⁷ This finds expression in the dictionary meaning of dialogue i.e. a conversation/discussion between two or more persons often to resolve areas of disagreement. See Stevenson, *supra* note 25, at 483.

²⁵⁸ On the notion of power-holders in a dialogue to boost legitimacy see Anthony Bottoms and Justice Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) 102(1) *Journal of Law and Criminology* 119, 159-60.

recurring feature of its rhetoric and undertakes an analysis that reveals the limits of its persuasiveness in affected communities.

Chapter Five

The International Criminal Court's Office of the Prosecutor & Selection Rhetoric¹

Rhetoric offers us a set of tools for thinking about the discursive conventions within which we work... [that can] bear not just upon how we say the things we say but also upon what we say, on what we are able to see, on what we are able to think [and] on what we are able to know and believe...²

During the negotiation of the Rome Statute of the International Criminal Court, the importance of the Court's independence was repeatedly stressed. At the time, delegations understood independence to mean a resistance to political influence, especially originating from States.³ As one delegate put it, 'the Court should be ... independent of any political influence, and its judgements should be given exclusively on the basis of law.'⁴ In the view of another delegate, the Court's independence would resist political pressure that consisted of 'the particular rather than the universal, the exclusive rather than the inclusive.'⁵ The general consensus was that the Court would displace complaints of 'victor's justice' by emancipating law from the machinations of politics. Hence, the Court was founded on a peak confidence in legalism: an ideological belief in law's superiority to politics.⁶

Today, optimism in the Court's legalism has long since waned. More than fifteen years since the Court opened, faith in its independence has undergone a deep malaise, particularly on the African continent.⁷ Distrust has been frequently attributed to the Court's 'engine room': The Office of the Prosecutor. Arguably its

¹ A version of this chapter is pending publication: Birju Kotecha, 'The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism' (2019) 32(1) *LJIL* (forthcoming).

² Gerald B. Wetlaufer, 'Rhetoric and its Denial in Legal Discourse' (1990) 76 *Virginia Law Review* 1545, 1548

³ See the *travaux préparatoires* of the Rome Statute (ICCst.): Summary records of the plenary meetings and of the meetings of the Committee of the Whole' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15th June -17th July 1998) A/CONF.183/13 (Vol. II). For example, the Iraqi Delegate remarked '...the Statute of the International Criminal Court should contain clear principles that [confirm] its neutrality and objectivity, its independent role and freedom from the political influences of States and international organisations') para. 33 at 116.

⁴ *Ibid.* para. 41, p. 67.

⁵ *Ibid.* para. 9, p. 73.

⁶ Eric A. Posner, *The Perils of Global Legalism* (UCP 2009) 21.

⁷ See below.

most public face, the OTP is perceived to be synonymous with the Court because its prosecutorial selections are pivotal and tend to draw the most criticism. Those objections begin with the Prosecutor's investigations focusing — almost exclusively — on African States.⁸ Furthermore, all of the Court's trials and the resulting eight convictions have been of nationals of African states.⁹ In addition, concerns are raised about the Prosecutor's lack of even-handedness in selecting cases across opposing parties to a conflict. These concerns have led to a critique of 'lawfare'¹⁰, and often arises when the Prosecutor has an unduly close relationship to a government that, *de facto*, shields the state from criminal investigations.¹¹ Finally, and more in general, selections that begin with a UNSC referral also attract opposition. For instance, the UNSC's triggering of the Court's jurisdiction in the situations in Libya and Sudan has underlined the criticism that the Prosecutor is subject to the vagaries of global geo-power politics.¹²

Unsurprisingly, many African governments have become deeply opposed to the Court. As touched upon in the previous chapter, such has been the widespread perception of the Court's bias that South Africa and Gambia attempted to withdraw from the Rome Statute, before Burundi, recently, became the first state to formally do so.¹³ During South Africa's attempt at withdrawal, its government surmised that,

⁸ There are open investigations in Burundi, Uganda, the Democratic Republic of Congo, two in the Central African Republic, Sudan (Darfur), Libya, Côte d'Ivoire and Mali. At the time of writing is the only investigation beyond the African continent is in Georgia. On the 20th of November 2017 the Prosecutor requested authorisation from the Court to initiate an investigation into crimes committed in Afghanistan. For a current list see ICC 'Situations under Investigation' <www.icc-cpi.int/pages/situations.aspx> accessed 31 July 2018.

⁹ Five of these convictions were the obstruction of the administration of justice and the tampering of witness evidence. See *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Judgment Pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (9 October 2016). The remaining 'core' convictions are those of Thomas Lubanga in *The Prosecutor v. Thomas Lubanga* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012); Germain Katanga in *The Prosecutor v. Germain Katanga*. (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/07-3436 (7 March 2014) and Ahmad Al Faqi Al Mahdi in *The Prosecutor v Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171 (27 September 2016). The ICC Appeals Chamber recently overturned the conviction of Jean-Pierre Bemba for crimes against humanity and war crimes; See *The Prosecutor v Jean-Pierre Bemba* (Judgment on the appeal of Jean-Pierre Bemba Gombo against Trial Chamber III Judgment Pursuant to Article 74 of the Statute) ICC 01-05-01-08 A (8 June 2018)

¹⁰ The premise of 'lawfare' is the use of the Court to attach scrutiny and stigma to political adversaries. See Alana Tiemessen, 'The International Criminal Court and the Lawfare of Judicial Intervention' (2015) *International Relations* 1.

¹¹ A notable example is the self-referral by the Ugandan Government for crimes committed by members of the Lord's Resistance Army, including its leader Joseph Kony. The referral subsequently led to a perception that the Prosecutor was blind to atrocities committed by Ugandan Government forces. See Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace-Justice Divide* (CUP 2015) 187-197.

¹² For an overview of the 'politics' of prosecution decisions see Alana Tiemessen, 'The International Criminal Court and the politics of prosecutions' (2014) 18 *I.J.H.R.* 444.

¹³ Burundi's withdrawal from the Rome Statute took effect on 27 October 2017. See UN Burundi: Withdrawal Reference: C.N.805.2016.TREATIES-XVIII.10 (Depositary Notification) <www.treaties.un.org/doc/publication/cn/2016/cn.805.2016-eng.pdf> The South African government, after a domestic legal challenge, retracted their intention to withdraw from the Rome Statute, but is currently

‘there are perceptions of inequality and unfairness in the practice of the ICC that do not only emanate from the Court’s relationship with the UNSC, but also by the perceived focus of the ICC on African States notwithstanding ample evidence of violations by others.’¹⁴ The sentiments of many African governments were expressed in an AU strategy that contemplated a collective withdrawal from the Rome Statute, and which began by declaring the Court was ‘riddled with... struggles over its perceived legitimacy’.¹⁵

Poor perceptions from African governments have come to be expected, but the Prosecutor has persistently distinguished the importance of an essential audience: ‘affected communities’.¹⁶ Prosecutions are conducted in the name of these communities (comprised of victims and those most affected by alleged crimes).¹⁷ Evidence from the ICTY and ICTR indicates that perceptions of political bias among such communities can be highly damaging to a tribunal’s perceived legitimacy.¹⁸ Of course, these perceptions are shaped by a multitude of factors including ethnic affiliations, psychological biases and media distortions.¹⁹ Nonetheless, the OTP’s effectiveness depends on attracting perceived legitimacy among affected communities if justice — whenever it comes — is to be seen to be done.²⁰ In this

considering alternative options. The President of Gambia has also restored the country’s commitment to the Rome Statute after the previous incumbent of the Presidency had labelled the Court racist and declared an intent to withdraw. See BBC News, ‘South Africa Revokes ICC Withdrawal after Court ruling 8 March 2017’ <<http://www.bbc.co.uk/news/world-africa-39204035>> accessed 31 July 2018; Pap Saine and Lamin Jahateh, ‘Gambia announces plans to stay in International Criminal Court’ (13 February 2017) <www.reuters.com/article/us-gambia-justice-icc/gambia-announces-plans-to-stay-in-international-criminal-court-idUSKBN15S2HF> accessed 31 July 2018.

¹⁴ ‘Declaratory Statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court Reference: UN Doc. C/N/786/2016.TREATIES-XVIII.10 (Depositary Notification) (19 October 2016) <<https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>> accessed 31 July 2018.

¹⁵ For the original draft AU strategy see ‘Withdrawal Strategy Document’ (Draft 2)’ (12 January 2017) <www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf>. See also Elise Keppler, ‘AU’s ICC Withdrawal Strategy Less than Meets the Eye: Opposition to Withdrawal by States’ <<https://www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye>> accessed 31 July 2018.

¹⁶ See, indicatively, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: justice will ultimately be dispensed for LRA crimes’ <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-02-2015-ug>> accessed 31 July 2018 and Fatou Bensouda, ‘Our Resolve to Create a More Just World Must Remain Firm’ (3 September 2015) <www.ictj.org/debate/article/our-resolve-create-more-just-world-must-remain-firm> accessed 31 July 2018.

¹⁷ ICC, *Strategic Plan 2013-2017* (interim update July 2015) p.6 (Judicial and Prosecutorial Goal 1.7); ICC ASP *Strategic Plan for Outreach of the International Criminal Court* ICC-ASP/5/12 (29 September 2006) 3.

¹⁸ See chapter 3.2 and Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the ICTY* (Routledge 2014); Stuart Ford, ‘A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms’ (2012) 45 *V and J. Transnat'l L* 405, 458-468; Sanja Kutnjak Ivković and John Hagan, *Reclaiming Justice: The International Tribunals for the Former Yugoslavia and Local Courts* (OUP 2011).

¹⁹ See, for example, Marko Milanović, ‘The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem’ (2016) 110 *AJIL* 233.

²⁰ Jaya Ramji-Nogales, ‘Designing Bespoke Transitional Justice: A Pluralist Process Approach’ (2010) 32(1) *Mich.J.Int'l L.* 1, 15; Yvonne M. Dutton, ‘Bridging the Legitimacy Divide: The International Criminal Court’s Domestic Perception Challenge’ (2017) 56 *Columbia Journal of Transnational Law* 70

regard there is some cause to be optimistic about the Court's effectiveness,²¹ but it remains imperative for the Court to be seen as legitimate within communities, that, ultimately, help to achieve its mandate.

In this context, this chapter enquires into the OTP's ability to persuade affected communities that the Court is politically independent. This ability has been called upon against the background of prosecution selectivity and the resulting (poor) perceptions of the Court's legitimacy. In general, the ability to persuade is a legal skill and one of the Prosecutor's professional obligations as the:

[The] Prosecutor should act in a way that makes victims of crimes and their relatives understand that the Prosecutor is acting on their behalf.... to safeguard that justice is seen to be done and to convince, in particular, those people on whose behalf this [Court] is working that there is no arbitrary selection of persons to be indicted...'²²

Specifically, the chapter analyses rhetoric; understood as the use of persuasive language, either verbal or written, directed towards given audiences.²³ The analysis focuses on the OTP's 'public communications', namely its own projection of information to an audience external to the organisation. These are in contrast to organisational communications that have an internal audience, such as the Prosecutor's courtroom advocacy which is confined to the particulars of the case and is generally directed towards the bench.²⁴ The chapter selects rhetoric used to defend, explain or otherwise convey the Court's political independence and, specifically, targets expressions of legalism. These expressions are pervasively found across the OTP's public communications, and is a self-evident choice as legalism countervails politics, because, by definition, it is 'sealed off from politics, and

²¹ A recent survey in Kenya of 507 randomly selected individuals found only 34.3% agreed with the statement 'The International Criminal Court, ICC, or The Hague is biased against Africa.' In particular victims—defined as those who suffered or observed violence—revealed 60% disagreed with the statement that the Court is biased. See Tessa Alleblas and others, 'Is the International Criminal Court biased against Africans? Kenyan Victims don't think so' *The Washington Post* (6 March 2017); Yvonne Dutton and others, 'Collective Identity, Memories of Violence and Belief in a Biased International Criminal Court: Evidence from Kenya' (22 August 2017) <www.ssrn.com/sol3/papers.cfm?abstract_id=3014844> accessed 31 July 2018.

²² Judge Schomburg, Dissenting Judgment in *Prosecutor v Miroslav Deronjić* (Sentencing Judgement) ICTY-IT-02-61-S Trial Chamber II (30 March 2004) para 10.

²³ See Catherine Soanes and Angus Stevenson (eds.), *Oxford Dictionary of English* (2010) 1524. This accords with James Boyd White's definition; the art of 'establishing the probable by arguing from our sense of the probable'; James B. White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) *52 U Chi L Rev* 684, 687.

²⁴ See generally, Mary F. Hoffman and Debra J. Ford, *Organisational Rhetoric: Situations and Strategies* (Sage 2010) 209-232.

cannot...amount to political preference.’²⁵ Fundamentally, legalism is used as a legitimization strategy; providing justifications that seek to attribute validity (and inspire confidence) in the OTP’s decision-making.²⁶ The ensuing analysis reveals the limits of legalism’s persuasiveness but first, the chapter begins by establishing the significance of the OTP’s rhetoric.

²⁵ Tiphonie Dickson, ‘Shklar’s Legalism and the Liberal Paradox’ (2015) 22(2) *Constellations* 188, 196.

²⁶ The use of legalism is related to demonstrating the Office’s impartiality in its prosecution selections. Impartiality and independence are closely linked; the former denoting the equal and fair treatment of cases and the latter referring to freedom and the absence of external affiliation or interference. The lack of independence provides grounds to question the existence of impartiality, but the converse is true; the existence of impartiality supports a claim to independence. See Stevenson, *supra* note 21, at 888; Luc Côte, ‘Independence and Impartiality’ in Luc Reydam and others (eds.), *International Prosecutors* (OUP 2012) 357-9; On legitimization, see Roberto Cipriani, ‘The Sociology of Legitimation: An Introduction’ (1987) 35(2) *Current Sociology* 1.

5.1 Rhetoric

The study of rhetoric does not fit within ‘a tidy academic pigeonhole.’²⁷ Rhetoric is a phenomenon of multi-disciplinary interest, and literature is found within, among others, the disciplines of linguistics, political science and psychology.²⁸ For instance, in political science, Alan Finlayson’s development of the ‘rhetorical political analysis’ demonstrates the benefits of using rhetorical concepts to investigate arguments, and the ‘*proofs* actors bring forward in justifying claims and giving reasons for others to share them.’²⁹ In linguistic studies, rhetoric is often located within a ‘sister’ analysis of discourse that targets texts and ‘language in use’, and enables the examination of socially constructed meanings that explain the world around us.³⁰ Most relevant for current purposes, the study of rhetoric has long been a part of the ‘law and literature’ movement.³¹ Law has been described as the ‘very profession of rhetoric’³² and legal argumentation and advocacy is interwoven with persuasion.³³

This chapter fills a gap in the literature with an interdisciplinary analysis. Hitherto, there has been limited research exploring rhetoric’s role in respect of the Court. Existing literature has tended to subsume rhetoric found in announcements, declarations or statements for case-specific purposes, or within notions such as ‘dialogue’ or ‘practice’.³⁴ Similarly, the literature on the Court and legalism has

²⁷ Susan Condor, Cristian Tileaga, and Michael Billig, ‘Political Rhetoric’ in Leonie. Huddy, David O’Sears and Jack S. Levy (eds.), *The Oxford Handbook of Political Psychology* (OUP 2013) 286.

²⁸ This accounts for the contested definitions of rhetoric and its interchangeable use with terms such as ‘argument’, ‘discourse’ and ‘language’. For an overview of these diverse disciplinary perspectives see *ibid*.

²⁹ See, Jude Atkins and Alan Finlayson, ‘... A 40-Year Old Black Man Made the Point to Me’: Everyday Knowledge and the Performance of Leadership in Contemporary British Politics’ (2012) 61(1) *Political Studies* 161, 162 citing originally Alan Finlayson, ‘Political science, political ideas and rhetoric’ (2004) 3(4) *Economy and Society* 528.

³⁰ James Gee and Michael Handford (eds.), *The Routledge Handbook of Discourse Analysis* (Routledge 2012) 1-6.

³¹ See, Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1989); Peter Brooks and Paul Gewirtz (eds.), *Law’s Stories: Narrative and Rhetoric in the Law* (1996); Austin Sarat and Thomas R. Kearns (eds.), *The Rhetoric of Law* (1996); Wetlaufer, *supra* note 2.

³² Austin Sarat (ed.), *Rhetorical Processes and Legal Judgments: How Language and Arguments Shape Struggles for Rights and Powers* (CUP 2016) 127.

³³ The dictionary defines ‘advocacy’ as ‘the public support for or recommendation of a particular cause or policy’; See Soanes and Stevenson, *supra* note 23, at 25.

³⁴ See for example; Damien Rogers, ‘Prosecutors’ Opening Statements: The Rhetoric of Law, Politics and Silent War’ in Nobuo Hayashi and Cecila M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (2017) 325-350; L. J. M Seymour ‘The ICC and Africa: Rhetoric, Hypocrisy Management, and Legitimacy’ in Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds.), *Africa and the ICC: Perceptions of Justice* (CUP 2016) 107-127; Kenneth A. Rodman, ‘Justice as a Dialogue Between Law and Politics: Embedding the International Criminal Court within Conflict Management and Peacebuilding’ (2014) 12 *JICJ* 437; Sara Kendall and Sarah

focused on their general relationship with one another, rather than a particular actor's use of legalism in their rhetoric.³⁵ To put it another way, literature on the Court has lacked a discrete treatment of rhetoric that distinguishes an actor, a context and the content of the rhetoric being communicated. The present chapter compensates for the lack of specificity by distinguishing the OTP, a context of distrust in the Court's political independence, and the content of legalism. In so doing, the chapter stimulates reflections about discursive conventions that may resonate with other international legal actors. In this light, the OTP's rhetoric is significant for, at least, three reasons.

First, rhetoric is significant because its function of persuasion depends on the audience to whom the rhetoric is addressed.³⁶ Persuasion is a process of psychological change in recipients pertaining to their actions or beliefs, i.e. being persuaded to do, or believe something.³⁷ It is inherently communicational with those seeking to persuade using language to influence and modify attitudes, beliefs and the existing perceptions of the audience.³⁸ Thus, rhetoric has an interdependent connection to an audience that is defined as an 'ensemble of those whom the speaker wishes to influence by his argumentation.'³⁹ On the one hand, an analysis of rhetoric highlights the Court's 'audience dilemma'; an expectation that the Court must 'speak to' a range of audiences, from abstract entities (such as the 'international community') to concrete constituencies (such as victims).⁴⁰ However, by the same token, rhetoric invites the identification of a concrete audience upon whom the rhetoric's persuasiveness can be analysed. In so doing, the chapter offers insight into the OTP's effectiveness in establishing a meaningful two-way communication to those most affected by the commission of atrocities.

Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' (2014) 76 *LCP* 235.

³⁵ See for example, Marieke de Hoon, 'The Future of the International Criminal Court: On Critique, Legalism and Strengthening the ICC's Legitimacy' (2017) 17 *Int.C.L.R.* 591; John M. Czarnetsky and Ronald J. Rychlak, 'An Empire of Law: Legalism and the International Criminal Court' (2003) 79(1) *Notre Dame Law Review* 55.

³⁶ Peter Goodrich, 'Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language' (1984) 4(1) *OJLS* 88, 95.

³⁷ Soanes and Stevenson, *supra* note 23, at 1327.

³⁸ Marianne Dainton and Elaine D. Zelle, *Applying Communication Theory for Professional Life: A Practical Introduction* (Sage 2014) 103-4. See also Garth S. Jowett and Victoria J. O. Donnell, *Propaganda and Persuasion* (Sage 2014) 38-39.

³⁹ Chaïm Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (University of Notre Dame Press 1969) 19.

⁴⁰ Mirjan. R. Damaška 'What is the Point of International Criminal Justice' (2008) 83 *Chi-Kent L. Rev* 329, at 347-9; M. M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33(2) *Mich.J.Int'l L.* 265.

Second, and relatedly, rhetoric is a ubiquitous social practice that has a behavioural impact on audiences.⁴¹ Rhetoric, by its nature, determines the range of political ideas that people encounter and thus shapes the ideas that become a part of a society's common understandings; helping to enable (or disable) groups to challenge existing social structures.⁴² Hence, rhetoric is a component of the Court's expressive function, namely, its broadcast of messages and norms that helps construct a consensus across a given society.⁴³ In this sense, rhetoric is, in fact, a pedagogic tool that can cast a shadow on affected communities. In so doing, the chapter illuminates the OTP's effectiveness in promoting the necessary behavioural change that helps to achieve the Court's goals e.g. the prevention of crimes and more indirectly, peace, stability and reconciliation.⁴⁴

Third, rhetoric is significant for its deeper relationship with the 'truth'. Both concepts are commonly understood to be hostile to one another with rhetoric having a pejorative association to terms such as deception, falsehood or pretence.⁴⁵ Indeed, Locke described rhetoric as being invented 'for nothing else, but to insinuate wrong ideas...'⁴⁶ However, Aristotle argued rhetoric is not inimical to truth but was necessary to enable the discovery of facts and to mobilise support from an audience.⁴⁷ Admittedly, rhetoric can argue the truth in several ways and its very contestability reinforces differing baselines with which to assess truth.⁴⁸ For instance, disagreements about rhetoric's claims to truth are acute in the context of legal argumentation (e.g. the interpretation of facts, concepts and meanings) because both legal arguments and rhetoric are premised on probability rather than certainty,

⁴¹ Kendall and Nouwen, *supra* note 34, at 260.

⁴² Kevin Coe, 'Rhetoric, Political' in Gianpietro Mazzoleni and others (eds.), *The International Encyclopaedia of Political Communication* (Wiley & Sons 2015) 1428.

⁴³ See Tim Meijers and Marlies Glasius, 'Trials as Messages of Justice: What should be expected of international criminal courts?' (2016) 30 *Ethics and International Affairs* 429, 432-4; Mark Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 173-9.

⁴⁴ See Damaška, *supra* note 40, at 343; Martha Minow, Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints* (UMP 2015) 363. The Office's didactic function includes maximising the impact of its activities (e.g. the preliminary examination, investigation and trial) as, in its own words, 'mere announcement of ICC activities can have a preventive impact' See OTP, *Paper on some policy issues before the Office of the Prosecutor* (September 2003) p.3; OTP, *Prosecutorial Strategy 2009-2012* (1 February 2010) 7; See also DW Conflict Zone, 'Fatou Bensouda Interview with Tim Sebastian' (26 January 2016) <<http://www.dw.com/en/storify-fatou-bensouda-on-dwzone/a-19016835>> accessed 31 July 2018; Fatou Bensouda 'Looking Back, Looking Ahead-Reflections from the Office of the Prosecutor of the ICC' (2012) 11 *Washington University Global Studies Law Review* 437.

⁴⁵ This is captured by an alternative dictionary definition of rhetoric, noting that its persuasive effect implies a lack of sincerity. See Soanes and Stevenson, *supra* note 23, at 1524 and Goodrich, *supra* note 36, at 88.

⁴⁶ John Locke, *An Essay Concerning Human Understanding* (Penguin Classics 1997) 41.

⁴⁷ Aristotle, *The Art of Rhetoric* in H. C. Lawson-Tancred (translation) (Penguin 1991) 74 para. 1355a.

⁴⁸ Ingo Venzke, 'What makes for a Valid Legal Argument?' (2014) 11 *LJIL* 811, at 812-3.

and thus share an ‘all-or nothing’ desire to secure the assent of an audience.⁴⁹ Nevertheless, rhetoric need not be approached with an *a priori* scepticism; rather its analysis is a heuristic technique that can expose an attempt at persuasion that distorts the truth.⁵⁰ Thus, the chapter exposes rhetoric’s denial or reliance on truth and this also helps to determine the effectiveness of the OTP’s persuasion strategy towards affected communities.

The chapter’s specific method recognises that rhetoric is instrumental to persuasion and, hence, proceeds by way of an Aristotelian analysis. For Aristotle, rhetoric was the power to observe the available modes of persuasion of any particular matter.⁵¹ The three classical modes of persuasion include: enhancing the credibility of the speaker (*ethos*), maximising the effect of the rhetoric on the emotional dispositions of its audience (*pathos*), and finally using deductive arguments to demonstrate that a particular position is true (*logos*).⁵² The present analysis adopts these modes as a framework to analyse the legalism within the OTP’s public communications. The chapter now turns to the significance of these form of communications.

⁴⁹ Ian Scobbie, ‘Rhetoric, Persuasion and Interpretation in International Law’ in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds.), *Interpretation in International Law* (OUP 2015) 64; Perelman and Olbrechts-Tyteca, *supra* note 39, at 19.

⁵⁰ Aristotle, *supra* note 47, at 74 para. 1355a. See also Fish, *supra* note 31, at 479.

⁵¹ Aristotle, *supra* note 47, at 74 para. 1356a.

⁵² *Ibid.* para. 1356a

5.2 Public Communications

Public communications are, collectively, significant to an organisation's 'public relations.' Bernays defined public relations as having three linked components; 'a) information given to the public, b) persuasion directed at the public to modify attitudes and actions, and c) efforts to integrate the attitudes and actions of an institution with [that of] its publics, and of publics with those of that institution'⁵³ In other words, the practice of public relations is concerned with the 'common meeting ground' between an organisation and the public at large, and effective public relations involves the management of organisational reputation by a cumulative effort to influence the opinions and behaviour of relevant audiences.⁵⁴ In this regard, public communications and its encompassing rhetoric are central to public relations because they both share a concern to develop the organisation's relationship(s) to its external audiences.

In respect of the OTP, the Rome Statute is wholly silent on the agenda of public relation. And so, it falls to the Court's Registry to strategically co-ordinate and manage its public communications across three integrated spheres of activity: external relations, public information and outreach.⁵⁵ The latter two activities are processes; public information is about articulating the principles, objectives and activities of the Court to the public at large and to target audiences, and outreach is about establishing a two-way communication with affected communities that can promote support for the Court's work. However, crucially, the strategy insists on the integration of activities because they are 'complementary and involve mutually reinforcing goals, priorities and messages.'⁵⁶ The Court-wide public information strategy also emphasises the importance of co-ordination and harmony with outreach activities.⁵⁷ Thus, the Court's public communications are based on activities that

⁵³ See Edward Bernays, *Crystallising Public Opinion* (Liveright Publishing Corporation 1961) (New Edition) liv-iv.

⁵⁴ Ibid. iii-iv; See also The Chartered Institute of Public Relations, 'What is PR?' <<https://www.cipr.co.uk/content/careers-advice/what-pr>> accessed 31 July 2018.

⁵⁵ ICC, *Integrated Strategy for External Relations, Public Information and Outreach* (18 April 2007) p.3. External Relations is the process that aims towards building and maintaining support and co-operation with the Court and is the dialogue between the Court and States Parties, Non-States Parties, international organisations, NGO's and other key partners.

⁵⁶ Ibid. 5.

⁵⁷ See ASP, *Strengthening the International Criminal Court and the Assembly of States Parties* ICC-ASP/8/Res.3 (26 November 2009) p.5, para. 33-4; ASP, *Report of the court on the public information strategy 2011-2013*, ICC-ASP/9/29 (22 November 2010) p.2 para. 3.

prioritise the significance of having a consistent message towards affected communities.⁵⁸

These communications can be motivated by any number of concerns or priorities; they can be made through various mediums (e.g. directly published online, by media channels or through the spoken word) but are essentially connected in being made public. These include media interviews, statements and speeches, but one might also add an equally under-scrutinised form of communications: policies. The OTP's published policies are motivated by transparency and the discharge of its mandate by way of explaining its activities, legal criteria and decisions. These policies continue and develop the two-way communication between the Office and affected communities.⁵⁹

Nonetheless a category of 'public communications' can create some methodological limitations. Notably it does not precisely recognise the aim, context, medium and justification of the communication. For instance, scholarship has often highlighted the importance of medium, pithily captured by 'the medium is the message.'⁶⁰ Furthermore, it does not acknowledge the importance of the 'rhetorical situation', namely, that rhetoric seeks to modify a set of exigencies produced by persons and/or events.⁶¹ The category also excludes the more forensic attention paid to rhetoric's arrangement, delivery and style including its particular argumentative scheme- a '*topoi*'⁶² alongside the use of prose and persuasive devices, e.g. analogy, metaphor or metonym.⁶³ Put simply, a category of public communications masks the fact that rhetoric is 'always for and adapted to a specific cause and a specific occasion.'⁶⁴

⁵⁸ See also IBA/ICC Monitoring and Outreach Program, ICC External Communications: Delivering Information and Fairness (June 2011); Coalition for the International Criminal Court, 'Key Principles for ICC Communications' (March 2015) <www.iccnw.org/documents/CommsTeamInformalCommentsRevision13MAR15.pdf> accessed 31 July 2018.

⁵⁹ See OTP, Policies and Strategies, <<https://www.icc-cpi.int/about/otp/Pages/otp-policies.aspx>> accessed 31 July 2018; See also Antonio Coco and Matthew Cross, Foreword (Special Issue: The International Criminal Court's Policies and Strategies) (2017) 15 *JICJ* 407, 408.

⁶⁰ This phrase is attributed to Marshall McLuhan and refers to how the precise medium of the message (rather than its content) has its own social effect. See Marshall McLuhan, *Understanding Media: The Extensions of Man* (McGraw-Hill 1964).

⁶¹ Lloyd F. Bitzer, 'The Rhetorical Situation' (1968) 1 *Philosophy and Rhetoric* 1.

⁶² This translates to 'place or location' but in the context of Aristotle's treatise tends to refer to a strategy for argumentation. See Aristotle, *supra* note 47, at 183-214, para. 1392a-1403b.

⁶³ *Ibid.* at 215-44, para 1404a-1414a and for a range of general persuasive techniques see Ward Farnsworth, *Farnsworth's Classical English Rhetoric* (David R. Godine 2010).

⁶⁴ Alan Finlayson, 'Proving, Pleasing, Persuading? Rhetoric in Contemporary British Politics' (2014) 85(4) *The Political Quarterly* 428, 432. Aristotle also classified rhetoric into differing genres (the deliberative, the epideictic and the judicial).

These may be reasonable reservations, but the present aim is not to analyse the persuasiveness of every instance of legalism accounting for its aim, context, medium and justification. Indeed, to do so would ignore the fact that definitive judgements about persuasion require an empirical assessment (of individual opinions), that, in any case, is notoriously difficult to conduct.⁶⁵ As Kant argued, actual persuasion is bound up in the character of the individual subject; it only has private validity and is objectively difficult to rationalise.⁶⁶ By contrast, this chapter's starting point is legalism. In so doing, the analysis recognises that rhetoric and ideology are intertwined; both possess their own strategy and style of persuading a defined audience.⁶⁷ Thus, an analysis of the persuasiveness of legalism enables an assessment of the ideology of legalism too. The chapter turns to clarify legalism before turning to its widespread expressions across a range of the OTP's public communications.

⁶⁵ Coe, *supra* note 42, at 1432.

⁶⁶ Immanuel Kant, *Critique of Pure Reason* in N. Kemp-Smith translation (Palgrave Macmillan 1929) 645, at para A820/ B848.

⁶⁷ Alan Finlayson, 'Rhetoric and the Political Theory of Ideologies' (2012) 60(4) *Political Studies* 751, 763. See generally, Alan Finlayson, 'Ideology and Political Rhetoric' in Michael Freedon and Marc Stears (eds.), *The Oxford Handbook of Political Ideologies* (OUP 2013).

5.3 Legalism

Most interpretations of legalism begin with the writing of Judith Shklar. Her critique in *Legalism: Law, Morals and Political Trials* has been described as offering the ‘single most significant reckoning with the politics of international criminal justice ever written.’⁶⁸ In her view, legalism is the ‘ethical attitude that holds moral conduct to be a matter of rule following and moral relationships to consist of duties and rights determined by rules.’⁶⁹ For legalists, rules are viewed as the only guide to decision-making, and compliance with them is a moral mode of being in the world.⁷⁰ Thus, legalism ascribes greatest priority to present laws (*lex lata*) and compliance with them is seen as a clear black or white, yes-or-no judgement.⁷¹

Nonetheless, many references to Shklar tend to overlook her distinction between two kinds of legalism. First, a ‘professional legalism’ as the operative ideology of lawyers; internal to the legal profession and comprised of beliefs, habits and tendencies of rule-orientated lawyers. This kind of legalism consists of thinking of law as simply ‘there’, as a discrete entity, and is rooted in the legal profession’s view of its own functions.⁷² Second, a ‘political legalism’ as an external projected ideology; one that is inserted into complex and diverse political environments that contain multiple, and often competing ideologies.⁷³ Here, legalism interprets politics as the antithesis of law; law is neutral, objective and best orientated towards justice; politics is rejected as competitive, egotistical and vague.⁷⁴ Of course ‘political legalism’ produces a dichotomy that exposes an assumption: legalism views itself as ‘doing or solving’ political dilemmas better than politics itself can. This is the claimed virtue of legalism; it presents itself as an improvement on politics but, in so doing, disregards the connection that law has with political values because its very premise is to divorce or hide those values.⁷⁵

⁶⁸ Samuel Moyn, ‘Judith Shklar on the Philosophy of International Criminal Law’ (2014) 14 (4/5) *Int.C.L.R.* 717, 717.

⁶⁹ Judith N. Shklar, *Legalism: Law, Morals and Political Trials* (HUP 1986) 111.

⁷⁰ This is associated with *nullum crimen sine lege*. See Robin West, ‘Reconsidering Legalism’ (2003) 88 *Minnesota Law Review* 119, 122 and Antonio Cassese, ‘The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice’ (2012) 25(2) *LJIL* 491, 492.

⁷¹ Vesselin Popovski, ‘Legality and Legitimacy of International Criminal Tribunals’ in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds.), *Legality and Legitimacy in Global Affairs* (OUP 2012) 408.

⁷² Shklar, *supra* note 69, at 35.

⁷³ *Ibid.* viii.

⁷⁴ *Ibid.* 111. For an alternative interpretation of ‘political’ see Sarah Nouwen and Wouter G. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2011) 21(4) *EJIL* 941, 945.

⁷⁵ Zenon Bankowski, ‘Don’t think about it: Legalism and Legality’ (1993) 15 *Rechtstheorie Beiheft* 45, 47.

Before turning to the OTP's public communications, one must acknowledge the fundamental explanations for a recourse to legalism. First, the Prosecutor is a member of an 'interpretive community' of international lawyers that possesses a set of cultural assumptions and beliefs that would admit a vocabulary of legalism as a matter of common sense.⁷⁶ This community is encompassed within an ensemble of international actors, or a broader 'epistemic community' (e.g. academics, campaigners, civil society, diplomats) that gathered at the Rome Conference. Common to both communities is the use of legalism as the only 'correct and proper' way to think (and speak) about international criminal law.⁷⁷ Second, the articulation of legalism generally prevails across international law, and is arguably a symptom of what Koskeniemi calls managerialism. For Koskeniemi, managerialism involves international lawyers placing exclusive attention on compliance with rules and technocratic practices, rather than having a meaningful engagement with the reasons why such rules and practices exist, and the (political) purposes they ultimately serve.⁷⁸ In this sense, international lawyers' use of legalism is, by nature, a deeply embedded community and managerial practice.

The OTP's public communications contain innumerable expressions of legalism and these appear in various contexts, over an indeterminate period of time and with variable frequency. It is not within the present scope to explore them all, or to attribute them, more or less, to the tenure of either Luis Moreno Ocampo or Fatou Bensouda. For present purposes, Shklar's classification of legalism can help to organise its most common expressions.

Shklar's account of professional legalism, referring to the practice of law, or its own discrete science⁷⁹ helps to explain three identifiable expressions. Taking the first, the OTP reinforces a Court-wide message that it is a judicial institution, with an exclusive judicial mandate. The Court's website stresses that it is free from political control and is only dictated by the legal criteria found in treaty texts.⁸⁰ The content of webpages affirms that the Prosecutor is independent, impartial and that 'political

⁷⁶ The concept of interpretive community is originally attributed to the work of Stanley Fish. See Fish, *supra* note 25, at 141. See also Jean d'Aspremont, 'The Professionalization of International Law' in Jean d'Aspremont and others (eds.), *International Law as a Profession* (CUP 2017) 30.

⁷⁷ Andrea Bianchi, *International Law Theories* (OUP 2016) 12.

⁷⁸ Martti Koskeniemi, 'The Politics of International Law-20 Years Later' (2009) 20 *EJIL* 7, at 15-16.

⁷⁹ Shklar, *supra* note 69, at 8-9.

⁸⁰ ICC, 'Understanding the International Criminal Court' < <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> > accessed 31 July 2018.

considerations never form part of the Office's decision making.'⁸¹ Secondly, and most commonly, legalism is used to demonstrate a commitment to professional impartiality. The Prosecutor, in many speeches, has been keen to declare she makes no decisions out of fear or favour.⁸² In so doing she, in adherence to the law's neutrality and objectivity, often stresses that 'politics and political considerations have no place and play no part in the decisions taken by the Office and in the execution of its independent and impartial mandate'.⁸³ In addition, the Prosecutor in newspaper editorials and in declared policy, has reinforced legalism by insisting that the Court's mandate will 'never be compromised by political expediency.'⁸⁴ More subtly, the third expression captures positivism in terms of jurisdictional limits and terminological interpretation. For instance, the Prosecutor in person and in press releases has stressed that she is only guided by the Rome Statute and often cites the Preamble to elaborate on her aims.⁸⁵ Hence, the Prosecutor explains the boundaries of her decision-making by implicitly articulating the rules of treaty interpretation.⁸⁶ Such an approach also distinguishes the Prosecutor's professional identity; as former Prosecutor Luis Moreno- Ocampo once stated: 'I follow evidence. I'm a criminal prosecutor; I'm not a political analyst.'⁸⁷

⁸¹ ICC 'About The OTP' <<https://www.icc-cpi.int/about/otp/Pages/default.aspx>>accessed 31 July 2018.

⁸² Fatou Bensouda, Speech at the 52nd Munich Security Conference (15 February 2014); <<https://www.securityconference.de/en/activities/munich-security-conference/msc-2016/speeches/speech-by-fatou-bensouda/>>accessed 31 July 2018; Fatou Bensouda Speech at a seminar hosted by the Attorney General of the Federation and Ministry of Justice of Nigeria International Seminar (24 February 2014) <<https://www.icc-cpi.int/iccdocs/otp/SpeechProsecutor-AbujaNigeriaFra.pdf>>accessed 31 July 2018; Shehzad Charania 'Without Fear or Favour-An Interview with the ICC Prosecutor Fatou Bensouda' (15 October 2015) <<http://justiceinconflict.org/2015/10/15/without-fear-or-favour-an-interview-with-the-icc-prosecutor-fatou-bensouda/>>accessed 31 July 2018; Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine' (2 September 2015) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-st-14-09-02.aspx>accessed 31 July 2018.

⁸³ See for example, 'The Determination of the Office of the Prosecutor on the communication received in relation to Egypt' (8 May 2014) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1003>> accessed 31 July 2018.

⁸⁴ Fatou Bensouda, 'The Truth about ICC and Gaza' *The Guardian*, (29 August 2014) <<http://www.theguardian.com/commentisfree/2014/aug/29/icc-gaza-hague-court-investigate-war-crimes-palestine>>accessed 31 July 2018. See OTP, *Interests of Justice Policy Paper* (1 September 2007).

⁸⁵ The Preamble of the ICCSt. cites two main goals; 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.' There are innumerable examples of rhetoric that refers to the ICCSt. and/or the Preamble; See Fatou Bensouda, 'Local Prosecution of International Crimes: Challenges and Prospects' (4 November 2014) Opening Remarks 7th Colloquium of International Prosecutor(s) <<https://www.icc-cpi.int/iccdocs/otp/otp-statement-141105.pdf>> accessed 31 July 2018; 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' (16 January 2015) ICC Press Release <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1083>> accessed 31 July 2018.

⁸⁶ See the VCLT Art. 31(1), 31(2) (General Rule of Interpretation).

⁸⁷ Luis Moreno-Ocampo, 'I follow evidence, not politics' (20 January 2012) See International Peace Institute <<https://www.ipinst.org/2012/01/moreno-ocampo-i-follow-evidence-not-politics>>accessed 31 July 2018. Current Prosecutor Fatou Bensouda has expressed similar sentiment stating: 'We are a new tool, a judicial tool, not a tool in the hands of politicians who think they can decide when to plug or unplug us.' See David Smith, 'New Chief Prosecutor Defends International Criminal Court' *The Guardian* (23 May 2012).

Shklar's account of 'political legalism' helps explain two further expressions. Political legalism is about casting law as an uncompromising culture of rule-following that is sustained by depicting politics as irrational and essentially 'a species of war.'⁸⁸ Simpson describes this version as 'transcendent' in its desire to implicate politics by law's ruination.⁸⁹ In this regard, the OTP makes a concerted endeavour to elevate the law's significance as a means to deflect, offset (and remove) any negative association with politics. Thus, the OTP uses legalism normatively, articulating law in terms of its contribution to political and social goals particularly in the field of conflict resolution and crime prevention. The use is captured pithily by the words of former Prosecutor Moreno-Ocampo, '...experience has taught us that law is the only efficient way to prevent recurrent violence and atrocities.'⁹⁰

In another speech, Fatou Bensouda provided a more striking example, complemented by the use of rhetorical and literary devices such as a metonyms or synecdoche. To briefly digress, a metonym is a figure of speech where a concept, place or thing is replaced by something closely associated to it e.g. 'The Hague' can often be used to refer to the International Criminal Court. A synecdoche is specifically where a component is used to refer to the whole, or the whole refers to one its components. For example, 'bread' can be used to represent food in general as in the expression 'breadwinner' or, by contrast one can refer to a whole nation when specifically referring to its football team. Thus, the Prosecutor has tended to describe the ICC as simply 'the law', often accompanying it by the imagery of force. A typical example includes the following:

⁸⁸ See Shklar, *supra* note 69, at 122.

⁸⁹ Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity Press 2007) 19-20.

⁹⁰ Luis Moreno-Ocampo, 'Building a Future on Peace and Justice: The International Criminal Court' in Kai Ambos, Judith Large and Marieke Wierda (eds.), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development (The Nuremberg Declaration on Peace and Justice)* (Springer 2009) 13.

I firmly believe in the power of the law to stop and prevent violence, and to pacify communities gripped by conflict. I believe in the law as an instrument to affect constructive change. Through the might of the law, we can highlight the brutality and barbaric nature of these crimes; we can hold perpetrators accountable, and, crucially... [establish] new norms of acceptable conduct.⁹¹

The Prosecutor also uses legalism creatively in casting the law as an agent of normative political change and thereby removing the implication that law is tainted by undesirable bias against States. These include, somewhat incredulously, speculating about the Court's role in establishing peaceful elections on the African continent.⁹² In particular, and more frequently, the Prosecutor uses law as a metonym for justice and has expressed that the 'law sets one standard for everyone...and provides justice for all.'⁹³ This extends to describing the Court as a 'credible, professional, independent instrument of international justice'⁹⁴ but also places the Court as the arbiter of providing a 'real justice [that] has to be guided solely by the law and the evidence.'⁹⁵ Taken in context, the Prosecutor's rhetoric consistently encapsulates justice by the frequently-aired, 'protected embrace of the law.'⁹⁶

The final expression of legalism finds expression in John Austin's command or coercive orientation of law.⁹⁷ Legalism has a 'strong-arm' effect that capitalises on law's ability to produce a monopoly of force and coerce compliance from other (political) actors.⁹⁸ Taking the words of former Prosecutor Ocampo, 'other actors

⁹¹ Fatou Bensouda, 'The investigation and prosecution of sexual and gender-based crimes: reflections from the Office of the Prosecutor' (24 August 2015) (The Hague Academy of International Law Advanced Course on International Criminal Law Special Focus: Gender Justice) <<https://www.hagueacademy.nl/wp-content/uploads/2015/03/Opening-keynote-speech-The-Hague-Academy-of-International-Law-Advanced-Course-on-International-Criminal-Law.pdf>> accessed 31 July 2018.

⁹² 'In Africa, for instance, there have been close to 20 presidential elections in 2012 or 2013. Most of them have gone relatively peacefully. I am not giving credit to the ICC for that. History will judge that, but the ICC has a role to play... I firmly believe the world is a better place for having the ICC as an institution. I just want us to ask this question: What would the world be like without an ICC?' F. Bensouda, 'We Should at all Costs Prevent the ICC from being Politicised' (2014) 62(1) VEREINTE NATIONEN – *German Review on the United Nations* <http://www.dgyn.de/fileadmin/user_upload/DOKUMENTE/English_Documents/Interview_Fatou_Bensouda.pdf> accessed 31 July 2018.

⁹³ Fatou Bensouda, 'Reflections from the International Criminal Court Prosecutor' (2012) 45 *V and. J. Transnat'l L* 955, 956

⁹⁴ Fatou Bensouda, Remarks to the 25th Diplomatic Briefing (26 March 2015) 5 <<https://www.icc-cpi.int/iccdocs/db/25DB-OTP-Eng.pdf>> accessed 31 July 2018.

⁹⁵ Bensouda, *supra* note 93, at 959.

⁹⁶ See for example, Fatou Bensouda, Address at the First Plenary, 'Fifteenth Session of the Assembly of States Parties' (16 November 2016) 9; see also Bensouda Munich Speech, *supra* note 80.

⁹⁷ John Austin, *The Province of Jurisprudence Determined* (Spottiswoode 1832).

⁹⁸ Shklar, *supra* note 69, at 131.

have to adjust to the law'⁹⁹ and, in the language of Fatou Bensouda, there is a dogged determination to use the 'full power of the law'.¹⁰⁰ In this guise, the OTP's rhetoric presupposes the significance of the Court's role in conflict-affected and/or divided societies, and the need for compliance with the Court's requests. For example, in a speech in 2014, Fatou Bensouda stated:

The ICC is a fact of life and all players in the international arena must adjust their behaviour to the reality that this new player in the international scene is committed to fulfilling its mandate of ending impunity for mass crimes that tear at the fabric of society and threaten the peace, security and well-being of the world.¹⁰¹

Here the OTP's rhetoric reinforces the mandatory nature of the Rome Statute and how its very existence 'impact(s) on conflict management efforts.'¹⁰² As declared policy elaborates, 'The issue is no longer whether we agree or disagree with the pursuit of justice in moral or practical terms. It is the law.'¹⁰³ Taking more nuanced examples, Fatou Bensouda has regularly warned of the consequences of not supporting the ICC. For instance, she has contended that 'backing the ICC is to support humanity's progress towards a more just world'¹⁰⁴ and cautioned that 'without the ICC, we will regress into an even more turbulent world where chaos, volatility and violence take the upper hand as inevitable norms.'¹⁰⁵ The implication of such rhetoric is that those who do not comply with the Rome Statute are on the 'wrong side' and accept the impunity and violence the Court is helping to tackle.

Admittedly, these expressions of legalism are accompanied by the adjacent language in the communication, but this does not detract from the fact that legalism is undoubtedly one of the Office's 'key messages'; clear and short statements that

⁹⁹ My emphasis. See Luis Moreno- Ocampo, Prosecutor of the International Criminal Court, 'Keynote Address' Council on Foreign Relations (4 February 2010) <<https://www.icc-cpi.int/NR/rdonlyres/A80CDDDD-8A9A-432E-97CE-F6EAD700B5AE/281527/100204ProsecutorspeechforCFR.pdf>> accessed 31 July 2018.

¹⁰⁰ See for example, Fatou Bensouda, 'Opening Remarks: Launch of the ICC Office of the Prosecutor's Policy Paper on Sexual Violence and Gender-Based Crimes' (7 November 2014); Fatou Bensouda, 'Our Resolve to Create a More Just World Must Remain Firm' (3 September 2015) <www.ictj.org/debate/article/our-resolve-to-create-more-just-world-must-remain-firm>accessed 31 July 2018.

¹⁰¹ Fatou Bensouda 'Africa and the ICC: A Decade on. Africa and the International Criminal Court: Lessons Learned and Synergies Ahead' (9-10 September 2014) 3 <<http://www.africalegalaid.com/news/statement-by-fatou-bensouda-prosecutor-of-the-icc>>accessed 31 July 2018.

¹⁰² OTP, *Policy Paper on Interests of Justice* (1 September 2007) p.4.

¹⁰³ Ibid.

¹⁰⁴ Fatou Bensouda, 'Diplomatic Briefing in The Hague' (9 October 2017) p.15.

¹⁰⁵ See Bensouda, *supra* note 92, at 8.

are consistently reiterated.¹⁰⁶ These messages are commonly attached to an organisation's 'brand' i.e. part of its external image that purports to be distinctive and thus crucial in 'marketing' its work.¹⁰⁷ These messages are essential to persuade its target audiences and, ideally, need to be noticed, remembered and attract acceptance and support.¹⁰⁸ This resonates with the Court's Integrated Strategy and its stress on 'core message themes'; accurate but simple messages that reach a non-specialist audience that explain the need for co-operation and/or situate the Court as part of the international justice movement.¹⁰⁹ The chapter turns now to extend Shklar's critique and exposes the limits of legalism's persuasiveness vis-à-vis affected communities.

¹⁰⁶ Key messages are an essential part of an organisation's public relations and regularly promoting them is part of running effective media and PR campaigns. This is a fundamental principle found in communications, marketing, public relations, and media studies literature as well as practical training materials. See Averill E. Gordon, *Public Relations* (OUP 2011) 6-25; Craig E. Carroll and others, 'Key messages and message integrity as concepts and metrics in communication evaluation' (2014) 14 *Journal of Communication Management* 386, 389.

¹⁰⁷ Christine Schwöbel Patel, 'The Rule of Law as a Marketing Tool: The International Criminal Court and the Brand of Global Justice' in Christopher May and Adam Winchester (eds.), *Research Handbook on the Rule of Law* (EEP 2018) 434, 434-6.

¹⁰⁸ *Ibid.*

¹⁰⁹ See Integrated Strategy, *supra* note 55, at 4-5.

5.4 Persuasiveness (*Ethos, Pathos & Logos*)

For Aristotle the first rhetorical mode of persuasion concerned the character of the speaker or their ethos.¹¹⁰ This mode is concerned with persuasion that enhances the speaker's credibility and 'must come about in the course of the speech, not through the speaker's being believed in advance to be of a certain character.'¹¹¹ Aristotle clarifies that a speaker's existing credibility, originating within the community to which she belongs, is the strongest component of persuasiveness (characterised as their 'situated ethos').¹¹² This ethos includes their professional expertise, reputation and even what Max Weber called 'charismatic authority'; a set of exemplary personal leadership qualities.¹¹³ Nonetheless, Aristotle's target is the causal flow in the opposing direction, namely, whether the speaker's rhetoric can elevate their situated ethos in the eyes of the audience (termed their 'constructed ethos').¹¹⁴ Thus, in the analysis of rhetoric, the speaker's constructed ethos should, in general, elevate or remind the audience of his/her situated ethos.

The central question that follows is whether legalism can elevate the Prosecutor's situated ethos. One can answer this question by asking why legalism is attractive to lawyers. The answer, almost certainly, is found in its essential content: law. As McEvoy argues the temptation of legalism lies within the seduction of law; its affinity to values such as certainty, objectivity and rationality.¹¹⁵ Furthermore, legalism helps articulate an ordered world where the law is glorious and superior because of its presumed civilising and rationalising function.¹¹⁶ This function provides law with a positive force that is boosted by the condemnation that unlawful actions attract. On these terms, it is easy to see how the use of legalism could elevate the Prosecutor's situated ethos.

This claim can be further evidenced by way of illustrating her use of professional legalism. Primarily professional legalism valorises the principle that

¹¹⁰ See Aristotle, *supra* note 47, at 74 para. 1356a. The Greek origin of the word 'ethos' means 'nature or disposition' See Soanes and Stevenson, *supra* note 23, at 601.

¹¹¹ See Aristotle, *supra* note 47, at 74 para. 1356a.

¹¹² Michael Burke, 'Rhetoric and Poetics: The Classical Heritage of Stylistics' in Michael Burke (ed.), *The Routledge Handbook of Stylistics* (2014) 24-30.

¹¹³ See Aristotle, *supra* note 47, at 141 para. 1378a and Max Weber, 'Politics as a Vocation' in Hans. H Gerth and Charles W. Mills (eds.), *From Max Weber: Essays in Sociology* (Routledge 1995) 79.

¹¹⁴ *Ibid.*

¹¹⁵ Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' *JLS* (2008) 411, 414-416

¹¹⁶ *Ibid.* 416-417; See also Judith Shklar, 'In Defense of Legalism' (1966) 19 *Journal of Legal Education* 51, 58.

lawyers mechanically apply their expert idiom to whatever (political) reality is presented to them.¹¹⁷ It conveys ‘safety’ and is associated with lawyers being guardians of procedural correctness e.g. it honours the rules of *sub-judice*.¹¹⁸ More generally, it captures legalism’s historical symbolism to use law (rather than violence) in response to criminality and, evokes Robert Jackson’s celebrated Nuremberg address; to ‘submit captive enemies to the judgement of the law.’¹¹⁹ Finally, and unquestionably, professional legalism captures international criminal law’s ‘progress narrative’¹²⁰ that culminated in the creation of the ICC; a legalistic model of justice that transcends politics.¹²¹ This narrative idealises the delivery of an ‘impartial, majestic justice’¹²² that is based on the Court’s operational distance from the political contestations of domestic societies.¹²³

However, much of this appeal depends on precisely how the Prosecutor’s situated ethos is understood. Legalism is appealing if one understands her ethos in traditional terms: apolitical, conservative, client-based and based on procedural probity.¹²⁴ However, conversely, the Prosecutor’s situated ethos can also be understood in deeply political terms, one more akin to a ‘cause-lawyer’: a lawyer with an activist mission to trigger social change in societies.¹²⁵ As a cause-lawyer, the Prosecutor contributes to the Court’s goals including the prevention of crimes, and the promotion of peace, stability and reconciliation in affected communities. Her conduct encompasses the promotion of domestic prosecutions, engaging with civil

¹¹⁷ Florian Hoffmann, ‘Facing the Abyss: International Law Before the Political’ in Marco Goldoni and Chris McCorkindale (eds.), *Hannah Arendt and the Law* (Bloomsbury 2012) 180.

¹¹⁸ The Office’s respect for this rule is imperative after previous challenges from defence counsel and cautions from the Chambers about the Prosecutor’s public comments. These challenges, amongst other things, have alleged the Prosecutor’s public statements, including press releases, have displayed bias that is prejudicial to the fair trial of the accused. See, for example, *The Prosecutor v Callixte Mbarushimana* (Defence Request for an Order to Preserve the Impartiality of Proceedings) ICC-01/04/01/10-14 Pre-Trial Chamber I (9 November 2010) para 17; *The Prosecutor v Thomas Lubanga Dyilo*, (Decision on the press interview with Ms Le Fraper du Hellen) ICC-01/04-01/06-2433 Trial Chamber I (12 May 2010) p.19-20.

¹¹⁹ Robert Jackson, Opening Statement, Nuremberg Trial Proceedings Volume 2 (21 November 1945) <<http://avalon.law.yale.edu/imt/11-21-45.asp>> accessed 31 July 2018.

¹²⁰ Progress narratives depict a linear line of incremental development, moving from an abstract, politicised collection of principles to a formal, organised and legitimated framework based on law. See Andre Vartan Armenian, ‘Selectivity in International Criminal Law’ (2016) 16 *Int.C.L.R.* 1, 2; Matthew Windsor, ‘Narrative Kill or Capture: Unreliable Narration in International Law’ (2015) 28 *LJIL* 743, 748-9.

¹²¹ See Czarnetsky and Rychlak, *supra* note 35, at 62.

¹²² See Simpson, *supra* note 89, at 30.

¹²³ Phil Clark, ‘Distant Justice: The Politics of the International Criminal Court in Africa’ (27 October 2014) <<https://podcasts.ox.ac.uk/distant-justice-politics-international-criminal-court-africa>> accessed 31 July 2018.

¹²⁴ See generally Kieran McEvoy and Rachel Rebouche, ‘Mobilising the Professions? Lawyers, Politics and the Collective Legal Conscience’ in John Morrison, Kieran McEvoy and Gordan Anthony (eds.), *Judges, Transition and Human Rights* (OUP 2007) 284.

¹²⁵ The literature on cause-lawyering is considerable, however for a concise overview see Kieran McEvoy, ‘What Did the Lawyers Do During the War?’ Neutrality, Conflict and the Culture of Quietism’ (2011) 74(3) *MLR* 350, 354.

society groups and advocating publically on behalf of victims. These are all deeply political activities. Crucially, her use of political legalism in championing law in the achievement of justice and conflict resolution, appeals more to a cause-lawyer ethos; an identity deeply woven with political and social activism.¹²⁶

Here lies the problem; the co-existence of her traditional and cause-lawyer identities can produce an unclear message about her relationship to politics. Her traditional ethos is based on a premise of political detachment, but her cause-lawyer ethos is based on a premise of political attachment. There is no comfortable equilibrium; her expressions of political legalism dilute the appeal of professional legalism, and her use of the latter betrays the fact that, outside the courtroom, she does not act or talk like a traditional lawyer but is closer to that of a campaigner. In other words, both types of situated ethos generate a friction with one another and produce a cognitive dissonance at the centre of the Prosecutor's identity. From the perspective of affected communities that are the recipients of the Prosecutor's rhetoric, her expressions of legalism are likely to confuse because they make opposing claims about her political positioning. Thus, one can conclude that legalism's persuasiveness about the Court's political independence, makes a much weaker appeal to ethos than is first assumed.

Next, we turn to pathos. The purpose of pathos in rhetoric is to elicit emotional support among the audience at which the rhetoric is targeted.¹²⁷ Pathos is about the stirring of an emotional disposition and consequently rhetoric must recognise that the judgements of an audience will differ when they are aggrieved or pleased, sympathetic or in a state of revulsion.¹²⁸ For Aristotle, the rhetorician must understand a range of emotions (e.g. anger, pity, fear, favour and envy) to help inform the use of rhetoric so that it can, ideally, heighten its degree of persuasion.¹²⁹ Put another way, pathos is simply about the pursuit of a 'best fit'; rhetoric is more likely to persuade when it complies with an audience's wants, needs, desires and prior commitments.¹³⁰

¹²⁶ For example, see the many references to victims in Statement of ICC Prosecutor, Fatou Bensouda, before the UNSC on the Situation in Darfur, pursuant to UNSCR 1593 (2005) (13 December 2016).

¹²⁷ Pathos is quality that tends to evoke a particular emotional disposition and is most often associated with sadness or sympathy. See Soanes and Stevenson, *supra* note 23, at 1302.

¹²⁸ Aristotle, *supra* note 47, at 74 para. 1356a.

¹²⁹ Aristotle, *supra* note 47, at 139-171 para. 1378b-1388b.

¹³⁰ Jonathan Charteris-Black, *Politicians and Rhetoric: The Persuasive Power of Metaphor* (2nd edn, Palgrave MacMillan 2011) 17-19.

To address whether legalism can elicit emotional support among affected communities, one must acknowledge the indeterminacy of ‘emotional support’. Emotion is a complex, psychological and highly subjective phenomenon. Hence, rhetoric’s appeal to emotion can only be based on a *general* presupposing of an audience’s perceptions; what they will perceive positively and be willing to emotionally accept. Of course, no single audience is a *tabula rasa* but is, in fact, comprised of individuals that carry socially conditioned beliefs and convictions.¹³¹ Similarly, the degree and nature of ‘support’ is open to interpretation. Rhetoric can attract a range of support, but it need not be of a degree that conclusively leads to persuasion but should, as a minimum, establish a foundation for persuasion. This foundation may rest on ‘diffuse support’; a reasonable and stable acceptance of an institution but that does not always extend to satisfaction with its every decision.¹³² However, in this sense, legalism’s appeal to pathos within affected communities is likely to be limited.

First, legalism’s primary appeal is to notions of legality but lacks, therefore a commensurate appeal to perceived legitimacy wherein emotion is located. Legality is the belief in the validity of a statute, rationally created rules and the discharge of statutory obligations.¹³³ By contrast, perceived legitimacy is a psychological acceptance or belief in an entity’s authority and right to rule.¹³⁴ It is a phenomenon shaped by a range of causes that help to produce an individual’s perceptions. These can be described as audience ‘anchors’¹³⁵ and can be based on their ethnic, political, religious or social affiliations. These anchors, in turn, can produce cognitive biases and emotionally driven reasoning that hardens resistance towards messages countering those anchors.¹³⁶ Rhetoric thus should target those anchors because

¹³¹ See Scobbie, *supra* note 49, at 69-71. See also John Locke, *An Essay Concerning Human Understanding* (Penguin Classics 1997) 105.

¹³² Yonatan Lupu, ‘International Judicial Legitimacy: Lessons from National Courts’ (2013) 14 *Theoretical Inquiries in Law* 437, 440-1; Vanessa A. Baird, ‘Building Institutional Legitimacy: The Role of Procedural Justice’ (2001) 54 *Political Research Quarterly* 333, 339.

¹³³ See Weber, *supra* note 113, at 79.

¹³⁴ There is considerable literature on perceived legitimacy. Most definitions associate the concept with sociological (or Weberian) legitimacy. See Sergey Vasilev, ‘Between International Criminal Justice and Injustice: Theorising Legitimacy’ in Nobuo Hayashi and Cecilia M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (CUP 2017); Hitomi Takemura, ‘Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court’ (2012) 4(2) *Amsterdam Law Forum* 4.

¹³⁵ See Garth S. Jowett and Vanessa O’Donnell, *Propaganda and Persuasion* (Sage 2014) 39.

¹³⁶ See Milanović, *supra* note 19; See Clark, *supra* note 18, at 58-83.

emotional persuasion requires altering sets of internal assumptions that make up a listener's frame of reference.¹³⁷ Jowett and O'Donnell elaborate on this point:

People are reluctant to change; thus in order to convince them to do so, the persuader has to relate change to something in which the persuadee already believes...[and that can] be used to tie down new attitudes or behaviours. An anchor is a starting point for a change because it represents something that is already widely accepted by the potential persuadees.¹³⁸

In this sense, legalism does too little to address those anchors. Instead, its privileging of legality is, at best, only a component of perceived legitimacy but does not exhaust it. In so doing, legalism circumvents the complex blend of affiliations and beliefs that make up individual perceptions within affected communities.¹³⁹

Second, and relatedly, legalism's limited appeal to emotion can be attributed to its very uniformity. Legalism's attraction is that it is a general 'one size fits all' rhetoric that speaks to multiple audiences at the same time. However, the OTP's prevalent usage imagines a single, and rather abstract audience; something that finds expression in the concept of a universal audience' — namely a systematized construction in the mind of the speaker of an ideal audience capable of assenting to its claims.¹⁴⁰ This being the case, the universal audience is not a concrete or material entity (with typically diverse sectional interests) but is constructed by the rhetoric (and the speaker) itself.¹⁴¹ Leaving the conceptual concerns aside, one could defend the uniformity of legalism if it had *general* emotional utility. However, it is not clear that it does have such utility. The appropriate starting point for such a determination is to identify the emotion legalism seeks to inspire. In the most part, legalism makes the same general assumption that its audience lacks confidence in the Court's detachment from politics. The question thus becomes whether legalism does inspire such confidence among affected communities.

Aristotle explained confidence as requiring 'the remoteness of fearsome things and the proximity of salutary ones.'¹⁴² In other words, the near presence of

¹³⁷ Cory S. Clements, 'Perception and Persuasion in Legal Argumentation: Using Informal Infallacies and Cognitive Biases to Win the War of Words' (2013) 3 *Brigham Young University Law Review* 319, 330-1.

¹³⁸ Jowett and Donnell, *supra* note 135, at 22-3.

¹³⁹ See Vasilev, *supra* note 134, at 77-81.

¹⁴⁰ Perelman and Olbrechts-Tyteca, *supra* note 39, at 19.

¹⁴¹ Scobbie, *supra* note 49, at 69-71.

¹⁴² Aristotle, *supra* note 47, at 156 para. 1383a.

something can inspire a belief in its certainty or favourability, combined with the distancing of whatever causes distrust or a lack of belief.¹⁴³ However, on these terms, it is not at all convincing that legalism does inspire confidence. Legalism's combined stress on law and the terms of the Rome Statute can become self-defeating. It is a perception of the Court's politics including its bias that is legalism's target for persuasion. However, paradoxically, the use of legalism and its stress on law and the Rome Statute is, if anything, likely to remind affected communities of the Court's spatial and moral distance. In so doing, legalism maintains the Court's distance, rather than helping to collapse it and thus, perpetuates the existing space for distrust about its politics.

There is further reason to doubt legalism's ability to inspire confidence. Lying within legalism is an emotional deficit, one it produces by encouraging a disconnection between the law and the political. However, in the space between law and politics lies the value that is of most emotional concern to affected communities: justice. For legalists, the pursuit of justice is articulated and understood as the intensification of legalism.¹⁴⁴ By contrast, and at a minimum, affected communities are likely to perceive legalism as insufficiently expressive of justice because justice is pluralistic, and politically and socially constructed. In conflict-affected societies, many non-legal mechanisms and strategies (e.g. truth and reconciliation commissions,) can contribute to justice processes. To argue, as legalism does, that law has a monopoly on justice often leads to international criminal tribunals overselling their ability to achieve truth and reconciliation and other goals associated with post-conflict nation building.¹⁴⁵ Legalism thus tends to engender perennial disappointment; its preference for a simple answer cuts through the moral ambiguities of justice.¹⁴⁶ For the potential victims of crimes, the position is aptly surmised by Kamari Maxine Clarke: 'We ask for justice, you give us law.'¹⁴⁷ Hence, the resulting impact of legalism on affected communities is likely to do little to build confidence; it over-promises and subsequently under-delivers.

¹⁴³ This is consistent with the dictionary definition of confidence: See Soanes and Stevenson, *supra* note 23, at 365.

¹⁴⁴ See Shklar, *supra* note 69, at 117-19.

¹⁴⁵ See McEvoy, *supra* note 115, at 426.

¹⁴⁶ Fernanda Pirie and Judith Scheele, *Legalism: Community and Justice* (OUP 2014) 1-4.

¹⁴⁷ Kamari M Clarke, 'We ask for justice, you give us law': 'The rule of law, economic markets and the reconfiguration of victimhood' in Christian. De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015) 272.

One can predict that legalism is unlikely to produce sufficient pathos to persuade affected communities of the Court's political independence. This is not to say that legalism has no emotional appeal; one could argue that legalism inspires emotional certainty. This might be appealing to some within affected communities that have endured the sheer lawlessness that can give rise to the commission of atrocities. But even then, legalism is ill-equipped to appeal to pathos because it closes the space for emotional acknowledgement in its urgency to point to law as a remedy. Put another way, it is inextricably bound with the telos of rhetoric: victory rather than cure.¹⁴⁸ In contrast legalism is far better-equipped at reinforcing the pre-existing pathos of idealistic international criminal lawyers that refuse to acknowledge the Court's complex political dimensions.¹⁴⁹ In this regard, legalism epitomises the OTP's own organisational 'personality' and is symptomatic of its own ideological 'echo-chamber' — understood in popular discourse as those environments where the views of a narrow set of persons are amplified and reinforced by tending to exclude those with opposing views. One can conclude that legalism is highly persuasive for communities of international lawyers disposed to agreement, but will generally lack persuasiveness within affected communities that do not share such a disposition.

Finally, we turn to logos. Aristotle's principle of logos pertains to the central principles of logic, reason and proof.¹⁵⁰ He drew a distinction between logic and rhetoric: logic is rooted in arguments based on certainty, reason and truth; rhetoric is rooted in persuasive techniques about subjects based on possibilities and probabilities.¹⁵¹ However, for logic to be persuasive, he stressed the role of rhetorical syllogisms, (or more specifically an *enthymeme*) and the demonstration of reasoning to show that something *is* the case.¹⁵² Building on his previous work on dialectics, Aristotle argued that syllogisms are based on a process of deduction.¹⁵³ Deductive arguments thus tend to adopt a 'major or minor premise-conclusion' structure. A

¹⁴⁸ Peter Goodrich, 'Jani anglorum, Signs, Symptoms, Slips and Interpretation in Law' in Costas Douzinas, Peter Goodrich and Yifat Hachamovitch (eds.), *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (Routledge 2004) 127.

¹⁴⁹ Samuel Moyn, 'Judith Shklar versus the International Criminal Court' (2013) 4(3) *Humanity* 473, 494.

¹⁵⁰ The Greek origin of the term logos is 'word, reason'. Logos is also the origin of the word logic. See Soanes and Stevenson, *supra* note 23, at 1040.

¹⁵¹ See Aristotle, *supra* note 47, at 76-78 para. 1357a-1358a.

¹⁵² *Ibid.* 75-77 para. 1356b-1357b.

¹⁵³ Deductive reasoning is based on drawing logical inferences from a general rule that can then form the basis for specific conclusions.

common example of this is ‘All men are mortal. Socrates is a man. Therefore, Socrates is mortal.’¹⁵⁴

However, as Aristotle discussed, rhetoric often omits certain premises that would otherwise be significant in dialectical practice.¹⁵⁵ One could not expect the audience of rhetoric to follow through several deductive steps, so a general premise can be located within a sign argument. A sign is an inductive presentation of something existing that the audience, *a priori*, needs to accept, so that a syllogism can be derived, and a valid deduction established. To provide Aristotle’s example, ‘He is ill, since he has a fever.’ This is an example of a syllogism that cannot be refuted if the sign of having a fever is true, as, *ergo*, he must therefore be ill (as it is not possible to be otherwise).¹⁵⁶

Turning to the Prosecutor’s use of legalism, one may analyse its rhetorical structure in the following way. First, the implicit sign argument is that the law is neutral in all matters. Flowing from the sign, is an indication of legalism’s major premise, that the law rejects the political. Thus, the intended conclusion from this premise is that the Prosecutor’s decision-making cannot contain political factors and hence any given decision is not political. At first glance, this syllogistic structure may be deductively persuasive, but the essential question is the extent to which the both the sign argument and the major premise withstand scrutiny. If both the sign and the major premise are demonstrably questionable, then the persuasiveness of legalism is commensurately reduced.

In relation to the sign argument, to accept that the law is neutral ignores the extent to which law is a technique for ‘ends prescribed by politics’, or simply, that law is politics transformed.¹⁵⁷ It is no news that there is a politics of international (criminal) law,¹⁵⁸ but what is critical is how the law’s logic is perceived. Here, the perception the sign argument is attempting to maintain is unlikely to be sustainable. Inevitably, individuals within affected communities, or simply the ‘man in the street’ tend to personify the law by questioning its very origin in the political order.¹⁵⁹ In short, ‘the law is not an abstraction. It cannot be understood independently of the

¹⁵⁴ This example is common in discussions on Aristotle and deduction, see for example Michel Meyer, ‘Aristotle’s Rhetoric’ (2012) 31(2) *Topoi* 249, 251.

¹⁵⁵ See Aristotle, *supra* note 47, at 77-78 para. 1357b.

¹⁵⁶ *Ibid.*

¹⁵⁷ Simpson, *supra* note 89, at 23.

¹⁵⁸ Martti. Koskenniemi, ‘The Politics of International Law’ (1990) 1(1) *EJIL* 4, 8.

¹⁵⁹ Edward H. Carr, *The Twenty Years’ Crisis 1919-1939: An Introduction to the Study of International Relations* (Macmillan & Co 1946) 178-179.

political foundation on which it rests and of the political interests which it serves.’¹⁶⁰ Thus, a given perception of law is shaped not only by one’s background and personal perspective, but crucially, the political system in which law exists.

Of course, the evaluation of the major premise does not escape a similar set of criticisms. The law is not perceived in a vacuum and thus legalism (and its inherent minimalism) is likely to be perceived as simply endorsing the structural biases of the Court. If one is critical of these biases and views them as part of the problem, then the only concern is whether institutions are *good* and the decisions they make are the *right* ones.¹⁶¹ Here legalism is also weak because it is inherently unable to provide an answer to the most relevant normative question. The question legalism prefers to answer is simply whether the law admits the political, but, the more normative question being asked — that legalism fails to answer — is what sort of politics is legalism maintaining?¹⁶²

Further evidence of legalism’s logical weaknesses can be located in the Prosecutor’s use of professional legalism and its insistence that rule application and rule following does not accommodate political factors. The insistence, however, unravels if one looks closely at the rules themselves. Of course, one might argue that all rules provide general categories into which particular (political) situations need to fit.¹⁶³ This being true, it is undoubtedly the case that the Court’s jurisdiction is based on a set of rules that are intrinsically permeable to political considerations.

Principally, the OTP’s selections all require a degree of political assessment. These begin with whether to accept a referral to the Court by either a government (including a self-referral), or by the UNSC in accordance with Chapter VII of the UN Charter, or whether to initiate an investigation *proprio motu* (on his/her impulse).¹⁶⁴ At this stage the Office may make a political judgment in selecting a situation and often resorts to making a determination about whether the situation is of ‘sufficient gravity.’¹⁶⁵ Furthermore, under Article 53(1) (a)-(c) of the Rome

¹⁶⁰ Ibid.

¹⁶¹ Martti Koskeniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70 (1) *MLR* 1, 18-19.

¹⁶² Shklar, *supra* note 69, at 144.

¹⁶³ Pirie and Scheele, *supra* note 146, at 140-141.

¹⁶⁴ Art. 14; Art. 13(b); Art. 15 ICCSt.

¹⁶⁵ In reality the OTP resorts to making judgments about the relative gravity of a situation to justify either proceeding or declining to proceed. This use exposes the concept as vague and subjective and can readily mask political considerations. See William A. Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals* (OUP 2012) 86 and generally, Margaret M. DeGuzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2008) 32 *Fordham Int’ L.J* 1400.

Statute, the Prosecutor must consider admissibility i.e. the tests of ‘complementarity’ and ‘gravity’¹⁶⁶ and determine whether to decline to proceed with an investigation or prosecution ‘in the interests of justice’.¹⁶⁷ By nature these are judgements that cannot be based on applying legalistic criteria, but are shaped by political sensitivities.¹⁶⁸ These sensitivities are also incorporated in the final choice of defendant, who, in principle, ought to reflect ‘the greatest responsibility’ for the most serious crimes.¹⁶⁹ And yet, selecting the ‘best’ individual to prosecute requires a blend of objective and subjective determinations that reconciles available evidence, enforcement capability, and other prosaic questions such as how limited resources should be directed.¹⁷⁰ Moreover, international criminal prosecution policies (and therefore decisions), inherently, account for the social context of conflict settings.¹⁷¹ Thus, the logical weakness of legalism’s major premise is its betrayal of the Prosecutor’s decision-making realities; it masks the ‘politics in law’ by presenting law as an autonomous and independent framework but politics gives the Prosecutor her ‘rough content’ and driving force.¹⁷² To put it rather bluntly, legalism presents a vision of law ‘as legalism wants it to be, not as it actually is.’¹⁷³

It might be said these logical weaknesses only apply in reference to professional legalism and the same cannot be said with respect to political legalism. However, the Prosecutor’s use of political legalism tends to produce its own fallacy. Its use is based on improving the state of politics by advancing the law as a remedy for justice and conflict resolution, and, by mandating compliance and co-operation from other political actors. However, political legalism’s premise is to simultaneously dismiss and marginalise politics and so cannot, effectively, improve the environment in which politics is actively operating.¹⁷⁴ In fact, this kind of

¹⁶⁶ See Art. 17(2) (a-c) ICCSt.

¹⁶⁷ See Art. 53(1) (c) and Art 53(2) (c) ICCSt.

¹⁶⁸ See OTP, *Interests of Justice Policy Paper* (1 September 2007) p.4. The consideration of political and social context is now explicitly incorporated e.g. the Prosecutor is expected to assess whether a selected case impacts the occurrence of on-going or future crimes. See OTP, *Policy Paper on Case Selection and Prioritisation*. (15 September 2016) p.16.

¹⁶⁹ *Situation in the Republic of Cote d’Ivoire* (OTP Request for authorisation of an investigation pursuant to article 15) ICC-02/11-3 (23 June 2011) para. 45-46 and generally Richard J. Goldstone, *For Humanity: Reflections of a war crimes investigator* (YUP 2000) 105-6.

¹⁷⁰ See OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) p.6 para. 12.

¹⁷¹ UNSC Report of the Secretary General *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* S/2004 616* (23 August 2004) p.15.

¹⁷² Miro Cerar, ‘The Relationship between Law and Politics’ (2009) 15(1) *Annual. Survey International & Comparative Law* 19, 20-21.

¹⁷³ See Shklar, *supra* note 69, at 35.

¹⁷⁴ Martti Koskenniemi, ‘What is International Law For?’ in Malcolm Evans (ed.), *International Law* (OUP 2014) 48.

legalism maintains a pretence of political agnosticism so it can champion law as the ‘better’ politics, but this bias towards formalism simply reflects the law’s value (and misery) of being the surface upon which political preferences are contested.¹⁷⁵ In this sense, the Prosecutor’s use of political legalism is completely circular; it reproduces the tensions between law and the political, rather than helping to address those tensions. There are thus significant reasons to doubt that legalism provides a logical or rational explanation of the Court’s political independence.

That does not mean to say, that which is demonstrably rational, is always persuasive. Rationalism does not have a monopoly on what someone believes to be true. As Boyd White argues, on the matters that really divide a community, agreement cannot be compelled by the force of logic or by the demonstration of facts.’¹⁷⁶ Truth is contested and incommensurable; an individual may not believe a rational truth in favour of other ‘truths’ that subjectively conforms to their existing perceptions. Indeed, on some deep level, the very notion of ‘truth’ or an ‘objective reality’ is bound up in individual perceptions themselves. In this regard, Parlevliet argues:

People have a certain impression of how reality is, which is their perception of reality; they call it objective reality themselves, but essentially it is always subjective reality. Thus, for most people there is no wedge between reality and perception: perception is reality.¹⁷⁷

Most frequently, perceptions in divided societies are driven by non-rational factors such as one’s own emotional disposition. Indeed, and as discussed in chapter three, in these societies the existence of denial, myths and revisionism can often be rife, and people may be more willing to believe their internal and often emotionally-driven narratives that have acquired a ‘logic of their own.’¹⁷⁸ It is those narratives that constitutes their truth — their reality. On that basis, and as explained earlier, legalism lacks an emotional resonance that has come to, increasingly in today’s

¹⁷⁵ Ibid.

¹⁷⁶ James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community* (UCP 1984) 22.

¹⁷⁷ Michelle Parlevliet ‘Considering the Truth, Dealing with a Legacy of Gross Human Rights Violations’ (1998) 16 *NQHR* 141, 146.

¹⁷⁸ Serge Brammertz, ‘Address of Mr. Serge Brammertz, Prosecutor, Mechanism for International Criminal Tribunals and International Criminal Tribunal for the Former Yugoslavia to the United Nations Security Council’ (7 March 2017) <<http://www.unmict.org/sites/default/files/statements-and-speeches/170607-prosecutor-unsc-en.pdf>> accessed 31 July 2018.

society, drive persuasion.¹⁷⁹ Furthermore, and to reiterate, legalism lacks sufficient logical support and, at best, enjoys only an ‘appearance of veracity’ that is likely to further limit its persuasiveness among affected communities.

¹⁷⁹ For a recent discussion on ‘post-truth’ see Matthew D’Ancona, *Post Truth: The New War on Truth and How to Fight Back* (Ebury Press 2017) 23-34.

Conclusion & Recommendations

In today's political climate the motives behind rhetoric are increasingly the object of distrust, particularly, its ability to confuse claims about objective truth. One could argue this is merely the continuation of a historical trend; from Plato through to figures of the enlightenment, many have subscribed to the view that rhetoric is a 'machinery of persuasion [that]... can never fail to rid one completely of the lurking suspicion that one is being artfully hoodwinked.'¹⁸⁰ At the centre of philosophical distrust is the belief that rhetoric is inherently antagonistic to rationalism. This chapter has not argued that rhetoric ought to defeat rationalism but rather proceeded, as Aristotle argued, on the premise that rationalism depends on rhetoric if facts and logic is to be persuasive.

In this light, this chapter outlined that, in the context of affected communities potentially lacking trust in the Court's independence, the Office of the Prosecutor has adopted a rhetoric relying on legalism. A rhetorical analysis of legalism reveals it makes a weak appeal to ethos, has a limited appeal to pathos, and, perhaps most troublingly, does not possess sufficient logos to demonstrate its premise is true. Legalism, as the art of rhetoric, has limited persuasiveness and leads to the conclusion that it is a weak tactic of legitimation. Legalism, as a statement of fact, lacks verifiability and leads to the conclusion that its promises are hollow. In combination, one might contend that instances of legalism are disingenuous and utterances of a platitude that can have a delegitimising effect; the exact opposite of what is intended. Just as soberly it helps make the case that legalism, as the progress narrative of international criminal law, is becoming well-worn.

The chapter's findings may stimulate renewed research in the direction of communication strategies and the content and effects of rhetoric on specific audiences. It follows that the findings may have general implications for other international legal actors; specifically, rhetoric in public communications, their attempts at legitimation, and their desire to improve perceived legitimacy within essential audiences. The political independence of international legal actors is all too frequently attacked and their response to such attacks requires rhetoric that

¹⁸⁰ Immanuel Kant, *The Critique of Judgement* in James C. Meredith (translation) (OUP World Classics 2008) 327.

accommodates persuasion *and* rationalism — qualities that are not mutually exclusive but should be made to depend on one another. Otherwise, and using the OTP as an example, if rhetoric was to prioritise persuasion then it would dangerously invite the use of subterfuge and could fundamentally undermine the Court's legitimacy. Alternatively, if rhetoric were to prioritise rationalism then it would admit the Court's real political dependencies — but — that would undermine the effectiveness of any persuasion strategy and be no less detrimental to the Court's legitimacy. Admittedly, those intent on seeing bias will locate every resource to justify doing so, and peers, the media and political elites may be more effective at influencing public opinion. Nonetheless, however futile the endeavour, it does not follow that institutional persuasion strategies should be abandoned. The consequences of doing so are likely to be more damaging than a strategy that has only a slight or modest impact. Put simply, silence is unaffordable. In this light, the following recommendations may help the OTP improve its rhetoric towards those communities that are essential to the Court's perceived legitimacy.

First, the recognition of legalism's limited persuasiveness does not mean that the OTP should abandon it within its public communications. To recognise legalism's limits of persuasion is not to argue for its premature removal as changes in organisational rhetoric should occur incrementally. Rhetoric may need to be sustained in the medium term in spite of limited persuasion e.g. for continuity and consistency in messaging. In any case, in spite of its flaws, displacing legalism is no easy task, for it is deeply entrenched within the minds of international criminal lawyers; it is not only a way of saying, but a habitual way of acting and thinking.¹⁸¹ That being the case, the OTP, in the interim, might carefully reflect on its language surrounding legalism, and the way in which it, generally, can compensate for legalism's shortfall in ethos, pathos and logos. This could include a renewed thoughtfulness as to diction and style, and alternative ways to explain the Court's jurisdiction. This might be manifested in the art of story-telling that can use narratives and other literary devices that enable more evocative forms of communication.¹⁸² The OTP's desire to maintain legalism and be 'on message' does not exclude a more imaginative exercise of rhetoric elsewhere.

¹⁸¹ See Pirie and Scheele, *supra* note 146, at 131.

¹⁸² Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (YUP 1996) 42-3.

Second, the OTP should commit to a deeper understanding of emotional anchors within affected communities (including those that originate in ethnicity, nationality, political preference etc.). This understanding can be gained by engaging with the much-needed, ‘rigorous, context-specific psychological research that [can] provide evidence-based guidelines on optimal strategies for pursuing attitude change in ... post-conflict situations.’¹⁸³ Her rhetoric could then focus on the audience perceptions that she intends to speak to, and be more context sensitive and culturally-specific.¹⁸⁴ This specificity should recognise that affected communities may need an emotionally targeted form of persuasion; one that can empathise, humanise, and thus incrementally tackle the hard-wired cognitive pre-dispositions that are so hard to remove. This is not an argument for her to pander to emotions but to genuinely understand them, and so, develop a more meaningful two-way dialogue. This might require efforts to fully understand the emotive sensibilities of a given community and the development of narratives that speak to ‘head and heart alike’.¹⁸⁵ This is no doubt challenging but, if the OTP’s rhetoric wants to compete in what it sees is a ‘marketplace of falsehoods’ about the Court, then, it must recognise the emotional imperatives of those to whom the rhetoric is addressed.

Finally, the OTP’s use of persuasive rhetoric is not an end in itself. Persuasive rhetoric will not mean that which is criticised will be improved, or indeed, forgotten. Rhetoric is accompanied by what a listener sees and if reality significantly diverges, then rhetoric will become cyclic and forever doomed to disappoint; generating false expectations and re-entrenching cynicism. For some critics, the Court may never be able to demonstrate its political independence and even, its ultimate worth. Be that as it may, current evidence suggests there is a compelling case for the OTP to manage expectations with rhetoric that is humble in its promises. And so, the Prosecutor would be wise to avoid striking triumphalist tones that merely detaches the Court from the communities that are its *raison d’être*.

* * *

The preceding analysis exposed another limit to the OTP’s effectiveness in contributing to reconciliation. The OTP’s rhetoric — legalism — lacks the

¹⁸³ Marko Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’ (2016) 47 *Geo. J. Int’l L* 1321, 1369.

¹⁸⁴ White, *supra* note 23, at 701.

¹⁸⁵ D’Ancona, *supra* note 179, at 701.

persuasiveness to convince affected communities that prosecution selections are made fairly. It follows that legalism is unable to elevate the Court's perceived legitimacy; something that is critical if the justice and truth it dispenses are to be seen and accepted, and a small step towards reconciliation is to be made. The knock-on consequence is that the rhetoric is also more indirectly unable to tackle the emotional anchors and psychological dispositions that prevail in divided societies and the resulting internal narratives that entrench the suspicion that affected communities have of each other. This was discussed in chapter three, but, Ford has distilled the challenge confronting international tribunals:

[Courts] may be able to contribute to successful reconciliation by trying to break down inaccurate and self-serving narratives of victimisation [and if they do so] then perceptions of the court's legitimacy should improve...and successful reconciliation will be more likely.¹⁸⁶

The question that follows is, how can the Court seek to break down these narratives? There is no doubt that this task is extraordinarily difficult. It is hoped, nonetheless, that the chapter's main recommendation — to understand the emotional anchors of affected communities — will stimulate reflections on how the OTP can honestly, but persuasively, explain its selections and make a dent in those competing narratives. This could entail, as Human Rights Watch (HRW) recommend, the provision of comprehensive reasons as to why not all parties in a situation are being prosecuted.¹⁸⁷ The OTP cannot, of course do it alone, and it may depend on several factors including the reinforcing role played by other actors or constituencies in a divided society. In the end, altering those narratives must, however, correlate with specific emotional anchors. There are no quick-fixes. However, the starting point must be to genuinely listen to the concerns of those communities that remain heavily attached to those anchors.

In this light, the OTP must develop a deeper dialogue with affected communities. By this, the OTP must 'first seek to understand and then be

¹⁸⁶ See Ford *supra* note 17, at 476.

¹⁸⁷ HRW, 'Comments on the ICC Office of the Prosecutor Draft Policy Paper on Case Selection and Prioritisation' (3 May 2016) <<https://www.hrw.org/news/2016/05/03/human-rights-watch-comments-icc-office-prosecutor-draft-policy-paper-case-selection>> accessed 31 July 2018.

understood.’¹⁸⁸ In terms of the former, the OTP should first, through the Court’s outreach functions, understand the concerns of the broadest cohort of victims in all affected communities across *all sides* of divided societies, rather than, be narrowly focused on the victims of specific cases. This pre-investigative engagement would be about fully understanding the political, ethnic and religious anchors that characterises those communities (rather than binding its future decision-making). The OTP can then use this engagement to be better understood e.g. by explaining that its selection may be motivated by the most pragmatic course of action.¹⁸⁹ There is no guarantee, but over time, affected communities may begin to at least understand the OTP’s position, even if that is not conclusive to being persuaded.¹⁹⁰ The OTP’s engagement in such a dialogue will improve its fight in the battle for ‘hearts and minds’ that enables the Court to have a positive impact on those within affected communities.

The study now proceeds to consider a further method of enhancing the OTP’s effectiveness. The closing chapter turns to assess the OTP’s attempt to measure the effectiveness of its outputs i.e. its prosecutions. In doing so, the chapter adopts a broad perspective that is not narrowly concerned with selection procedure. Instead, the chapter takes a critical look at the OTP’s organisational context that inevitably shapes how the procedure is implemented including its effect on the exercise of discretion. This context, in particular, includes the OTP’s assessment of its own performance and how it is (and should be) measured. At the centre of this assessment is the OTP’s use of performance measurement tools. The following chapter analyses these tools and exposes the limits of its measurement of effectiveness vis-à-vis the Court’s perceived legitimacy.

¹⁸⁸ Stephen Covey, *The Seven Habits of Highly Effective People* (Simon and Schuster 2004) cited in Joanne Lung, ‘Seek First to Understand’ *Huffington Post* (6 December 2017).

¹⁸⁹ See the comments of ICC Deputy Prosecutor, James Stewart in Mark Kersten, ‘In the ICC’s Interest: Between Pragmatism and Idealism’ (16 July 2013) <<https://justiceinconflict.org/2013/07/16/in-the-iccs-interest-between-pragmatism-and-idealism/>> accessed 31 July 2018.

¹⁹⁰ Covey, *supra* note 188, at 150.

Chapter Six

The ICC's Office of the Prosecutor & Performance Indicators¹

*[Managerialism is] an ideology under which ... an institution is separated from its assumed beneficiaries in the belief that [it] is responsible only to the managerial leadership and its performance is assessed by criteria set down by it — criteria only looking for the optimal result.*²

Performance is an ambiguous and contested concept. On one hand, it denotes capability and success, and often exudes ‘an aroma of action, dynamism and purposeful effort’.³ However, in a common and often pejorative sense, performance can mean an overstated demonstration or presentation.⁴ This ambiguity is most common within organisations, where performance is juxtaposed to two further concepts: management and measurement. The relationship is aptly surmised: ‘to manage performance it is also essential to measure performance’.⁵ Hence, ‘everyone is measuring performance’.⁶ The motivation for performance measurement is based on the oft-cited beliefs that ‘what gets measured gets done’⁷ and ‘if you don’t measure results, how can you tell success from failure’.⁸ Once a commitment to measurement has been made, the only remaining question is how to measure performance. A measurement tool first made fashionable during public administration reforms in the 1980s,⁹ performance indicators provide standards that

¹ A version of this chapter has been published, see: Birju Kotecha, ‘The ICC’s Office of the Prosecutor and the Limits of Performance Indicators’ (2017) 15(3) *JICJ* 543.

² Martti Koskeniemi, ‘Hegemonic regimes’ in Margaret Young (ed.), *Regimes Interaction in International Law: Facing Fragmentation* (CUP 2012) 305.

³ Christopher Pollit, ‘Beyond the Managerial Model: The Case for Broadening Performance Assessment in the Government and the Public Services’ (1986) 2 *Financial Accountability and Management* 155, 160.

⁴ Angus Stevenson (ed.), *Oxford Dictionary of English* (3rd edn, OUP 2010) 1320.

⁵ International Criminal Court Office of the Prosecutor (OTP), *Strategic plan June 2012-2015*, 11 October 2013, para. 82.

⁶ Robert D Behn, ‘Why Measure Performance? Different Purposes Requires Different Measures’ (2003) 63 *Public Administration Review* 586, 586.

⁷ David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Addison-Wesley 1992) 146.

⁸ Barbara Townley, David J. Cooper and Leslie Oakes, ‘Performance Measures and the Rationalisation of Organisations’ (2003) 24 *Organisation Studies* 1045, 1060.

⁹ Neil Carter, ‘Performance Indicators: ‘back-seat driving’ or ‘hands off control’ (1989) 17 *Policy and Politics* 131, 132.

can help describe progress towards established goals, and thus are central to measurement practice.¹⁰

From hospital waiting list times, to graduation numbers, to user satisfaction scores, to rates of recorded crime, there is virtually no area of public life where performance indicators do not extend. The significance and prevalence of performance indicators has been transformative. Principally, these indicators are significant because of their perceived utility. They can focus action plans, help budget, motivate workforces and provide feedback to help improve performance.¹¹ Their prevalence reflects the importance attached to holding organisations accountable, and thus indicators are central to what has been described as an ‘audit explosion.’¹² Accordingly, performance indicators speak to many audiences beyond those concerned with day-to-day management. These include funding and supervisory bodies that have responsibility for audit, monitoring and oversight, and to whom an organisation is accountable.¹³

In this context, this chapter assesses the OTP’s performance indicators. To date, literature on the Court has mostly overlooked performance indicators, with there being little to no scrutiny on the Court-wide attempt to develop such indicators.¹⁴ This lack of research is surprising, considering that the adoption of performance indicators is a novel feature of the ICC, with no (real) comparison at other international criminal tribunals.¹⁵ Indeed, the literature has not kept up with the growing momentum behind the Court’s attempts to develop performance indicators. This momentum has been growing since 2014 when the Court was requested to ‘intensify its efforts to develop ... indicators ... to demonstrate better its

¹⁰ Neil Carter, ‘Learning to Measure Performance: The Use of Indicators in Organisations’ (1991) 69 *Public Administration* 85, 90. See also Kevin Davis, Benedict Kingsbury, Sally E. Merry, ‘Introduction: Global Governance by Indicators’, in Kevin E. Davis and others (eds.), *Governance by Indicators: Global Power Through Quantification and Rankings* (OUP 2012) 3-28.

¹¹ Behn, *supra* note 6, at 588.

¹² Michael Power, *The Audit Society: Rituals of Verification* (OUP 1997) 6-10.

¹³ Pollit, *supra* note 3, at 163.

¹⁴ The only research addressing the area is by Philipp Ambach (Chief of the International Criminal Court’s Victims and Reparations section), ‘Performance Indicators for International(ised) Criminal Courts—Potential for Increase of an Institution’s Legacy or ‘Just’ a Means of Budgetary Control?’ (2018) 18 *Int.C.L.R.* 426. The only ‘non-ICC literature’ on performance indicators is constituted by briefings and consultation documents that have in fact been developed in collaboration with the Court. See Open Society Foundations Open Society Justice Initiative, *Establishing Performance Indicators for the International Criminal Court Briefing Paper* (November 2015) <<https://www.opensocietyfoundations.org/sites/default/files/briefing-icc-perforamnce-indicators-20151208.pdf>> accessed 31 July 2018. Federal Department of Foreign Affairs of Switzerland, ‘International Criminal Court Retreat on Performance Indicators’ (24 May 2016) <<https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/voelkerrecht/2016-criminal-court-conveno-srummy EN.pdf>> accessed 31 July 2018.

¹⁵ For an overview of the practice of ‘performance measurement’ adopted at the ICTY and the STL see Ambach, *supra* note 14.

achievements and needs, as well as allowing State Parties to assess the Court's performance in a more strategic manner'.¹⁶ More specifically, there has been no literature on the OTP's development of performance indicators, in particular the set of indicators identified by its current prosecutorial strategy.¹⁷ This latter research gap is particularly surprising, because these measurement tools illuminate how the OTP is run and the message it communicates to external audiences beyond the organisation.

The chapter conducts its assessment of performance indicators with the use of public administration perspectives, positioning itself at a disciplinary intersection that is described as 'international bureaucracy research'.¹⁸ This intersection acknowledges that, historically, international organisations have adopted management approaches that progressively mirrored national public management reforms.¹⁹ In this regard, this disciplinary perspective provides insight into international organisations' strategy making and, in turn, highlights the context of performance indicators.²⁰ Indicators are not an isolated management tool, but exist against a background of 'managerialism': market-oriented principles and practices that are intended to drive progress towards organisational goals.²¹

Performance indicators (often prefixed with the qualifier 'key') sprung originally within strong managerial environments. In these environments, indicators became routinely associated with maximising the virtuous three 'E's of performance: economy, efficiency and effectiveness.²² These three performance concerns incorporate the relationship between organisational inputs, outputs and outcomes. In short, economy is concerned with performance that minimises inputs (most often understood in terms of financial costs and resources). In light of those costs, efficiency targets performance that maximises outputs – i.e. the day-to-day service

¹⁶ ASP, *Strengthening the International Criminal Court and Assembly of States Parties*, ICC-ASP/13/Res.5, 17 December 2014, para. 7(b).

¹⁷ See OTP, *Strategic Plan June 2012-2015* (11 October 2013) paras. 94-98.

¹⁸ Jörn Ege and Michael W. Bauer, 'International bureaucracies from a Public Administration and International Relations perspectives', in Bob Reinalda (ed.), *Routledge Handbook of International Organization* (Routledge 2013) 135, 135.

¹⁹ Eduardo Missoni and Daniele Alesani (eds.), *Management of International Institutions and NGO's: Framework, Practices and Challenges* (Routledge 2013) 3.

²⁰ Ege and Bauer, *supra* note 18, at 135.

²¹ The origins of managerialism (often synonymous with 'New Public Management') can be traced to the ideological and market-based reforms of public/state (i.e. Weberian) bureaucracies in the 1980s and 1990s. See Christopher Pollitt, *Managerialism and the Public Services* (2nd edn, Blackwell Publishing 1996) 1-10; Christopher Hood, 'A Public Management for All Seasons?' (1991) 69 *Public Administration* 3, 4-5.

²² Neil Carter, Rudolf Klein and Patricia Day, *How Organisations Measure Success: The Use of Performance Indicators in Government* (Routledge 1995) 35-36.

activities that an organisation delivers or provides (e.g., schools deliver educational qualifications and hospitals provide treatments and operations — these are their outputs). Finally, effectiveness is concerned with performance that transforms successful outputs into particular outcomes within target audiences.²³ As such, outcomes are concerned with real-world phenomena occurring outside the organisation, and, in turn, are intended to support the original and fundamental goals set by an organisation.

To illustrate, high quality school qualifications can achieve specific outcomes (e.g. to make students literate and numerate, or to develop their critical reasoning skills, etc.) that produce well-informed and skilled citizens. In an alternative setting, successful hospital treatments and operations can achieve specific outcomes (e.g. to make patients free from ill-health symptoms, physically mobile, or to help them self-manage pain etc.) that lead to long-term health and well-being.²⁴ Thus, in the case of the OTP, performance can be translated into managing its running costs (*economy/inputs*), into maximising prosecution activities in light of those costs (*efficiency/outputs*) and, finally, into ensuring that successful prosecutions can achieve outcomes that further the goals of the Rome Statute (*effectiveness/outcomes*).

In this light, this chapter traces the historical development of performance indicators within the OTP's prosecutorial strategies. Then, it adopts the above-mentioned 'three-'E's' as a framework to assess those same indicators. This framework corroborates the chapter's main contention that there is a current gap in the measurement of prosecution effectiveness in terms of outcomes that can boost the Court's perceived legitimacy in affected communities. First, however, the chapter begins by establishing the significance of the OTP's performance indicators.

²³ Ibid.

²⁴ Christopher Pollitt and Sorin Dan, *The Impacts of the New Public Management in Europe: A Meta-Analysis*, European Commission, Coordinating for Cohesion in the Public Sector of the Future, (14 December 2011) p. 11-12. <http://www.cocops.eu/wp-content/uploads/2012/03/WP1_Deliverable1_Meta-analysis_Final.pdf>accessed 31 July 2018.

6.1 Performance Indicators

An indicator is a device or tool that signals the state, or level of something.²⁶ In doing so, indicators provide information about the condition of *that* thing, most often to help gauge (and measure) its existence and quality.²⁷ By logical extension, ‘performance indicators’ are tools that measure the existence and quality of ‘performance’. However, their meaning can only be fully grasped by considering where they are frequently used: organisations. Of those, performance indicators originally surfaced in businesses and commercial organisations. In these environments, and according to prevailing descriptions, performance indicators are a ‘measurable value that demonstrates how effectively a company is achieving key business objectives.’²⁸ However, over time, these measurement tools began to be more prevalent in a range of organisations, including formerly state-run bureaucracies and public administrations. These tools have since been invariably referred to as ‘key performance indicators’ — an expression that now has an independent entry in the dictionary: ‘a quantifiable measure used to evaluate the success of an organization, employee, etc. in meeting objectives for performance.’²⁹ This definition, in turn, places attention on other concepts such as quantification, evaluation and goals. In this context, performance indicators are considered to have various salient features that reflect what they do in practice, and their ultimate benefits. Davis, Kingsbury and Merry describe four essential characteristics of indicators:

- 1) the name of the indicator and the associated assertion of its power to define and represent the phenomenon...;
- 2) [its] ordinal structure enabling comparison and ranking and exerting pressure for ‘improvements’ as measured by the indicator;
- 3) the simplification of complex social phenomena;
- 4) the potential to be used for evaluative purposes.²⁵

²⁵ Kevin E. Davis and others, ‘Introduction: Global Governance by Indicators’, in Kevin. Davis and others (eds.), *Governance by Indicators: Global Power Through Quantification and Rankings* (OUP 2012) 6.

²⁶ See the dictionary definitions of ‘indicate’ and ‘indicator’; See Stevenson, *supra* note 4, at 889-890.

²⁷ *Ibid.*

²⁸ Cited in Ambach, *supra* note 14, at 427.

²⁹ See Stevenson, *supra* note 4, at 962-3.

These characteristics require brief development. First, the organisation's naming of an indicator brings its operation into effect and reflects a commitment to produce knowledge upon which organisational decisions will be made. Second, the structure of the indicators enables a reading to be taken and, thus, some form of ranking or measurement to occur. Third, and arguably of greatest significance, is that an indicator's reading will effectively simplify a given phenomenon (part of the very appeal to create the indicator in the first place), and, in so doing, produce a coherent and often 'black or white' picture of performance. Fourth, the indicators intend to set a standard against which performance can be measured, and thus are crucial in evaluative processes; such a process may be entirely reliant on indicators, or they may be contextualised into a broader assessment of the organisation's functions and policies.³⁰

It follows that indicators can have consequences for organisational goals, work-place culture and the personnel within the organisation. It is not within the present scope to undertake an exhaustive evaluation of these consequences either those that are positive or adverse. Needless to say, their development, their effects and their use(s) have triggered significant debate in the public administration, management and organisational studies literature.³¹ Nonetheless, and to offer only a flavour, critics are keen to point out that performance indicators reconstruct places of work by developing a culture whereby the indicators take on significance in and of themselves (rather than what they purport to measure). Others suggest that because indicators tend to be reductive they can actively mislead because they are unable to accommodate the complexity of a phenomenon. Finally, there is a strong body of critique not on indicators themselves, but on the disproportionate significance given to them, often for the purposes of accountability, auditing and budget management.³² By way of summary, Espeland and Sauder offer a more neutral characterisation of their potential effects;

³⁰ Ibid.

³¹ See, indicatively, Juha Siltala, 'New Public Management: The Evidence-Based Worst Practice?' (2013) 45(4) *Administration and Society* 468; Gwyn Bevan and Christopher Hood, 'What's Measured is What Matters: Target and Gaming in the English Public Health Care System' (2006) 84 *Public Administration* 517.

³² Ibid.

‘Successful indicators’—those that become influential and institutionalised—often produce powerful and unanticipated effects: they can change how people think about what they do, what is comparable, how excellence of mediocrity is defined or even who they are...indicators are restless signifiers whose consequences and significance can be hard to predict or even contain. They reconstruct the places and people that they purport to measure, change how power and expertise are mobilised, and often reproduce themselves as they prompt the creation of new layers or tiers of quantified evaluation.’³³

Leaving these effects temporarily aside, the present concern is to first establish why the OTP’s development and use of such indicators is significant. One can readily identify four such reasons. First, the choice of certain performance indicators (as opposed to others) embodies a normative claim about the appropriate standards for evaluating the conduct of organisations.³⁴ As Davis, Kingsbury and Merry contend, indicators are embedded with a model for an ideal conduct and governance and, thus, the best process for achieving it.³⁵ In this regard, the indicators are standard-setting instruments and can become explicit markers for an organisation’s ethos and ideology.³⁶ The OTP’s indicators, thus, establish a motivating focus on its personnel and the precise selection of indicators expresses a vision of what is desirable, and what the Office interprets as excellent performance towards particular goals.³⁷

Second, performance indicators have an external communicative element that resonates with diverse audiences within political and social environments.³⁸ These indicators inherently communicate and seek to influence the expectations of external audiences such as affected communities. This finds expression in the belief that indicators communicate and construct a particular reality about one’s environment.³⁹ On the one hand, the communicative effects of indicators might not correlate with the intent of its producers i.e. the organisation that has established them.⁴⁰

³³ Wendy Nelson Espeland and Michael Sauder, ‘The Dynamism of Indicators’ in Kevin E. Davis and others (eds.), *Governance by Indicators: Global Power Through Quantification and Rankings* (OUP 2012) 86-7.

³⁴ See Davis and others, *supra* note 29, at 9-10.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ See Espeland and Sauder, *supra* note 33, at 87, 93.

³⁸ See Davis and others, *supra* note 29, at 10.

³⁹ Richard Clements, ‘Proxies for Progress’ *Edward Elgar Blog* <<https://elgar.blog/2017/07/18/proxies-for-progress/>> accessed 31 July 2018.

⁴⁰ *Ibid.*

Nonetheless, in respect of the OTP, the establishment of indicators are still part of its response — as an organisation — to the societies and communities within which its decisions are inevitably perceived and contested. These indicators are one small component of the OTP’s general public communications, helping to establish a better understanding of its operations.⁴¹ Most importantly, these indicators speak to the OTP’s attempt at having an ultimate impact within these environments — i.e. to be effective. Thus, performance indicators reveal how the OTP intends to contribute — and how it indeed contributes — to the Court’s goals.⁴²

Third and relatedly, the use of performance indicators is particularly revealing of organisational culture. Ultimately, as Clements explains, indicators are devised by professionals and shaped by their experiences, cultures, and beliefs.⁴³ However, once they have been devised they establish a benchmark or a target that, (intentionally or unintentionally) shapes the way the same personnel carry out their activities.⁴⁴ Consequently, organisations can become reliant on processes of simplification i.e. ensuring performance data is convenient, comprehensible and comparable. However, and to offer a brief example, organisational culture can lead to routines of ‘editing’: ensuring one removes the ambiguity and complexity of performance. In turn, this phenomenon can lead to ‘uncertainty absorption’: an overriding belief in the data that indicators produce (that appears more robust than it actually is) and that subsequent decisions are obvious one’s (that otherwise might be more disputable).⁴⁵ It can also lead an organisation to lose sight of the goals and audience(s) the organisation’s effectiveness depends upon. In this context, the OTP’s performance indicators offer an insight into the attendant risks for its organisational culture and core procedures e.g. that of selections.

Finally, performance indicators are crucial in demonstrating responsiveness to external bodies that exert accountability. For those bodies, indicators are part of a robust dialogue, with the intention being to develop organisational transparency. In

⁴¹ Cited in Philipp Ambach, ‘Performance Indicators for International (ised) Criminal Courts—Potential for Increase of an Institution’s Legacy or ‘Just’ a Means of Budgetary Control?’ (2018) 18 *Int.C.L.R.* 426, 457.

⁴² For one of many sceptical accounts, see Payam Akhavan, ‘The Rise and Fall and Rise of International Criminal Justice’ (2013) 11 *JICJ* 527-536.

⁴³ Richard Clements, ‘Proxies for Progress’ *Edward Elgar Blog* <<https://elgar.blog/2017/07/18/proxies-for-progress/>> accessed 31 July 2018.

⁴⁴ This finds expression in something described as ‘Goodhart’s Law’, namely the vulnerability of a measure becoming an enticing target. On this see Marilyn Strathern, ‘Improving Ratings’: Audit in the British University System’ (1997) 5 *European Review* 305, 308.

⁴⁵ Wendy N. Espeland and Mitchell L. Stevens, ‘A Sociology of Quantification’ (2008) 49(3) *European Journal of Sociology* 401, 421-2.

practice, such a dialogue is also intended to maximise organisational ‘productivity’ and are particularly concentrated on budgetary assessments relative to measurable performance.⁴⁶ Performance indicators are thus seen as ‘disciplinary tools’ used to maintain organisational focus on the ‘best’ performance, often, by enabling external bodies to enforce disciplinary sanctions against the organisation.⁴⁷ In this regard, the OTP’s performance indicators are particularly useful in interrogating the relationship between the OTP and those bodies that exert some form of accountability, principally the Assembly of States Parties (ASP) and the Chambers. This relationship, in turn, can help to identify the OTP’s constraints and limits in maximising its effectiveness.

⁴⁶ See Ambach, *supra* note 41, at 458-9.

⁴⁷ *Ibid.*

6.2 Prosecutorial Strategy

To begin, it is important to establish the context of the OTP's performance indicators. First, the OTP's performance indicators are part of a Court-wide commitment to a set of market-oriented principles known as 'managerialism.'⁴⁸ Indeed, the ICC's first Strategic Plan explicitly makes one of the Court's goals to be a 'model of public administration.'⁴⁹ The Plan describes this goal as focused on results rather than processes, empowering managers to take decisions to increase activities' speed, quality and efficiency, and to guarantee accountability within a non-bureaucratic administration. The Strategy's reference to a 'non-bureaucratic' administration alludes to preventing bureaucratic cultures that are disproportionately concerned with procedural correctness, rather than with efficiency and productivity.⁵⁰ This language chimes with characteristic managerial methods that are 'hard-headed, business-minded, cost-conscious, and data-driven'.⁵¹ The goal of being a model of public administration also establishes a 'One Court' structure, whereby the OTP works with other Court organs on matters of common concern⁵² but allows for the OTP's 'maximal integration' into the Court, especially within strategic planning.⁵³ Within this context, the OTP's first prosecutorial strategy fully subscribed to the Court's goal to be a model of public administration and made its first commitment to devise performance indicators.⁵⁴

Since that moment, the development of performance indicators has been an incremental and decade-long process, evidence of which is found within four OTP's

⁴⁸ Managerialism has been described by Christopher Pollitt as a set of beliefs, practices and values that sees better management as the effective solution to economic and social ills. See Christopher Pollitt, *Managerialism and the Public Services* (2nd edn, Blackwell Publishing 1996) 1-10; Christopher Hood, 'A Public Management for All Seasons?' (1991) 69 *Public Administration* 3, 4-5. For a recent review of managerialism, see Christopher Pollitt, 'Managerialism Redux?' 32 *Financial Accountability and Management* (2016) 429; Thomas Kilkaer, 'What is Managerialism?' (2015) 41 *Critical Sociology* 1103 and David G. Mathiasen, 'The New Public Management and its Critics' (1999) 2 *International Public Management Journal* 90, 92-93.

⁴⁹ ASP, *Strategic Plan of the International Criminal Court*, ICC-ASP/5/6 (5th Session) (5 August 2006) p. 9-10.

⁵⁰ Ibid. This priority is underlined in the ICC's current Strategic Plan, where the declared mission of the Court includes the fair and effective conduct of investigations and prosecutions, administrative transparency, efficiency and accountability. See *International Criminal Court Strategic Plan (2013-2017)* (24 July 2015) p.2.

⁵¹ Christopher Hood and Ruth Dixon, *A Government that Worked Better and Cost Less? Evaluating Three Decades of Reform and Change in UK Central Government* (OUP 2015) 15.

⁵² ASP, *Strategic Plan of the International Criminal Court*, ICC-ASP/5/6 (5th Session) (5 August 2006) p.3-4.

⁵³ Ibid. See also Art. 42(1) (The Office of the Prosecutor) ICCSt.

⁵⁴ OTP, *Report on Prosecutorial Strategy* (14 September 2006) ss 9-16.

strategic documents.⁵⁵ In the beginning, the OTP's first strategic document made a cursory statement of intent to 'establish a clear set of performance indicators and evaluation processes' while recognizing that — as no trials had yet commenced — it was too early to start evaluating its performance.⁵⁶

Four years on, and in spite of trials having commenced, the second strategy affirmed a commitment to participate in the Court-wide work on performance indicators. The strategy recognised that measuring the Office's performance is a complex task that requires an evaluation of the entire Rome Statute's system. The strategy highlighted that this evaluation should recognize the role and function of complementarity and the fundamental requirement of co-operation for the system to function effectively.⁵⁷ The strategy also provided, rather tentatively, examples of 'diversified performance indicators'.⁵⁸ These included measuring the number of national prosecutions for international crimes, of peace accords that exclude amnesty for ICC crimes, of public declarations of political leaders in support of the Court's decisions, and the reduction in the number of armed groups and armed forces using children.⁵⁹ Nonetheless, these examples were solely included for the purpose of illustration i.e. what might future indicators look like.

One might have thought that by the time of the third strategy a concrete set of relevant performance indicators would have been developed. By contrast, the third strategy cited measurement complexity and a lack of time and resources to explain the continuing absence of clear performance indicators.⁶⁰ According to the strategy, measurement complexity was due, on one side, to the challenge of determining the precise outcome of OTP's activities (offering the prevention of crimes as an example of such an outcome) and – on the other side, to accurately measuring the OTP's impact on outcomes, which may have been determined – alternatively or cumulatively – by other causes. Hence, the strategy retreated from measuring outcomes and declared an intent to (re)evaluate whether a 'refocused and limited' set of indicators would be more suitable.⁶¹ To underline the retreat, the strategy hinted at

⁵⁵ The first was in the form of a report on prosecutorial strategy, and the second merely a prosecutorial strategy. Both the third and current strategy are in the form of strategic plans. For simplicity, the term 'strategy' is adopted in this chapter.

⁵⁶ OTP, *Report on Prosecutorial Strategy* (14 September 2006) paras. 13-16.

⁵⁷ OTP, *Prosecutorial Strategy 2009-2012* (1 February 2010) para. 79.

⁵⁸ *Ibid.* paras. 78-80.

⁵⁹ *Ibid.*

⁶⁰ OTP, *Strategic Plan June 2012-2015* (11 October 2013) paras. 94-96.

⁶¹ *Ibid.* para. 95.

what such indicators could be, referring to ‘securing convictions ... and [to] an increase of the percentage of charges confirmed and [of the] conviction rate.’⁶²

The OTP’s first formal performance indicators surfaced when the current strategy was released in July 2015. The strategy identifies a start-up of fourteen interrelated indicators, reproduced below.⁶³ Again, the strategy grapples with contributory causes and measurement complexity. It explains that the OTP does not have sufficient control over certain outcomes, for instance on crime prevention.⁶⁴ These indicators are reproduced below.

Area of Performance	Indicator
Strategic	
Effectiveness	<ol style="list-style-type: none"> 1. Prosecutorial results in terms [of] perpetrators <ul style="list-style-type: none"> • Arrest warrants’, summonses to appear granted / requested • Persons confirmed / charged • Persons convicted / charged 2. Counts granted/counts charged at stage or arrest warrant, confirmation, trial
Operational	
Operational Excellence <i>Quality</i> <i>Efficiency</i> <i>Productivity</i>	<ol style="list-style-type: none"> 3. Pattern of judicial findings on how the Office conducts its preliminary examinations, investigations and prosecutions 4. Compliance with Key Office Policies and Standards 5. Quality of interaction with the Office 6. Yearly achieved efficiency gains 7. Milestones per activity: planned versus actual.
Management Excellence <i>HR</i> <i>Financial Management</i> <i>Risks</i>	<ol style="list-style-type: none"> 8. Implementation of training program per year: planned versus actual 9. Working climate survey 10. Evolution of fitness of work 11. Evolution of the general gender and nationality balance per year 12. Yearly implementation rate of the budget 13. Implementation rate of measures to control priority risks out

⁶² Ibid.

⁶³ Ibid. ss 104-106.

⁶⁴ OTP, *Strategic Plan 2016-2018* (6 July 2015) s 104.

	of the OTP risk register
Innovation and Learning	14. Impact of improvement projects on effectiveness, operational excellence and management excellence.

As displayed, the fourteen indicators are divided in two categories: strategic and operational. The strategic category includes those indicators intended to measure the Office’s effectiveness in achieving its mandate under the Rome Statute.⁶⁵ Operational indicators measure the implementation of the OTP strategy, which is assumed to impact positively on the strategic indicators.⁶⁶ Hence, the twelve operational indicators are intended to foster the achievement of the two pivotal strategic performance indicators.

As shown in the table, the first strategic indicator — labelled ‘prosecutorial results in terms [of] perpetrators’ — is concerned with: the number of arrest warrants or summonses to appear granted, out of those requested; with the number of defendants whose charges have been confirmed, out of those for whom charges were presented; and with the number of persons who have been ultimately convicted, out of those who were charged. The second indicator refers to the number of counts granted, out of those charged at the stage of the arrest warrant, confirmation or trial.⁶⁷ As the annex of the strategy makes clear, these indicators are intended to meet the strategic goal of conducting impartial, independent, high quality preliminary examinations, investigations and prosecutions.⁶⁸ Thus, both the strategic indicators are primarily concerned with quantitative and qualitative outputs; they intend to motivate prosecutorial ‘wins’ and dis-incentivise the presentation of requests, charges and cases that are unlikely to succeed.

Strikingly, the table of indicators also reveals a different interpretation of the three E’s of performance. For instance, both strategic indicators are juxtaposed with effectiveness, and thus, in contrast to the understanding outlined at the outset of the chapter, the OTP interprets effective performance, solely, in terms of the success of its output activities — evidenced in positive rulings and verdicts. There is no recognition that effectiveness is normally measured against the real-world outcomes produced upon the success of those outputs, or the relationship between those

⁶⁵ Ibid. s 105.

⁶⁶ Ibid. ss 105-106.

⁶⁷ Ibid. s 106.

⁶⁸ Ibid. at Annex 4.

outcomes and the ultimate goals of the Court. Similarly, the sixth operational performance indicator refers to ‘efficiency gains.’ However, the indicator’s detachment from outputs suggests that the OTP understands efficiency more in terms of economy, rather than, *a priori*, maximising successful outputs with the least amount of resources.⁶⁹

Leaving these concerns aside, what is left is a set of performance indicators that are exclusively output-focused and, as such, they invite general concerns about their limitations. Typically, these indicators reduce what is a complex phenomenon into raw data.⁷⁰ This conversion can be attractive because it standardises information — making data easy to read and to compare — but, in doing so, it strips the meaning and context from the particular phenomena the indicators seek to capture.⁷¹ In this sense, output indicators always act like ‘tin-openers’.⁷² They do not provide authoritative conclusions about performance, but rather prompt further qualitative inquiry because the performance ‘reading’ is contestable. In respect of the OTP, this argument can be illustrated by two examples.

To take the first, prosecution results do not account for the diverse causal factors that may contribute to their rates of achievement. The OTP has recognised this, and has supplemented its performance indicators by creating ‘external critical success factors’. These include the presence or lack of co-operation (i.e. the general support received by the Office) as well as security (i.e. the inability to conduct operations due to security concerns and the impact of witness interference).⁷³ In other words, these factors hint at the significance of understanding the context for any given reading.⁷⁴ Presumably then, the reading of prosecution results indicators will need to be reconciled with an accompanying assessment of these critical success factors.

The second illustration concerns the common risk of skewed data contributing to those results. Current OTP strategy provides an example of this risk

⁶⁹ Annex 2 of the current OTP strategy provides a table of efficiency gains. This table summarises a range of cost savings that are not directly concerned with prosecution outputs — from the preference for economy class flights, to the use of residential accommodation (rather than hotels) during field trips and to savings made by improvements to IT systems.

⁷⁰ See Davis and others, *supra* note 29, at 6.

⁷¹ See Davis and others, *supra* note 34, at 8. See also Espeland and Sauder, *supra* note 33, at 91-92 who describe a process of ‘commensuration’ — something that involves turning qualities into quantities that are described by the same metric.

⁷² See Carter and others, *supra* note 22, at 48.

⁷³ OTP, *Strategic Plan 2016-2018* (6 July 2015) s 107.

⁷⁴ ICC, *Third Court’s report on the development of performance indicators for the International Criminal Court* (15 November 2017) para. 17.

with its statistics on the rate of charges confirmed at the confirmation stage.⁷⁵ The OTP admits (conveniently in a footnote) that the positive performance increase from its previous strategy is rather drastically affected by a single case, i.e. the contempt case *Bemba et al.* — where each of the five defendants received approximately double the number of total charges that the Office had requested for all other proceedings in the same period.⁷⁶ Hence, about 90% of all charges presented by the Prosecutor in the period from June 2012 to June 2015 pertain to one single case concerning multiple offences against the administration of justice.

This is not to argue that output indicators are of no value. Indeed, even when further explanation is needed, the OTP's pursuit of positive prosecution outputs is one of its core endeavours. Furthermore, as an international court, the ICC is in a reasonable state of infancy and the Prosecutor's desire to improve prosecution results can be fairly characterised as wanting to put 'legal runs on the board.'⁷⁷ Successful 'runs' demonstrate the Prosecutor's ability to prosecute defendants right through to conviction and, in the process, help improve her procedural conduct at all stages in future cases.

Rather, the more fundamental problem with the OTP's performance indicators is the lack of attention shown to measuring prosecution effectiveness in terms of their specific outcomes i.e. desired effects in affected communities. The root of these effects are perceptions of the Court e.g. justice being seen to be done. These effects can then be reasonably expected to lead to the achievement of the Court's goals. This measurement problem can be expressed as the gap between what *ought* to be measured with what *can* (accurately) be measured. In organisations that pursue complex goals, this gap is often articulated with frustration; a sentiment best captured by the expression 'only what is measurable matters.'⁷⁸ The OTP has fallen into this measurement trap, with its failure to measure prosecution effectiveness explained by a combination of outcome uncertainty and the impossibility of unequivocally attributing certain outcomes to its own prosecutorial performance.

⁷⁵ *Ibid.* at 5, s 1.

⁷⁶ *The Prosecutor v Bemba et al.* (Decision pursuant to Article 61(7) (a) and (b) of the Rome Statute) ICC-01/05-01/13 Pre-Trial Chamber II (11 November 2014) In combination, the five defendants in the case were charged with over 200 offences against the administration of justice under Art.70 ICCSt.

⁷⁷ Phil Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda', in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society 2008) 37, 44.

⁷⁸ See for example Gwyn Bevan and Christopher Hood, 'What's Measured is What Matters: Target and Gaming in the English Public Health Care System' (2006) 84 *Public Administration* 517.

6.3 Economy & Inputs

The aim of ‘economy’ is to drive performance towards the reduction of costs (or inputs) or, simply, towards minimising the consumption of resources.⁷⁹ However, in most organisations economy is rarely an end itself; it is usually combined with a commitment to an acceptable benchmark of output quality.⁸⁰ The pursuit of economy and the equal maintenance of the quality of outputs is often associated with a ‘hard’ form of managerialism. This form holds that reducing the amount of available resources can increase their relative value (i.e. avoiding waste) and, therefore, lead to those resources being channelled to maximise the prospect of better results.⁸¹ Typically, this culture of managerialism operates under a management and/or funding body that aggressively monitors and exerts accountability for those results, and, simultaneously is capable of imposing financial restraints on the organisation. In this culture, performance indicators can fulfil (arguably desirable) accountability and audit purposes, but they may also produce negative consequences for the Prosecutor’s professional identity. In turn, such consequences can further explain the lack of attention shown to measuring prosecution effectiveness. In this regard, this section’s analysis of performance indicators explains why an economic perspective leads to a neglect in measuring prosecution effectiveness.

The OTP is ultimately supervised by the Court’s legislative and management body — the ASP, which both elects and can formally remove the Prosecutor.⁸² The ASP also provides management and budgetary oversight of the Court, and this includes the ability to approve the OTP’s budget.⁸³ Arguably, then, there is a clear relationship of accountability between the ASP and OTP. Nonetheless, in the context of financial prudence, the relationship is perhaps not as ‘hard’ as in those commercial organisations that are ultimately assessed against the achievement of a financial bottom-line (i.e. final net income/profits). Rather, the better description would be that the ASP acts as a principal (or even trustor) and exerts a more indirect

⁷⁹ Andrew Flynn and others, ‘Making Indicators Perform’, (1998) 8 *Public Money and Management* 35, 38.

⁸⁰ Carter, Klein and Day, *supra* note 22, at 37.

⁸¹ Osborne and Gaebler, *supra* note 7, at 15 and 19-20.

⁸² The ASP has the ability to elect or remove the Prosecutor in case of serious misconduct, for a serious breach of his or her duties, or if unable to exercise the functions required by the Statute. See Art. 46(1) ICCSt. See also Alison M. Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’, (2003) 97 *AJIL* 510, 524.

⁸³ Art. 112 (Assembly of States Parties) ICCSt; Art. 115. (Funds of the Court and of the Assembly of States Parties) ICCSt.

influence over the OTP that is akin to a trustee actor.⁸⁴ Whichever the characterisation, the effect of the said financial influence has culminated in the ASP's demand for a 'Basic Size' OTP model.⁸⁵ The Basic Size model seeks to provide States Parties with a more predictable basis for budgetary planning, while providing the OTP with a model for managing its financial affairs in view of long-term sustainability. This model depends on financial forecasts of outputs, based on assumptions of their success at various stages from preliminary examination through to trial.⁸⁶

Moving to the issue of costs, the OTP is described as the Court's 'engine-room' and is a significant component of the Court's budget. The OTP's caseload also determines the financial burdens of other organs, most evidently the Chambers and the Registry. For instance, in 2017, the OTP was reserved more than €46 million from a proposed Court budget of approximately €147 million.⁸⁷ As is now well known, states have been notoriously slow in fulfilling financial commitments to the Court, with some remaining in long-term arrears.⁸⁸ For example, between 2009 and 2013 the overall budget growth for the Court was minimal and even shrank in real-terms in 2011.⁸⁹ However, the relative flat lining of the ICC's budget has been accompanied by the OTP's accumulating caseload, which from 2009 to 2013 effectively doubled.⁹⁰

In short, the OTP endures — to a degree — the aforementioned hard form of managerialism. The ASP exerts the pressure of accountability, but, in spite of the OTP's increased workload, past records reveal that it refuses to increase the OTP's funding in proportion. This has created tensions in the ASP-OTP relationship. For

⁸⁴ Karen J. Alter, 'Delegation to international courts and the limits of re-contracting political power', in Darren G. Hawkins, and others (eds.), *Delegation and Agency in International Organisations* (CUP 2006) 312, 321 and Karen J. Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14 *European Journal of International Relations* 33

⁸⁵ ASP, *Programme Budget for 2015 ...*, ICC-ASP/13/Res.1, (17 December 2014) para. I.3. See also OTP, *Strategic Plan 2016-2018* (6 July 2015) paras. 63-70.

⁸⁶ ASP, *Report of the Court on the Basic Size of the Office of the Prosecutor*, ICC-ASP/14/21 (7 August 2015) paras. 6-17.

⁸⁷ ASP, *Proposed Programme Budget for 2017 of the International Criminal Court*, ICC-ASP 15/10 (17 August 2016) para. 1. The precise figures were €147,250,700 and €46,280.20 respectively.

⁸⁸ See for example, ASP, *Report of the Committee on Budget and Finance on the work of its twenty-seventh session*, ICC-ASP 15/5 (28 October 2016) paras. 16-21. As of 31 October 2016, the current amount of outstanding arrears was in the region of €34 million. See ASP, *Report of the Bureau on the arrears of State Parties*, ICC-ASP 15/28 (10 November 2016) para. 12. For a discussion of the current shortfall in money see Elizabeth Evenson and Jonathan O' Donohue, 'States should use ICC budget to interfere with its work' *Open Democracy* (23 November 2016) <<https://www.opendemocracy.net/openglobalrights/elizabeth-evenson-jonathan-o-donohue/states-shouldn-t-use-icc-budget-to-interfere-w>> accessed 31 July 2018.

⁸⁹ For discussion on this see Stuart Ford, 'How Much Money does the ICC Need?' in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 84, 86.

⁹⁰ *Ibid.* at 89.

instance, former Prosecutor Luis Moreno Ocampo publically criticised the UK, France and Germany for having increased the Court's workload by voting for the referral of the *Situation in Libya* at the UNSC, while, at the same time, advocating limiting the ICC's budget.⁹¹ There have also been regular warnings from the Prosecutor Fatou Bensouda who, in the past, has protested that the lack of funding will significantly affect the work of the Office and may engender 'real detrimental results.'⁹²

The OTP's development of performance indicators cannot be divorced from this background of increased workload but reduced funding. As things stand, the ASP's accountability and funding pressures generate a degree of 'back-seat driving'⁹³, inevitably directing the Office towards demonstrating more economy of performance. Put another way, the ASP exerts accountability by imposing a 'hierarchically downward' and market-like pressure on the OTP.⁹⁴ The ASP's influence can be readily identified within the OTP prosecutorial strategy. For instance, financial oversight has become increasingly integrated into the OTP's assessment of its own capabilities and resources.⁹⁵ As a matter of fact, in the latest two OTP strategies, goals are expressly linked to budget assumptions.⁹⁶ This may account for the increasing page length of the strategies as they have become progressively more audit, budget and operationally focused, growing from 10 pages in 2006, to 18 pages in 2010, jumping to 43 pages in 2013 and, finally, to the 60 pages of the current strategy.⁹⁷ In addition, as if to demonstrate the pressing importance of economy considerations, the term 'budget' is used 57 times in the latter two strategies (combined), after appearing only twice in the first two strategies.

The OTP's concern for the economy of its activities is not misplaced, but, the problem is that it produces discernible effects on the practice of performance measurement. First, economy can risk reshaping the purpose of performance

⁹¹ Ibid.

⁹² Fatou Bensouda, 'Address at First Plenary: Fifteenth Session of the Assembly of States Parties.' (16 November 2016) p. 8 <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ASP15-Opening-Statement-Prosecutor-ENG.pdf> accessed 31 July 2018

⁹³ Carter, *supra* note 9, at 138.

⁹⁴ On this point, see Carol Jones, 'Auditing Criminal Justice' (1993) 33(2) *British Journal of Criminology* 187, 188

⁹⁵ Generally speaking, the 2012 and 2015 prosecution strategies exhibit the features of a 'SWOT' analysis. See indicatively, Arnoldo C. Hax, 'Redefining the concept of strategy and the strategy formation process', (1990) 18 *Planning Review* 34, 37.

⁹⁶ See OTP, *Strategic plan June 2012-2015* (11 October 2013) Annex A and *OTP Strategic Plan 2016-2018* (6 July 2015) para. 41 and Annex 4.

⁹⁷ The current Strategic Plan includes a 20-page annex discussing the results of the previous Strategic Plan in 2012-2015.

measurement into a simple ‘reward-or punish’ exercise. This comes with the belief that hard numbers are the basis for positive external judgment and the search for funding.⁹⁸ Second, and relatedly, economy shifts performance indicators to produce — as much as possible — hard data to fulfil auditing purposes. The development of performance indicators and auditing have inherently been mutually constitutive.⁹⁹ The development of performance measurement tools tends to conform to the image and practice of auditing.¹⁰⁰ Thus, the economy pressures on the OTP can lead to a numbers-driven audit-culture, which, by logical extension, would prioritise attention to prosecution outputs because they are most amenable to accountable and audited performance standards.¹⁰¹

One should then question why audit-rooted performance measurement excludes or dis-incentivises the measurement of prosecution effectiveness. Generally, one explanation is that these indicators can generate a powerful (and unanticipated) cultural consequence on the organisation’s personnel. In short, audit indicators may deeply implant audit values within professional identities.¹⁰² This may lead personnel to change their vision about who they professionally are and what it is they do.¹⁰³ Taking the Prosecutor, her professional identity is not only that of a courtroom advocate concerned with questions of evidence and procedure, but also one akin to a ‘cause lawyer’: someone whose prosecutions inevitably come with an activist mission to promote social change in conflict-affected and other divided societies (including their affected communities.)¹⁰⁴ Current OTP indicators may undermine such ‘cause lawyer’ identity by shifting her concern towards internal-facing considerations, casting her as a private entrepreneur who views prosecutions as a private commodity (rather than a public good), and positive prosecutorial outputs as essential organisational ‘profit’. This identity shift also implies a change

⁹⁸ Ewan Ferlie and Keith J. Geraghty, ‘Professionals in Public Service Organizations: Implications for Public Sector Reforming’, in Ewan Ferlie, Laurence E. Lynn Jr and Christopher Pollitt (eds.), *The Oxford Handbook of Public Management* (OUP, 2007) 422, 431.

⁹⁹ Power, *supra* note 12, at 119.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Power, *supra* note 12, at 115. See also indicatively, Christopher Pollitt, ‘How do we know how good our Public Services are?’ in Guy Peters and Donald Savoie (eds.), *Governance in the Twenty-First Century: Revitalising the Public Service* (McGill-Queen University Press 2000) 119-155; Peter Noordhoek and Raymond Saner, ‘Beyond New Public Management: Answering the Claims of Both Politics and Society’, *5 Public Organization Review: A Global Journal* (2005) 35, 44.

¹⁰³ Espeland and Sauder, *supra* note 33, at 86.

¹⁰⁴ The literature on ‘cause lawyering’ is considerable, but for a concise discussion see Kieran McEvoy, ‘What Did the Lawyers Do During the War?’ *Neutrality, Conflict and the Culture of Quietism*, 74 *MLR* (2011) 350, 354.

in the OTP's primary audience; encouraging a focus on the ASP, which holds the OTP accountable and whose demands the Office must strive to meet.¹⁰⁵ At its worst, quoting Max Weber, the Prosecutor becomes 'bureaucratised' and bound by an officialdom comprised of habitual and hierarchical obedience.¹⁰⁶ In summary, the concerns for accountability and audit may readily deflect the Prosecutor's attention away from prosecution effectiveness in terms of outcomes in divided societies and, within their affected communities.

This section is not suggesting the Prosecutor should not be concerned with economy. Realistically, no international prosecutor can operate without some consideration for organisational expenditure and the use of finite resources. To attempt to do so would be impossible or at least economically reckless in times of fiscal restraint. Nevertheless, performance indicators are shaped by considerations of economy. Consequently, the Prosecutor's professional identity and the primary audience for her performance can be altered and this explains the neglect in the attempt to measure prosecution effectiveness. Similar considerations can be derived from an analysis of the impact of the second 'E' on performance indicators.

¹⁰⁵ The OTP's current strategy makes clear that performance indicators 'also assist the Office to report on its performance to its stakeholders.' See OTP, *Strategic Plan 2016-2018* (6 July 2015) para. 103.

¹⁰⁶ Hans H. Gerth and Charles W. Mills (ed.), *From Max Weber: Essays in Sociology* (Routledge 1995) 229.

6.4 Efficiency & Outputs

Efficiency is naturally related to economy. It is concerned with the ratio of inputs to outputs and the desire to gain the maximum output from a given input.¹⁰⁷ The relationship of outputs to inputs is often captured by the notion of ‘value for money’, where ‘value’ is understood as a number reflecting the quantity and quality of outputs.¹⁰⁸ This notion tends to resonate in public debate about the Court’s performance. For instance, it is hardly surprising that headlines regularly decry the Court’s return of convictions from its 17 years of operation, particularly when its expenses run to well over \$1 billion dollars.¹⁰⁹ In this sense, the OTP’s efficiency is assessed quantitatively, by reference to the numbers of prosecutions, but also qualitatively, by reference to the success of those prosecutions i.e. convictions.¹¹⁰ This section’s analysis explains why efficiency’s priority on the number and quality of prosecutions exacerbates the OTP’s detachment from prosecution effectiveness.

It is self-evident that output indicators motivate increasing numbers of outputs. Such indicators inherently exert pressure towards positive (prosecution-leaning) conclusions when the OTP faces the dilemma of whether to proceed in a given situation or case. For instance, subsequent to an investigation and pursuant to Article 53(2) (a-c) of the Rome Statute, the Prosecutor must decide: whether there is a sufficient legal and factual basis to seek an arrest warrant or a summons to appear; whether the ensuing case would be admissible; and whether a prosecution would be in the ‘interests of justice’. Logically, the extent of available evidence determines the decision to charge a suspect, and thus, evidence is the strongest countervailing restraint on simply pursuing an increase in the number of positive charging decisions. On the contrary, the OTP’s discretion not to prosecute ‘in the interests of justice’ is a much weaker restraint. As vague as the expression is, the OTP is on

¹⁰⁷ Carter, Klein and Day, *supra* note 22, at 38. The dictionary definition of efficiency refers to maximum productivity with minimum wasted effort, or the ratio of useful work performance to the total energy expended. See Stevenson (ed.), *supra* note 4, at 561.

¹⁰⁸ Power, *supra* note 12, at 44.

¹⁰⁹ See for example ‘13 years, 1 billion dollars, 2 convictions: Is the International Criminal Court Worth it?’ DW, 27 January 2016, <<http://www.dw.com/en/13-years-1-billion-dollars-2-convictions-is-the-international-criminal-court-worth-it/a-19006069>> accessed 31 July 2018.

¹¹⁰ This reflects the alternative dictionary interpretation of efficiency that is based on competency or ‘doing the job well’. See Stevenson (ed.), *supra* note 4, at 561.

record in stating that there is a general presumption in favour of prosecution, and recourse to this clause would be exceptional.¹¹¹

Perhaps, the strongest factor mitigating against the pursuit of increasing numbers of prosecutions is the principle of complementarity.¹¹² Specifically, results indicators seem to be incompatible with the concept of ‘positive complementarity’, i.e. the principle according to which the OTP does not only act subsidiarily to national criminal proceedings, but actively promotes them.¹¹³ In this regard, the OTP has previously declared that the number of cases brought to trial at the ICC should not be the sole or even decisive measure of its effectiveness.¹¹⁴ Former Prosecutor Luis Moreno Ocampo went one-step further, stating that the very *absence* of cases would demonstrate the Court’s effectiveness, as it would imply that national authorities are undertaking their own prosecutions.¹¹⁵

This confusion could be resolved by resorting to ‘positive complementarity’ performance indicators i.e. those seeking to measure the OTP’s impact on national proceedings. However, hitherto, the OTP has failed to develop any such indicators. Thus, so long as the OTP’s performance indicators privilege prosecution results, they provide an additional reason for the Prosecutor to interpret complementarity as a competitive ‘grab’ for jurisdiction.¹¹⁶ In short, the indicators will motivate an aggressive interpretation of complementarity so as to allow more cases to be deemed admissible, and thus potentially prosecuted.

Results indicators encourage higher output numbers but equally generate concern as to the final quality of those outputs. After all, admissibility assessments should, in the end, lead to the best chance of success, by way of favourable rulings in the Chambers. However, the zeal to increase prosecution numbers may affect the

¹¹¹ OTP, *Policy Paper on the Interests of Justice* (September 2007) p.9. See also, albeit in relation to *not* opening an investigation, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation) ICC-01/13 Pre-Trial Chamber I (16 July 2015).

¹¹² Art. 17(1)(a) (ICC Issues of Admissibility) ICCSt.

¹¹³ There is significant literature on the concept of positive complementarity including its potential incorporation of efforts to build domestic judicial capacity. See, for example, William Burke-White, ‘Implementing a Policy of Positive Complementarity in the Rome System of Justice’, 19 *Crim.L.F.* (2008) 59-85; Justine Tillier, ‘The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law’, 13 *Int.C.L.R.* (2013) 507-591; Olympia Bekou, ‘The ICC and Capacity Building at the National Level’, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 1245-1258.

¹¹⁴ OTP, *Report on Prosecutorial Strategy* (14 September 2006) para. 14 and OTP, *Prosecutorial Strategy 2009-2012* (1 February 2010) para. 79.

¹¹⁵ Luis Moreno-Ocampo, ‘Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor’ (16 June 2003) p. 3, <<http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>> accessed 31 July 2018.

¹¹⁶ On the argument that complementarity promotes competition for jurisdiction see Sarah M. H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (CUP 2013) 340.

Prosecutor's ability to make an independent and objective assessment of facts, evidence and law. In practice, there is always a risk that results indicators can disrupt the balance that should be maintained between 'quantity' i.e. output numbers, and the commensurate 'quality' of the outputs i.e. securing convictions. Most frequently, the balance often tips in favour of quantities of outputs.

This particular phenomenon can, to briefly digress, be illustrated by considering the pressures placed on national prosecuting authorities, such as the Crown Prosecution Service (CPS) in England and Wales. The CPS adopts a performance management framework that includes conviction rates in the Magistrates and the Crown Court.¹¹⁷ In addition, its performance indicators include conviction rates for violence against women and girls, principally, for offences related to domestic abuse and those sexual-based offences such as rape. The motivation behind the establishment of such indicators may be entirely legitimate — to increase the rate of convictions for offences that have historically been under-charged and subsequently under-prosecuted.¹¹⁸ However, one of the incidental by-products of such indicators (combined with an environment of significant budgetary pressures), has been the creation of a 'quantity over quality' culture that may [even] be causing miscarriages of justice.¹¹⁹ Indeed, allegedly, one of the contributing factors behind the recent collapse of several rape trials in England has been an undue fixation on conviction rates. Put another way, the indicators have led to charging decisions that might otherwise not have been made.¹²⁰

In this context, efficiency has often been *the* primary motivation for the establishment of performance indicators. Albeit desirable, the organisation's pursuit of a perfectly rational end (i.e. efficiency) can, particularly if allowed to become over-bearing, have substantive justice implications¹²¹ The risk is neatly described by Jones;

¹¹⁷ CPS, 'Key Performance Measures 2017/2018' <<https://www.cps.gov.uk/key-measures>>; <<https://www.cps.gov.uk/sites/default/files/documents/publications/key-measures-definitions.pdf>> accessed 31 July 2018

¹¹⁸ CPS, 'CPS report shows more offenders are being successfully prosecuted for sexual crimes than ever before' (10 October 2017) <<https://www.cps.gov.uk/cps/news/cps-report-shows-more-offenders-are-being-successfully-prosecuted-sexual-crimes-ever>> accessed 31 July 2018.

¹¹⁹ Jonathan Ames and Frances Gibb, 'Prosecutors had one hour to make charging decision' *The Times* (2 February 2018)

¹²⁰ Richard Pendlebury, 'An innocent man has avoided jail only by luck': Richard Pendlebury on the worrying questions facing CPS chief obsessed with rape convictions' *Daily Mail* (10 December 2017); Theodore Dalrymple, 'Did 'target culture' in the police and CPS drive the tragic case of Frances Andrade?' *The Daily Telegraph* (10 February 2013)

¹²¹ See Jones, *supra* note 94, at 196.

The danger is that the value of efficiency, which too often is translated simply into the variable of...costs, is taken for granted as equal to or greater in importance than the need to preserve longstanding and valuable safeguards in procedure. We might call this the simple meaning of a trade-off between efficiency and justice.¹²²

In practice, the trade-off between efficiency and justice is often expressed by the tension between efficiency and the need to adhere to due process. Performance indicators can thus play a central role in compromising professional judgement (and adherence to procedural safeguards) in favour of the over-zealous pursuit of prosecutorial success. For instance, and to remain with England and Wales, the drive for efficiency has been attributed to poor practice in the CPS's duty of disclosure (i.e. the process by which relevant evidence that can potentially strengthen the defendant's case is made available to his/her legal teams so as to ensure a fair trial). A House of Commons Justice Committee Report released in July 2018, disapprovingly suggested that the CPS 'prioritised timeliness...and conviction rates over getting decisions right and [that] an increasingly 'target-driven' environment [produced] pressures for hearings to go ahead, whether or not all disclosure tasks have been performed.'¹²³

In this context, the effect of efficiency can shift a Prosecutor towards someone 'bent on securing the conviction of an accused [rather than] a quasi-judicial 'minister of justice' and whose detached function is to seek justice and to ensure fairness.'¹²⁴ The potential brake on this shift can depend on whether any measures exist to limit efficiency pressures; such as indicators on the adherence to due process, or even the quality of case preparation. Therefore, turning back, the present question is to ask whether the OTP's performance indicators equally bolster the quality of prosecution outputs alongside their quantity.

The answer to this question should take into account that these indicators have been developed in an environment that, increasingly, is recognising the importance of quality over quantity, as plainly acknowledged in the Plan for a Basic

¹²² Ibid.

¹²³ House of Commons Justice Committee, *Disclosure of evidence in criminal cases: Eleventh Report of Session 2017-19* (20 July 2018) para. 90.

¹²⁴ David Plater, 'The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?' (2006) 25(2) *University of Tasmania Law Review* 111, 111.

Size OTP.¹²⁵ Furthermore, the OTP has explicitly accommodated quality within its current indicator regime. The OTP has recognised that its strategic indicators clearly reflect the quality of investigations and prosecutions, since they attest the success rate of prosecutorial activities.¹²⁶ Moreover, operational indicator n. 3 measures the ‘pattern of judicial findings on how the Office conducts its preliminary examinations, investigations and prosecutions (particularly at the Appeals Stage).’¹²⁷ The significance of this indicator is underlined when one considers the prospect of criticism and even adverse rulings from the Chambers. To offer only two illustrations, first, the OTP was subject, notoriously, to criticisms about its dependence on intermediaries to help gather evidence in *Prosecutor v Thomas Lubanga*.¹²⁸ Second, in *Prosecutor v Callixte Mbarushimana* the Chamber was critical of the Prosecutor’s specificity in the draft of charges (perhaps due, in part, to the Prosecutor’s reliance on evidence in Human Rights Watch reports). This contributed to the Chamber refusing to confirm the charges.¹²⁹ Hence, one could argue that the current set performance indicators are equally focused on the need for the Prosecutor to be meticulous and demonstrate probity because, otherwise, the prospects of successful prosecutions would diminish.

That being the case, the OTP’s performance indicators tend to privilege exclusive concern for the number and quality of prosecution outputs. Indeed, one could argue that, to some degree, most criminal prosecutors (national or international) are likely to view ‘win-loss records’ as central to the evaluation of their own performance, even though ‘winning’ is not their exclusive goal.¹³⁰ Generally, attempts at performance measurement that are output-focused tends to be embedded in resource-limited environments, where economy and efficiency are primary concerns.¹³¹ The natural consequence of this is a slide away from measuring prosecution effectiveness in affected communities. The deficit in measuring

¹²⁵ ASP, *Report of the Court on the Basic Size of the Office of the Prosecutor*, ICC-ASP/14/21 (7 August 2015) para. 4.

¹²⁶ OTP, *Strategic Plan 2016-2018* (6 July 2015) para. 106.

¹²⁷ *Ibid.* One might add that operational indicators nn. 4 and 5 (concerned with compliance with policies and standards and the, rather obscure, ‘quality of interaction with the OTP’) also attest to the quality of the OTP’s activities.

¹²⁸ *The Prosecutor v Thomas Lubanga* (Judgment Pursuant to Article 74 of the Statute) ICC-01/04-01/06 Trial Chamber 1 (14 March 2012) p. 90-101.

¹²⁹ *The Prosecutor v Callixte Mbarushimana* (Decision on the Confirmation of Charges) ICC001/04-01/10 Pre-Trial Chamber 1 (16 December 2011) para 78, 82, 110.

¹³⁰ See Candace McCoy, ‘Prosecution’, in Michael Tonry (ed.), *The Oxford Handbook of Crime and Criminal Justice* (OUP 2013) 663, 688.

¹³¹ Pollit, *supra* note 3, at 161-163.

effectiveness can nevertheless, also be explained by the very complexity of the task, to which the chapter finally turns.

6.5 Effectiveness & Outcomes

The concept of effectiveness has been of central significance to this study. To reiterate, effectiveness describes the degree to which an organisation — principally by its outputs — can produce an intended outcome. In other words, effectiveness is concerned with the consequences of a given output, including its short, medium and even long-term effects on a target population or group.¹³² These outcomes are achieved by influencing target audiences – by changing attitudes, behaviour, perceptions and conditions.¹³³ This section analysis of the OTP's performance indicators explains the fundamental absence of attention paid to measuring prosecution effectiveness. In doing so, it also identifies the indicators' perverse effects that aggravate this omission.

In business and public administration contexts, effectiveness is often cast in terms of achieving an outcome of 'end-user satisfaction'. As such, the OTP can only measure such outcomes after having identified its relevant audiences i.e. those 'users'. Normally, the OTP speak to several audiences simultaneously, from abstract entities (such as the 'international community') to concrete constituencies (e.g. specific institutions, civil society and other state or non-state actors). Yet, the most relevant audiences are those within which the Court's goals are empirically achieved: these goals include ending impunity, preventing further criminality and, crucially for present purposes, reconciliation.¹³⁴ Thus, international criminal proceedings are of critical interest for audiences of affected communities (encompassing a broad cohort of victims). However, herewith lies the root cause for the OTP's omission in measuring prosecution effectiveness: its lack of clarity in defining prosecution outcomes. Tackling this lack of clarity requires, *a priori*, the

¹³² Carter, Klein and Day, *supra* note 22, at 35-38. Carter's definition accords with that of the dictionary, which outlines effectiveness as the degree to which something is successful in producing a desired result. See Stevenson (ed.), *supra* note 4, at 560. Although not specifically relevant for present purposes, the concept of 'impact' is often used interchangeably with 'outcome'. For a discussion of the distinction between the two terms, see Daniele Alesani, 'Results-Based Management', in Eduardo Missoni and Daniele Alesani (eds.), *Management of International Institutions and NGO's: Framework, Practices and Challenges* (Routledge 2013) 267.

¹³³ Carter, Klein and Day, *supra* note 22, at 36.

¹³⁴ Literature on the goals of international criminal law and international criminal justice is vast. See for example; Laurel E. Fletcher and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation', (2002) 24 *HRQ* 573; Mirjan R. Damaška, 'What is the Point of International Criminal Justice' (2008) 83 *Chi-Kent L.Rev.* 329 and Shahram Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage in Consequentialist Aspirations' (2014) 3 *Penn. St. J.L. & Int'l Aff.* 30, 31-109.

OTP to identify target audiences and then to establish specific outcomes that are desired for each such audience.

To illustrate this argument, the OTP has previously recognised the importance of outcomes as the starting point for performance measurement by stating, for example, that:

[t]o evaluate the (cost-) effectiveness of the Office requires first determining what outcome the Office is *supposed* (my emphasis) to produce; prevention of crimes, complementarity achieved, justice (seen to be) done, etc.¹³⁵

However, this excerpt is also revealing of the problem. References to outcomes are broad, generic and scattered in differing directions. There has been little reflection about some necessary and crucial distinctions, like the one between prosecution outcomes and the goals of the Court as a whole, or the distinction between outcomes generated from the Office and those from its prosecutions. For instance, successful prosecutions may achieve specific outcomes (e.g. positive perceptions of Prosecutor decision-making) that may lead to the achievement of the Court's goals, but those outcomes are not equivalent or identical to the Court's goals. Alternatively, the Office's wider operations may achieve an outcome of an increase in national proceedings (i.e. positive complementarity), but, this is not an outcome that is directly related to its outputs. The OTP would also need to determine whether the desired outcomes are identical for all prosecutions, or whether they should instead be context-specific, taking into account the defendant's identity, the nature of the alleged crimes and their socio-political context. Effectiveness cannot be measured without asking these questions about outcomes and further deliberation about how best to construct and design them. The quoted excerpt — by simply listing some of the outcomes that the Office is 'supposed' to achieve — reveals a casual circumvention of the deep and complex questions that need to be addressed before outcomes can be articulated and the measurement of effectiveness be contemplated.¹³⁶

¹³⁵ OTP, *Strategic plan June 2012-2015* (11 October 2013) para. 95.

¹³⁶ On this see also Christopher Gevers, 'International Criminal Law and Individualism: An African Perspective', in Christine Schwobel (ed.), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014) 221, 239-240.

This lack of clarity precedes the OTP's concern that it is not possible to — unequivocally — attribute the production of a certain outcome to the Office's activities (the so-called dilemma of 'performance ownership'). The Office has made clear that it can only measure what it sufficiently controls.¹³⁷ In this respect, then, the lack of effectiveness measurement has equally been attributed to 'causation complexity': i.e. desired outcomes can be influenced by a multitude of socio-political causes that act and are independent of the OTP's work.

Admittedly, this is a reasonable reservation (since effectiveness measurement would be of limited value if causation cannot be adequately determined), but it is not a sufficient reason not to develop those outcomes. First, performance indicators are always open to a degree of contention and scrutiny. Indicators that would measure effectiveness on outcomes would simply encourage further scrutiny and generate helpful debate about their readings. Second, the challenge of measuring effectiveness is logically preceded by the obstacle of defining and establishing desired outcomes. At present, it appears that the OTP is relying on 'causation complexity' in the abstract, and, has somewhat adopted it as an excuse to avoid genuine thinking about the outcomes it seeks.¹³⁸

Moreover, the current absence of effectiveness measurement is compounded by another concern: the OTP's claim that prosecution results indicators *are* indeed a measure of effectiveness. On one hand, one could argue that the OTP intends courtroom wins to be an indicator of the Office's effectiveness (certainly if the strength of its case preparation, evidential integrity and due process are deemed as desirable outcomes in and of themselves). However, on the other hand, prosecution wins cannot be sufficient — in themselves — to express the Office's effectiveness in fulfilling its mandate within affected communities; courtroom wins are only a starting point towards such an end. This might be expressed as the gap between 'doing justice' and ensuring — as far as it can do so — that justice is seen as being done. Instead, and more worryingly, the OTP's claim that prosecution results *are* an indicator of its effectiveness may produce some perverse effects.

First, the OTP's claim replicate a well-known flaw in performance measurement practice: obliterating the distinction between output and outcome.¹³⁹

¹³⁷ OTP, *Strategic Plan 2016-2018* (6 July 2015) para. 104.

¹³⁸ Open Society Briefing Paper, *supra* note 14, at 5.

¹³⁹ Power, *supra* note 12, at 115.

For the OTP, prosecution outputs are expected to lead to prosecution successes, but that success — in and of itself — is not equivalent to prosecution outcomes. For example, in an education setting, an increasingly positive reading from an indicator of ‘qualification pass rates’ may well lead to the goal of producing well-informed and skilled school-leavers. However, that indicator’s positive reading could not be wholly determinative of the goal: achieving the goal would depend on the type of the qualification, on the skill level required to gain it, and on a qualitative assessment of the qualification’s recipients.¹⁴⁰ The inclination to fuse output and outcome is reasonably common in public administrations, particularly when organisations remain under accountability and audit pressures in respect of those outputs. For instance, it is alleged that the United Kingdom’s education system is subject to an onerous accountability regime that leads to schools being disproportionately focused on positive outputs (i.e. examination results) at the expense of concentrating on the output’s outcomes (e.g. deep knowledge, skills, critical reasoning etc).¹⁴¹ Returning to the OTP, its tendency to fuse (or simply confuse) outputs and outcomes can lead the OTP to lose sight of those meaningful external outcomes, and thus further reduce the attention it pays to them. Moreover, the importance of output performance may be overestimated, often at the expense of normative discussions about the most appropriate outcomes of prosecutions and the extent to which they can — and should — inform decision-making e.g. in the course of its selection procedure.¹⁴²

Second, in the absence of a meaningful engagement with outcomes, the OTP embodies precisely what Martti Koskenniemi describes as ‘managerialism’. For Koskenniemi, managerialism is an approach whereby decision-makers’ attention is focused on compliance with certain rules, rather than on the reasons for the very existence of such rules.¹⁴³ Consequently, the achievement of outcomes is simply assumed by dint of the mere functioning of the institution. In these institutions, it is taken for granted that the only quest is to optimise performance — by the increasing employment of internal expertise, resources and administrative vocabularies —

¹⁴⁰ For a discussion on indicators and causality, see David McGrogan, ‘The Problem of Causality in Human Rights Law’ (2016) 65 *ICLQ* 615

¹⁴¹ This tends to generate the frequent criticism that schools are being transformed into ‘exam factories.’ See, for example, Merryn Hutchings, *Exam factories: The impact of accountability measures on children and young people*, National Union of Teachers, June 2015 <https://www.teachers.org.uk/sites/default/files2014/exam-factories_0.pdf> accessed 31 July 2018. See also Warwick Mansell, *Education by Numbers: The Tyranny of Testing* (Politico’s Publishing 2007).

¹⁴² Gevers, *supra* note 136, at 238-241.

¹⁴³ Martti Koskenniemi, ‘The Politics of International Law-20 Years Later’ (2009) 20 *EJIL* 7, 15-16.

towards measurable outputs that are in the service of a generic or nebulous purpose.¹⁴⁴ Inasmuch as the OTP's performance indicators are an expression of this version of managerialism, they perversely introduce a degree of myopia about the complexity of achieving outcomes. The fact that current indicators give exclusive priority to prosecution outputs exaggerates their very utility. This is what psychologists would label as 'the law of the instrument': 'it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail.'¹⁴⁵ In this regard, the Prosecutor may be tempted to think that, in order to achieve outcomes, it is sufficient to use her 'hammer' (i.e. the power to conduct investigations and prosecutions) and 'strike nails' (i.e. actually carry out successful investigations and prosecutions). However, as the OTP itself has recognised when addressing causation complexity, international criminal prosecutions are not the only means towards achieving those outcomes. On the contrary, for example, prosecutions work within conflict-resolution strategies and alongside other transitional justice mechanisms.¹⁴⁶ Thus, the OTP creates a paradox: on one hand, it refuses to engage with outcomes because of perceived causation complexity; on the other, it develops indicators that reduce the outcomes' complexity by implicitly assuming they are a natural extension of prosecutorial success.

To summarise, the absence of performance indicators measuring prosecution effectiveness lies, primarily, in the OTP's fundamental lack of clarity in defining outcomes; either those that are attributable to the OTP as an organisation or, more narrowly, attached to its prosecution outputs. Furthermore, by juxtaposing effectiveness with its output indicators, the Prosecutor has merged outputs with outcomes, further valorising the former while devaluing the latter. This not only exaggerates the misconception of prosecutions being a panacea to the problems faced by affected communities, but it oversimplifies outcomes by treating them as a spillover of prosecutorial success.

¹⁴⁴ Martti Koskenniemi, 'International Law, Constitutionalism, Managerialism and the Ethos of Legal Education', 1 *European Journal of Legal Studies* (2007) 8, 12-13.

¹⁴⁵ The expression is contained in Abraham H. Maslow, *The Psychology of Science: A Reconnaissance* (Harper & Row 1966) 15.

¹⁴⁶ Since the Court only hears a handful of cases, the desired outcomes can only be achieved through a collective effort involving other entities and extra-judicial activities — i.e. education, diplomacy and, more in general, peacebuilding. See OTP, *Strategic Plan 2016-2018* (6 July 2015) paras. 104-106.

Conclusion and Recommendations

Performance measurement has long attracted criticism from many quarters. Natsios once pithily warned against ‘obsessive measurement disorder’ – a flawed belief that incessant monitoring and measurement will improve policy effectiveness.¹⁴⁷ In contrast, this chapter has not argued that performance measurement is futile or, further still, that the OTP’s efforts in developing indicators ought to be abandoned. It is inescapable fact that performance indicators are likely to be viewed as an indispensable. The OTP has even declared that its current indicators are only a pragmatic start-up and, with more experience, it will refine and potentially expand their number.¹⁴⁸ This is likely be the case for the development of Court-wide performance indicators, too.¹⁴⁹ That being the case, the question then becomes, not whether to measure performance, but what to measure, and how best to do it.

In this light, this chapter’s intent was to stimulate a conversation about the OTP’s performance indicators. The OTP’s current performance indicators are exclusively output-focused and neglect the measurement of prosecution effectiveness (in terms of outcomes) in affected communities. This argument was explained by the chapter’s three-part assessment. First, the indicators tend to privilege the demonstration of economically auditable outputs and, amongst other things, serve to recast the Prosecutor’s professional identity to that of a ‘private entrepreneur’ that is responsive only to the accountability pressures exerted by the ASP. Second, the indicators privilege a concern for an increased number of prosecutions alongside a focus on their quality, i.e. to ensure that they are successful and lead to convictions. Finally, the lack of indicators that measure effectiveness indicators is, fundamentally, due to the OTP’s lack of clarity in defining desired prosecution outcomes of prosecutions, and this precedes the challenge of causation, i.e. attributing performance ownership to the OTP alone. In addition, the Office’s claim that prosecution results do measure its effectiveness, moreover, blurs the distinction between outputs and outcomes, exacerbating the neglect of the latter. In view of the

¹⁴⁷ Andrew Natsios, ‘The Clash of the Counter-bureaucracy and Development’, Center for Global Development Essay (13 July 2010) <https://www.cgdev.org/sites/default/files/1424271_file_Natsios_Counterbureaucracy.pdf> accessed 31 July 2018.

¹⁴⁸ OTP, *Strategic Plan 2016-2018* (6 July 2015) para. 109.

¹⁴⁹ ICC, *Second Court’s report on the development of performance indicators for the International Criminal Court* (11 November 2016) para. 3.

above, the Prosecutor may consider the following principles as a way to improve future performance measurement.

First, the OTP could realign its prosecutorial strategies, making them less about administrative procedures and more about long-term goals and the socio-political contexts of affected communities. The current strategic plan has come to resemble an auditing document, dominated by budgetary and operational orientations. However, the core meaning of a ‘strategy’ is a plan of action to achieve particular goals (often over a prolonged period of time).¹⁵¹ Indeed, the very function of a strategy is to help ensure that the demands/needs of target audiences can be met.¹⁵² In that light, the OTP would be wise to adequately distinguish its policies and strategies, rather than using the terms interchangeably. The former can be more internal-facing, focused on inputs, outputs and procedure, and the latter more external facing, focused on outcomes, goals and impact. In the end, and after the consultation recommended in chapter two, the OTP might emerge with a coherent strategy. Ambos and Stegmiller help to explain the benefits of such an approach:

... It is more practical to have the overall strategy in one document instead of in various documents...produced at different times and focus[ed] on different topics. Only a master document can set out a *leitmotif* from which focused strategies can be developed and on the basis of which periodic reflection can take place.¹⁵⁰

Such a strategy could then enable a more focused culture that was responsive to the precise challenges in the Court’s situations and lead to the setting of context-specific goals. This realignment would therefore comply with the UN’s recommendation that prosecution strategies in conflict-affected societies need to consider the socio-political context.¹⁵³ Moreover, it would ensure that performance assessment (and measurement) was not occurring in a vacuum i.e. as an inward-looking exercise but

¹⁵⁰ Kai Ambos and Ignaz Stegmiller, ‘Prosecuting International Crimes at the International Criminal Court: Is there a coherent and comprehensive prosecution strategy?’ (2013) 59 *Crime, Law and Social Change* 415, 418.

¹⁵¹ Stevenson (ed.), *supra* note 4, at 1761.

¹⁵² Daniele Alesani and Ivano Bongiovanni, ‘Strategic Thinking and Planning’, in Eduardo Missoni and Daniele Alesani (eds.), *Management of International Institutions and NGO’s: Framework, Practices and Challenges* (Routledge 2013) 246-248.

¹⁵³ UNSC, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General S/2004 616** (23 August 2004) p. 15.

would take account of the relevant context too.¹⁵⁴ The OTP is thus more likely to be outcome-focused and be oriented towards ensuring its prosecutions have an impact in affected communities.

Second, and following on from the above, the OTP could commit to a deep process of qualitative performance evaluation, as opposed to the current preference for quantitative performance auditing. Performance evaluation is about a holistic weighing of the strengths and weaknesses of its prosecutions.¹⁵⁵ As Dancy argues, evaluation is about ‘value’ and evaluating something often requires judgements based on normative criteria about something’s ‘worthiness’.¹⁵⁶ Hence, the OTP must embrace a process of critical self-evaluation, to help it learn and thus inform its judgments about prosecutions’ external effects i.e. an assessment of their impact by way of identifiable outcomes. In this sense, the OTP needs to embrace the ‘empirical-turn’ within international criminal justice.¹⁵⁷ The OTP can begin to rely on an increasing number of impact assessments found in the literature that are evaluating the domestic effects of prosecutions within conflict-affected societies.¹⁵⁸ In spite of such research, to date, the OTP has engaged in little self-evaluation about the consequences of its prosecutions (and the decisions behind them). This engagement could be an annual process that entails the OTP partaking in critical debates about the progress that has been made towards desired outcomes. The OTP’s commitment to evaluation will meaningfully enable it to identify where improvements can be made and thus, to close the ‘feedback loop.’¹⁵⁹

Finally, and most importantly, the OTP should make a resolute effort to develop outcomes for its prosecution activities. This effort could be coordinated with

¹⁵⁴ Gabrielle Louise McIntyre (Chef De Cabinet, Office of the President, UN Mechanism for International Criminal Tribunals, ‘Performance Measurement Cannot Take Place in a Vacuum’ <<https://iccforum.com/performance#McIntyre>> accessed 31 July 2018.

¹⁵⁵ The dictionary defines evaluation as the making of a judgment about the value or quality of someone or something. See Stevenson (ed.), *supra* note 4, at 561.

¹⁵⁶ Geoff Dancy, ‘Evaluating ICC Performance: Design is Critical.’ <<https://iccforum.com/performance#Dancy>> accessed 31 July 2018.

¹⁵⁷ Gregory Shaffer and Tom Ginsburg, ‘The Empirical Turn in International Legal Scholarship’ (2012) 106 *AJIL* 1, 25-30.

¹⁵⁸ See Geoff Dancy, *supra* note 156.

¹⁵⁹ This is a business and public management expression that has been described as: ‘you produce something, measure information on the production, and use that information to improve production. Around it goes—a constant cycle of monitoring and improvement. To stay healthy, every aspect of a business needs feedback loops. If a company isn’t measuring data on its work, how can it improve?’ See Daniel Newman, ‘How Well Does Your Organisation Use Feedback Loops’ *Forbes Magazine* (2 August 2016) <<https://www.forbes.com/sites/danielnewman/2016/08/02/how-well-does-your-organization-use-feedback-loops/#61e836d1594b>> accessed 31 July 2018.

Court-wide efforts to develop outcome or impact-oriented indicators.¹⁶⁰ The OTP's outcomes need to be narrowly defined and context or situation-specific, with a given time-span for their potential achievement. These outcomes can be developed in consultation with external bodies and partners working at the grassroots level. Indicators could then focus on desired changes in (subjective) attitudes and beliefs in affected communities that feed into the Court's perceived legitimacy e.g. perceptions of the consistency, impartiality and representativeness of the Prosecutor's decisions.¹⁶¹ This would mark a shift towards indicators focused on how communities understand and engage with the Court's essential decisions and paint a three-dimensional picture of prosecution effectiveness.

Of course, such outcome indicators would incur measurement difficulties as perceptions – to name only one problem – intertwine with pre-existing ethnic affiliations and distorted conflict narratives. Thus, arguably, these indicators could risk producing unreliable data because of other contributory causes. That being said, this risk can be mitigated by external expertise in appropriate methodologies: measurement in the field can be conducted by social scientists trained in causal inference. In this regard, and in any event, measurement challenges are not a sufficient reason not to attempt to develop outcomes. Performance indicators oriented towards outcomes serve as 'sites of uncertainty' and can still act as a diagnostic tool to help identify steps towards organisational improvement.¹⁶² The chapter, thus, does not suggest that outcomes are immune to the complexities of causation, but, nonetheless, makes the case that outcomes must be at the centre of performance measurement.

In his work on bureaucracy, Max Weber once described a bureaucrat unable to 'squirm out of the apparatus in which he is harnessed', 'chained to his activity by his entire material and ideal existence', 'a single cog in an ever-moving mechanism which prescribes to him an essential fixed route of march'.¹⁶³ The Prosecutor can resist becoming such a chained bureaucrat by engaging in the complex challenge of

¹⁶⁰ ICC, *Second Court's report on the development of performance indicators for the International Criminal Court* (11 November 2016) para. 4.

¹⁶¹ For an example of such empirical fieldwork (though in relation to the ICTY), see Janine Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge 2014).

¹⁶² The reference to performance indicators as diagnostic tools can be found at James A. Goldston, 'Plenary Session-Efficiency and Effectiveness ICC Performance Indicators' (22 November 2016) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP15-SGG-PD-PANEL-OSJI-ENG.pdf> accessed 31 July 2018.

¹⁶³ Gerth and Mills (eds.), *supra* note 106, at 228.

measuring the effectiveness of prosecutions in achieving outcomes within the affected communities she ultimately serves. In doing so, she may help recover much-needed faith in the worthiness of her endeavour.

* * *

To return to the study's big picture, this closing chapter identified how the OTP's performance indicators undermines its contribution to reconciliation. The indicators do little to steer the OTP towards efforts to improved effectiveness e.g. by measuring outcomes that improve perceptions of the Court in affected communities. The indicators, in this regard, reveal the OTP's commitment to achieving successful results (i.e. convictions), but simultaneously expose a blind spot in its organisational culture.

Ultimately, this organisational culture is crucial because it encroaches on its selection procedure and the exercise of prosecutorial discretion therein. For instance, the OTP seeks out direct interaction with victims at all stages of its activities and two of its criteria guiding the prioritisation of cases includes assessing 'the impact of investigations and prosecutions on victims and affected communities' and 'the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes'.¹⁶⁴ However, the lack of indicators that measure such an impact is likely to entrench a culture where selections will be motivated by economy and efficiency considerations (i.e. those deemed easy, quick and/or inexpensive wins). Yet, a culture that simply pursues convictions betrays the OTP's success; something the Prosecutor herself has admitted in recent remarks:

Success is not built on slogans, aspirations and convictions alone, but is secured through building the...capacity and environment that are conducive to getting the job done and done well...I am the first to recognise we need to continue to do more, much more.¹⁶⁵

¹⁶⁴ OTP, *Policy Paper Case Selection and Prioritisation* (15 September 2016) para. 50.

¹⁶⁵ Sam Sasan Shoamanesh, 'Institution Building: Perspective from Within the Office of the Prosecutor of the International Criminal Court' (2018) 18 *Int.C.L.R.*489, 490.

Momentarily leaving aside what the ‘job’ actually is, the excerpt contains an admission that the OTP — as an organisation — needs to be setup to do its job and to do it well. Should ‘doing this job well’ mean that prosecutions have an impact in the communities in whose name they are conducted? If justice is to be seen to be done, then the answer must surely be yes. It follows then that the OTP requires an organisational culture (including a renewed set of performance indicators) to orientate itself towards perceptions that enable it to contribute to goals such as reconciliation.

The question that follows is can such a shift in organisational culture be achieved. First of all, before this could occur, there needs to be attention paid to an agreed understanding of the OTP’s ‘job’ and its effectiveness. This necessarily entails debate about the Prosecutor’s identity. To elaborate, to align the OTP’s effectiveness towards achieving goals that are close to the lives of affected communities (such as, but not necessarily confined to, reconciliation) is to strongly cast the Prosecutor as a cause- lawyer. To align the OTP’s effectiveness towards due process and convictions is to attach a traditional and rather bureaucratic identity to the Prosecutor. To concentrate the OTP’s effectiveness towards co-operation and support from a range of actors (State, donors, civil society and political bodies such as the ASP and the UNSC), tends to brand the Prosecutor as a diplomat or international civil servant.¹⁶⁷ The extent to which these identities are reconcilable (or comfortably co-exist) is secondary to the fact that the Prosecutor and the OTP must adjust to and reflect *all* these identities. That is by no means easy, but the first step must be a culture that can facilitate these desired ends. In the first decade of the Court’s existence, the OTP lacked such a common ethos and approach. One frustrated OTP lawyer, for example, asked:

What is the culture of this Office? What is the identity of this office? We have many identities and we do our work together, but we don’t have a common culture ... You need someone who is very clear about what the culture of the Office is, which I think we miss in a way.¹⁶⁶

¹⁶⁶ Interview with OTP staff member cited in Jens Meierhenrich, ‘The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory’ in Martha Minow, Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints* (UMP 2015) 120.

¹⁶⁷ Martha Minow, Cora True-Frost, and Alex Whiting, *The First Global Prosecutor: Promise and Constraints* (UMP 2015) 361.

In this key respect, the Prosecutor has an essential role to play. The Prosecutor's Chef de Cabinet (Chief of Staff) has argued that the OTP does institutionalise lessons and it is a 'continuously learning and self-evaluating organ [that takes] a hard look at how things have been done, to build on what has worked, and to fill any identified gaps'.¹⁶⁸ This chapter identified the gaps left by the OTP's current set of performance indicators — recently referred to reductively as an 'internal management instrument.'¹⁶⁹ However, performance indicators reflect much more than such an instrument. It may have to be left to the Prosecutor's leadership to re-invigorate the OTP's culture (including the improved use of performance indicators) towards the achievement of goals such as reconciliation.

In close connection to the above, the chapter's key recommendation — to develop specific outcomes — is also significant. Established outcomes speak to an organisation's mission, values and culture. This finds expression in the OTP's current Strategic Plan, which states:

Both a mission statement and core values.... communicate to the outside world and staff what the Office aims to achieve and what it stands for. *They create predictability, which increases the legitimacy of the Office. They provide guidance in decision-making* and empower staff to take initiative. They help shape the most intangible yet critical part of any organisation, namely its workplace culture. If not managed explicitly, they tend to evolve implicitly (my emphasis).¹⁷⁰

At present, there is little doubt that the failure to declare outcomes can have a deleterious effect on (or at least impoverish) the OTP's mission and values. There is currently an excess of output-driven managerial values and a commensurate shortage of decision-making guidance in its selection procedure. This chapter's analysis (and the early exploration in chapter two) revealed the dangers of not being specific about outcomes and ultimate goals. The development of specific outcomes is the fundamental starting point to the OTP's contribution to reconciliation — and, by extension, many other goals found under the Rome Statute.

¹⁶⁸ See Shoamanesh, *supra* note 165, at 495.

¹⁶⁹ ICC *Third Court's Report on the Development of Performance Indicators for the International Criminal Court* (15 November 2017) para. 8.

¹⁷⁰ OTP, *Strategic Plan 2016-2018* (16 November 2015) para. 32.

Concluding Remarks

This study asked: how can the International Criminal Court's Office of the Prosecutor effectively contribute to reconciliation? The study focused on the OTP's core activity, namely, its procedure of selecting situations and cases. The opening chapter outlined the selection procedure. The subsequent chapter explored the OTP's selection goals and thereby sharpened the focus on reconciliation. The third chapter examined the goal of reconciliation and emphasised the need for the Court to be perceived as legitimate in affected communities. The fourth and fifth chapters analysed effectiveness, respectively, of selection procedure and selection rhetoric, vis-à-vis the perceptions of affected communities. The last chapter assessed the OTP's performance indicators that seek to measure, amongst other things, the effectiveness of its prosecutions.

The study made the following observations. The OTP's selection procedure is characterised by significant prosecutorial discretion. The uncertainty this creates requires attention to be paid to the goals of those selections. The OTP's selections contribute to a range of criminal justice, transitional justice and restorative justice goals. Against the backdrop of these categories, the goal of reconciliation requires conceptual clarity, and specificity as to its context and audience. The study defined the concept of reconciliation to be a societal process that includes the repair and restoration of people's relationships, and the rebuilding of trust. The context for reconciliation is divided societies (those that have suffered from intergroup violence and/or the occurrence of identity-based crimes), and that are now split along the lines of, typically, ethnicity and/or religion. These societies contain an essential target audience; affected communities that are characterised by those societal divisions. In these communities (comprised of a large cohort of victims), prosecutions may contribute to reconciliation because they provide justice and establish the truth. However, in order for justice to be done and seen, and the truth to be accepted, the Court must be perceived to be legitimate. A frequent origin of affected communities' perceptions of the Court are the selection of defendants. These selections can reflect divisions in society and inhibit steps towards reconciliation in affected communities.

Accordingly, the OTP must inspire perceptions of the Court as being legitimate if, eventually, it is to effectively contribute to reconciliation.

In light of these observations, the study's original findings can be surmised by the following. In affected communities, perceptions of the Court are influenced by objective and subjective factors. The former is comprised of features of the Court, but the latter are shaped by group identities that produce cognitive biases and psychological dispositions that, in turn make perceptions difficult to tackle. The OTP can develop its effectiveness by improving objective factors in ways that recognise the existence of those subjective factors. Three routes to doing this were outlined in the final three chapters of the study: realigning its selection procedure towards (greater) procedural justice; developing its rhetoric to target identity affiliations in affected communities; and devising performance indicators that adequately measure the OTP's effectiveness. These steps, in a small way, can help the OTP make a more effective contribution to reconciliation.

This is not to say that the OTP cannot take other steps to boost its effectiveness. A consideration of all the possibilities for improvements was beyond the scope of the study. However, to speculate, the OTP could boost the Court's perceived legitimacy by acting to develop domestic judicial capacity so that alleged perpetrators can be tried closest to the communities that have been affected by the crimes. In addition, it might be the case that the OTP can develop a co-ordination strategy so that its activities are better synchronised with those of other domestic transitional justice mechanisms, such as truth and reconciliation commissions. This may avoid potential tensions that have previously arisen when tribunals and truth commissions have operated contemporaneously.¹ Leaving all the potential improvements aside, one must acknowledge, nonetheless, that the OTP's contribution to reconciliation is likely to be modest.

Invariably, the OTP's contribution to reconciliation will depend on the existence of favourable domestic conditions. The extent to which a divided society treads the path towards reconciliation is shaped by several influences. The pace of reconciliation will depend on the conflict and its nature, domestic political will and

¹ See William A. Schabas, 'Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 *JICJ* 1082; Alison Bisset, *Truth Commissions and Criminal Courts* (CUP 2014) 104-143. For a critical review of this book, see my earlier review in, 'Alison Bisset, Truth Commissions and Criminal Courts' (2015) 13(2) *JICJ* 411.

leadership, and the existence of widespread denial or revisionism, to name a few.² Embarking upon the path to reconciliation is going to be led and shaped by the society concerned and the steps taken will be specific to each and every situation. In the end, reconciliation can take decades and it may be ‘useful to conceive it always being ‘on the road’.³ It follows that evidence demonstrating its existence may also take considerable time to emerge. However, the OTP can still, albeit modestly, help to pave a foundation for the achievement of reconciliation.

For those that work at the OTP, reconciliation is unlikely to be an immediate priority. However, if it begins to think meaningfully about goals like reconciliation then it would trigger considerable benefits and lead to a rethink about the way its affairs and operations are conducted. In this context, it is hoped that that the study has stimulated a fresh and renewed conversation in the literature. For too long, the debate about how (best) to contribute to reconciliation has centred on the perceived dichotomy between punitive responses (i.e. prosecutions) and non-punitive responses (i.e. amnesties, truth processes and other forms of grass-roots redress). The debate has often fixated on contrasting the contribution of one response against another. However, if one is to recognise that prosecutions, under certain conditions, can contribute to reconciliation, then fixating on such a dichotomy is no longer tenable.⁴ Instead, attention should be directed at ‘how to get the most’ from institutions.

This does not mean that one should expect institutions to trigger transformational change by themselves. Alas, one of the risks of international tribunals seeking to contribute to goals such as reconciliation is that other actors or external audiences attribute, delegate or reserve the exclusive responsibility for the goal to the tribunal. In doing so, the tribunal becomes an easy target for criticism when the contribution is not demonstrable and this can re-entrench popular disappointment in its work. Alternatively, some commentators argue that establishing such goals merely inflate expectations and lead to the Court being overburdened by the weight of those expectations. However, the starting point must be to

² Julija Bogoeva, ‘Prosecuting War Criminal as the Basis for Reconciliation Policy’ (2015) Policy Brief Series No. 42 (Torkel Opsahl 2015) 4 <www.legal-tools.org/doc/a3fa05/> accessed 31 July 2018.

³ Stephan Parmentier, ‘Transitional Justice and Reconciliation for International Crimes: Who Holds the Roadmap?’ (2009) 3 *Promotio Iustitiae* 63, 69.

⁴ Anniken R. Krutnes, ‘Concluding Remarks: Reconciliation vs. Accountability: Balancing Interests of Peace and Justice’ (29 May 2015) Forum for International Criminal and Humanitarian Law <<https://www.ficlh.org/activities/krutnes-statement/>> accessed 31 July 2018.

ensure that tribunals maintain that they are seeking only to optimise a *contribution* to reconciliation. In this endeavour, tribunals can still take pro-active steps to manage expectations (e.g. avoid the use of soaring rhetoric as discussed chapter five), and be willing to co-ordinate, collaborate and communicate with other actors and audiences about how best to, *collectively*, pursue the same end. It may require lawyers to engage with not only other legal professionals, but with social scientists, psychologists and other experts in the behavioural sciences.⁵ The project is long-term, multi-disciplinary and multi-faceted, but it is certainly a normative horizon within view.

The study has also offered some fresh perspectives for future research on the Court. First, it underlined the need for more organ-specific accounts of the Court. Second and relatedly, it invites more single-goal analyses that can determine the effectiveness of those organs. Third, it has renewed research on prosecution selectivity by concentrating new attention (by way of procedural justice) on selection procedure *and* the perceptions of affected communities. Fourth, it has bought attention to features of the OTP that have been, hitherto, under-researched (if not entirely overlooked), such as its rhetoric and performance indicators. In combination, the study invites more holistic and multi-disciplinary assessments of effectiveness that, in the end, can help the Court's mandate to be achieved.

The study also, self-evidently, speaks to the criteria used to measure the Court's effectiveness. This study's assessment of the OTP's effectiveness will inevitably trigger further debate about the fairness of the criteria used to assess the Court more generally. The study has not addressed the question of whether the Court *should* be expected to contribute to reconciliation. In principle, the study endorses the request for humility or, at least, the insistence on having expectations that are 'fair' or 'reasonable'. Yet, to some extent, this debate is a deflection from the fact that ambitious expectations are bound to arise. They are impossible to ignore: the Court is always going to be assessed against the highest standards imposed by the domestic state, and the society in which it has intervened. In that light, the Court, in any event, must exhaust efforts to maximise its effectiveness, and thus, increase the prospects of its potential impact. Hence, the study invites further research on the effectiveness of the Court's organisational procedures, strategies and practices. It is

⁵ Ibid.

also hoped, that the study has expanded the scope for future empirical research and scrutiny (e.g. on selection procedure or rhetoric) that is required to provide a more comprehensive picture of the Court's effectiveness.

In light of this, the study's recommendations for the OTP are significant for the Court at large. The recommendations are united by the fact that they are all oriented towards boosting the Court's perceived legitimacy in affected communities. The Court's perceived legitimacy is at the root of the Court's contribution to all of its goals that require individual behavioural change, such as reconciliation, but also others, such as deterrence. More generally, it is at the root of the Court's crisis on the African continent. Perceptions of the Court's legitimacy are an end in itself. This has transpired to be one of the most serious challenges facing the Court because much of the public debate and column inches reflect deep-rooted scepticism about its authority. It is thus incumbent on the Court to be open to adopting changes that can tackle perceptions.

In view of this, the study's recommendations are scalable, and extend to the Court at large. To explain, the present findings on the OTP's effectiveness vis-à-vis the Court's perceived legitimacy has inevitable consequences for the many organs that make up the Court. Principally, this is because the Office's selection of cases 'creates the framework in which these other actors must implement their own responsibilities.'⁶ Hitherto, many of the challenges faced by the Court's organs can be attributed to the OTP's selections:

'Perception issues created by the OTP's selection of cases will affect the neutral delivery of information through the court's outreach programs. Meanwhile, the prosecution's investigations and choice of cases set in motion the judicial proceedings that will follow before the court; the pace of the prosecution's investigations and, more generally, the unpredictable nature of judicial developments flowing from these investigations, affect the timeframes in which other actors can implement their own activities. Under the court's case law, the scope of the prosecution's charges will determine which victims are eligible to participate in proceedings and even to apply for reparations.'⁷

⁶ HRW, *Making Justice Count: Lessons from the ICC's Work in Côte d'Ivoire* (4 August 2015) 4.

⁷ *Ibid.*

Furthermore, the suggested recommendations to improve the OTP's selection procedure, communication strategy, and its practice of performance measurement have implications for the Court. Indeed, given the Court's significance, they may even offer other international criminal tribunals useful comparative lessons that can inform change and reform. For instance, the ECCC's reasoning in a decision that involved budgetary pressures on on-going investigations, contained thinly veiled criticisms of the effects of performance indicators on international courts.⁸ In this spirit, these final remarks turn to consider the effects of the study's recommendations on the Court.

To begin, chapter four analysed the OTP's selection procedure and argued for a greater commitment to procedural justice. The chapter recommended changes to its selection procedure that would develop consistent treatment of preliminary examinations, acknowledge apprehensions of bias in its selections, and finally, boost the representation of affected communities in, to begin with, its decision not to prosecute. The chapter's main suggestion was to implement a mechanism whereby victims can exercise a right to review a decision not to prosecute (i.e. in the interests of justice). However, beyond the benefits to the procedure, the establishment of a right to review scheme would both signal and strengthen a crucial Court-wide commitment. This commitment is found in the Court's Strategy in Relation to Victims. The Strategy recognises victims by adopting a rights-based approach so as to;

‘...focus on them not as someone with needs who requires assistance, but as a rights holder to whom the duty bearer—in this case the Court...—owes an obligation it must fulfil, [and] reconfirms and empowers the victim as a vital actor in the justice process rather than a passive recipient of services and magnanimity.’⁹

⁸ ECCC, The Co-Investigating Judges (Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for Yim Tith) 004/2/07-09-2009-ECCC-OCIJ (11 August 2017) para. 37-42.

⁹ ASP, *Court's Revised Strategy in relations to Victims* ICC-ASP 11/38 (5 November 2012) para 6.

The OTP's review mechanism would develop the Court's commitment to victim rights in at least two ways. First, and specifically, the OTP's decision to prosecute upholds the rights of victims (victim(s), in effect, trigger a prosecutorial duty to initiate proceedings). This is not an absolute and unconditional right and there may be countervailing considerations that mitigate that duty. However, it logically follows, that a decision *not* to proceed to an investigation/prosecution necessarily, and to some degree, interferes with those rights. In that instance, an OTP review mechanism would develop the Court's respect for victim rights because a potential interference would be more transparent and subsequently fully explained and/or justified.

Second, the OTP's review mechanism could enhance the Court's respect for the voices of victims. Research suggests the Court's respect for victims' voices is highly valued; in the words of one victim: 'The Court is there so our voice is heard.'¹⁰ That being true, victims understand that being heard requires meaningful interactions as part of a genuine dialogue with the Court.¹¹ The Court's inclination in this regard is already discernible. In July 2018, the PTC, in respect of the on-going preliminary examination in the *Situation in Palestine*, ordered (uniquely) the Court's Registry to establish a system of public information and outreach activities among the affected communities and to establish a continuous system of interaction between the Court and victims.¹² It is, as yet, not clear, why the order has been directed at the *Situation in Palestine* alone, nor the reasons why the obligation should not extend to all victims in other situations at the preliminary examination stage.¹³ The establishment of a review mechanism could trigger the development of Court-wide procedures that enable victims' views to be expressed and for them to receive clear and consistent responses.¹⁴ Victims do not speak with one voice, and their views can change, but that is precisely why formal procedures help to foster — in one key way — that affected community-to-Court dialogue.¹⁵

¹⁰ Stephen Cody and Alexa Koenig, 'Procedural Justice in Transnational Contexts' (6 June 2018) *Va.J.Int'l L.* (forthcoming) p.17 available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192116##> accessed 31 July 2018.

¹¹ *Ibid.*

¹² *Situation in the State of Palestine*, (Decision on Information and Outreach for the Victims of the Situation) ICC-01/18 Pre-Trial Chamber I (13 July 2018) para. 14.

¹³ Stephen Kay QC and Joshua Kern, 'Not Appropriate: PTC1, Palestine and the Development of a Discriminatory ICC Jurisprudence' (26 July 2018) <<https://www.ejiltalk.org/not-appropriate-ptc-i-palestine-and-the-development-of-a-discriminatory-icc-jurisprudence/>> accessed 31 July 2018.

¹⁴ Luke Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague' (2015) 13(2) *JICJ* 281, 286.

¹⁵ See Cody and Koenig, *supra* note 10, at 17-20.

Moreover, the review mechanism would prompt Court-wide debate about how to enforce the interests of victims. There is no doubt that there are challenges in implementing victim participation in the Court's procedures, and there has been significant criticism in terms of the administration, overall cost, time (e.g. length of the proceedings in the Chambers by *de facto* duplicating questioning and the presentation of evidence) and indeed questions over the actual benefit to those participating victims.¹⁶ However, the normative principle remain sacrosanct: in the words of the Prosecutor herself: 'the ICC was established as a judicial institution with the interests of victims as a bedrock.'¹⁷ For instance, it has been suggested by others that the PTC should strongly secure the interests of victims by exercising a pro-active review of the Prosecutor's investigations and decisions.¹⁸ If the imperative is to move towards what has been described as 'victim-oriented justice'¹⁹ then reforming procedures, despite the practical challenges, is a crucial step in linking the Court to the experiences of those most affected by the crimes.

Next, the penultimate chapter analysed the OTP's selection rhetoric and argued that its existing reliance on legalism is unpersuasive. The chapter recommended improvements in its rhetoric; to accompany legalism with alternative forms of rhetoric, to speak to affected communities' identity affiliations, and generally, to resort to humility and avoid triumphal tones. These recommendations should be a starting point for a re-think about the Court's communication strategy.

First, this re-think should focus on the Court's public relations agenda. Since its inception, the Court's public relations and legalism have become intertwined and mutually constitutive; 'public relations [also] describes, at one and the same time, an organisation's techniques and its recognition of itself as a political identity.'²⁰ The Court's self-identification is rooted in legalism and this has been essential to the

¹⁶ For an indicative overview, see William A. Schabas, 'Two Ways to Live Within the Budget: Restructure the Chambers; Tame Victim Participation and Reparations' (28 June 2018) <<https://iccforum.com/anniversary#Schabas>> accessed 31 July 2018. See also Luc Walley, 'Victims' Participation in ICC Proceedings: Challenges Ahead' 2016) 16(6) *Int.C.L.R.* 995

¹⁷ Fatou Bensouda, 'Reflections on Peace and Justice in the 21st Century: A Perspective from the Prosecutor of the International Criminal Court' Oxford Annual Global Justice Lecture (12 October 2017) <<http://podcasts.ox.ac.uk/oxford-annual-global-justice-lecture-2017-reflections-peace-and-justice-21st-century>> accessed 31 July 2018.

¹⁸ Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court' (2015) 26(2) *Crim.L.F.* 255, 286-8.

¹⁹ *Ibid.*

²⁰ Edward Bernays, *Crystallising Public Opinion* (Liveright Publishing 1961) 47-8 (xlvii-xlviii).

Court's 'brand'; i.e. its recognisability.²¹ However, the limits of legalism's persuasiveness serve to weaken the Court's public relations agenda. Questions should be raised if, in spite of legalism's recognisability, it is no longer boosting the perceptions of the Court in affected communities or, even worse, damaging them.

Second, and in close connection, the Court might need to re-evaluate its 'expressive' role. Expressivism has its roots in social pedagogy and is concerned with how law and legal practices constitutes attitudes, meaning and perceptions.²² It has been described as the law's function to convey messages or statements that help educate the wider public and reinforce moral consensus.²³ These can be rooted in the pre-trial process and begins with the selection of cases: as Marlies and Glasius consider 'messaging starts long before the verdict is pronounced, and the punishment administered.'²⁴ In the long term, it leads to norms that are internalised by communities and that can induce changes in behaviours and perceptions.²⁵ The Court might need to evaluate or consult on how it conducts of range of practices and procedures so as to boost their expressive impact and bring them closer to the lives of those in affected communities.

One thing is clear; the usual recommendation to improve the Court's outreach function may be necessary but will not be sufficient. The suggestion to improve the quality of outreach is often traced to the lessons of the past ad-hoc tribunals, and the frequent refrain made of the ICTY that a 'failure to engage in effective outreach meant that [the tribunal] lost the initiative in communicating its work and establishing its legitimacy.'²⁶ Often the recommendation is simply 'more and more' outreach that is more accessible and better funded, so as to 'bring the Court home' to affected communities. To clarify, the Court can always (and should) do more with its broad outreach and public communication functions, including adopting early and direct forms of communication channels with victims,

²¹ Christine Schwöbel-Patel, 'The Rule of Law as a Marketing Tool: The International Criminal Court and the Brand of Global Justice' in Christopher May and Adam Winchester (eds), *Research Handbook on the Rule of Law* (EEP 2018) 434-6.

²² See, originally, Emile Durkheim and Wilfred Douglas Halls, *The Division of Labor in Society* (Simon and Schuster Press 1997) and Mark A. Drumbl *Atrocity, Punishment and International Law* (CUP 2007) 173-180.

²³ Cass R. Sunstein, 'On the Expressive Function of Law' (1996) 144 *University of Pennsylvania Law Review* 2021, 2021-7; Margaret DeGuzman 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33(2) *Mich.J.Int'l L.* 265, 313.

²⁴ Tim Meijers and Marlies Glasius, 'Trials as Messages of Justice: What should be expected of International Criminal Courts?' (2016) 30(4) *Ethics and International Affairs* 429, 436.

²⁵ See DeGuzman *supra* note 23, at 313.

²⁶ Rachel Kerr, 'Lost in Translation? Perception of the ICTY in the former Yugoslavia' in James Gow, Rachel Kerr and Zoran Pajić (eds), *Prosecuting War Crimes: Lessons and Legacies of the International Criminal Tribunal for the former Yugoslavia* (Routledge 2014) 112.

strengthening its local field presence, and adopting more tailored and context-specific approaches to outreach that target those areas where there are low-levels of awareness and trust.²⁷ However, outreach is not a panacea. Outreach is only the medium of a communication strategy and in and of itself is unlikely to be effective. As Bogoeva explains:

If the societies and/or their states have no intention of relying on the courts, no amount of outreach will be effective. The best-calibrated outreach programme stands little chance against a disinterested or malicious national broadcaster and leading newspapers. If it has a hostile state against it, it will, at best remain marginal, catering to the few seeking the truth about a conflict whose antagonists are being prosecuted.²⁸

Instead, for outreach to be effective, the content of the communication strategy may require creativity and imagination in overcoming competing narratives about the Court. This creativity might come from the Court sharing the task of public relations by working more collaboratively with domestic actors, civil society, and other organisations to address perceptions. There is no sure-fire solution and it may even be an impossible task, but there are strong reasons for the Court to commence trying.

Finally, the closing chapter assessed the OTP's performance indicators and explained that they do not adequately measure prosecution effectiveness in terms of their eventual outcome(s). The chapter recommended that the OTP reinvigorate its strategy making, embrace qualitative performance evaluation (rather than quantitative performance auditing), and crucially, establish clear outcomes upon which its effectiveness can be duly measured. These recommendations resonate and parallel the concerns raised about the development of Court-wide performance indicators.

The project of developing Court-wide performance indicators began in December 2014. The stimulus for the project was the need for 'a clear picture of the

²⁷ Coalition for the International Criminal Court, 'Key Principles for ICC Communication' Information Comments to the Registry ReVision team' <<http://www.iccnw.org/documents/CommsTeamInformalCommentsRevision13MAR15.pdf>> accessed 31 July 2018.

²⁸ See Bogoeva, *supra* note 2, at 3.

Court's performance over time in key areas that are seen as critical for its success.'²⁹

The first Court report declared the following four key goals were essential to assess the Court's performance:

- 1) The Court's proceedings are expeditious, fair, and transparent at every stage.
- 2) The ICC's leadership and management are effective
- 3) The ICC ensure adequate security for its work, including protection of those at risk from involvement with the Court;
- 4) Victims have (adequate) access to the Court.³⁰

One can state that the four goals, written rather tersely, tend to invite further uncertainty, e.g. what is 'adequate' and what is 'effective' management? The particular challenge of translating the above goals into specific activities has been somewhat addressed by a suite of accompanying indicators that can now be found in the latest report.³¹ Leaving the details to one side, the common feature of these indicators is that they are all quantifiable and highly data-driven.³² This is hardly surprising because the four goals above are 'operative' in nature, or to put it in terms of a judge from the ECCC, they are predominantly 'management or support services related.'³³ The four goals, in the Court's own terms, reflect the need to be 'modest and concentrate[s] on a reduced number of measurable criteria ... without overburdening the exercise with too many criteria and details.'³⁴

That being true, these goals overlook questions of the Court's effectiveness in terms of its outcomes or impact, particularly in affected communities. More scathingly, the goals have been described as a 'hodgepodge of performance targets' that do not sufficiently relate to goals that stem from the Statute, stakeholders or normative expectations e.g. ending impunity.³⁵ Indeed, the goals reflect an availability bias i.e. a tendency to declare something readily identifiable as more

²⁹ ASP, *Strengthening the International Criminal Court and Assembly of States Parties*, ICC-ASP/13/Res.5, 17 December 2014, para. 7(b).

³⁰ ICC, *Report of the Court on the development of performance indicators for the International Criminal Court* (12 November 2015) para. 7.

³¹ ICC, *Third Court's Report on the Development of Performance Indicators for the International Criminal Court* (15 November 2017) p. 3-7.

³² Ibid.

³³ See ECCC Combined Decision, *supra* note 8, at para. 38-9.

³⁴ ICC, *Second Court's report on the development of performance indicators for the International Criminal Court* (11 November 2016) para. 21.

³⁵ Yuval Shany, 'An ICC Availability Bias? The Performance Indicators relating to the Four 'Key Goals' Provide Useful Information on the Court's Operations but of limited Utility in Measuring the Court's Overall Effectiveness' <<https://iccforum.com/performance#Shany>> accessed 31 July 2018.

representative or indicative [of effectiveness] than it actually is.³⁶ Perhaps the one that comes close to effectiveness is the fourth goal on victim's access to the Court, but even then, the Court's most recent report admits that further indicators are required to better assess 'the impact of the various measures taken by the Court to ensure victims' access to the Court and to reach out to the affected communities'.³⁷

The failure to measure the Court's impact is a blind spot that has been raised by civil society representatives. For instance, HRW has strongly encouraged the Court to focus on 'evaluating performance through the lens of impact for victims and affected communities and develop further indicators as necessary.'³⁹ This suggestion, as raised in chapter six, can be made in respect of the OTP's selections because deciding to try particular crimes, in a particular place and by particular persons/groups is critical to its impact on affected communities.⁴⁰ At present the continuing march of measurement tools are, in and of themselves, only 'proxies for progress.'⁴¹ The Court-wide indicators, thus, face a similar risk to that attributed to those of the OTP: an assumption 'that some undefined but relatively simple and measurable goal is being pursued.'⁴² This assumption can impoverish the Court's ideological purpose, because;

'The figure of success becomes 'efficiency' or 'value for money' whilst the often complex and politically contested question of what constitutes 'value' in a particular area is moved away from the spotlight... [Furthermore]...the actual specification of the relevant goals and values is avoided, being obscured within a discourse in which efficiency appears to become the end as well as the means.'³⁸

This being the case, the Court must take steps to establish official goals. There are at least two reasons for doing so. First, the current operative goals (and their accompanying indicators) offer a limited picture of the Court's effectiveness. These goals reflect a tendency to 'make ends of means in organisations ... [and that risks

³⁶ Ibid.

³⁷ ICC, *Report of the Court on the development of performance indicators for the International Criminal Court* (12 November 2015) para. 36.

³⁸ Ibid.

³⁹ See generally, HRW, 'Briefing Note: Fifteenth Session of the International Criminal Court Assembly of States Parties' (11 November 2016) <<https://www.hrw.org/news/2016/11/11/fifteenth-session-international-criminal-court-assembly-states-parties>> accessed 31 July 2018.

⁴⁰ Ibid.

⁴¹ Richard Clements, 'Proxies for Progress' *Edward Elgar Blog* (18 July 2017) <<https://elgar.blog/2017/07/18/proxies-for-progress/>> accessed 31 July 2018.

⁴² Nicola Lacey, 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' (1994) 57(4) *MLR* 534, 534.

losing] sight of the end to which the means are meant to contribute.’⁴³ Ultimately, statistics and numerical measures can only ever paint a limited picture of the Court’s effectiveness or productivity. In the words of the late Antonio Cassese: ‘A court of law is not a factory.’⁴⁴

Second, in the absence of establishing those goals, there is credence to the claim that the current indicators only have ‘legitimising potential’ as part of a public relations exercise to justify requests for funding from States Parties.⁴⁵ This finds expression in the risk that performance measurement is reduced to a ‘self-serving exercise of performance validation.’⁴⁶ If that is true, then there is a cruel paradox in relying on measureable outputs to seek funding. In the short-term, this attempt to demonstrate performance is logical but — perversely — may entrench dissatisfaction with international courts in the future. Ford discusses, that in the long-term, states are motivated to fund international courts not because of measurable outputs, but because of their outcomes i.e. the net benefit that is derived from their impact on the world (e.g. taking steps towards goals that enables societies and communities to see justice being done).⁴⁷ In other words, a State’s rational long-term determination to fund will be a tribunal’s effectiveness in having an impact. It follows then that disproportionate attention on measurable outputs might pursue short-term satisfaction but could be at the expense of the long-term support that keeps international tribunals open.

* * *

Speaking at the turn of the century, the first President of the International Criminal Court argued that the Court’s effectiveness ‘must be placed in a long-term perspective [and that] newer institutions must be given time to be seen as a natural

⁴³ Edward Gross, ‘The definition of organisational goals’ (1969) 20(3) *The British Journal of Sociology* 277, 280.

⁴⁴ Antonio Cassese, *Report on the Special Court for Sierra Leone* (12 December 2006) para. 58. <<http://www.rscsl.org/Documents/Cassese%20Report.pdf>> accessed 31 July 2018.

⁴⁵ Richard Clements, ‘Proxies for Progress’ <<https://elgar.blog/2017/07/18/proxies-for-progress/>> accessed 31 July 2018.

⁴⁶ Carsten Stahn, ‘Is ICC Justice Measurable? Re-thinking Means and Methods of Assessing the Court’s Practice’ <<https://iccforum.com/performance#Stahn>> accessed 31 July 2018.

⁴⁷ Stuart Ford, ‘A Hierarchy of the Goals of International Criminal Courts’ (2018) 27 *Minnesota Journal of International Law* 179, 186-7 (Quoting the work of Ralph Zacklin — once the UN’s Assistant Secretary General for Legal Affairs who played a key role in developing the ICTY and ICTR—who argues that states became dissatisfied with the ad-hoc tribunals because their overall costs were disproportionately greater than their tangible accomplishments and impact on the external world). See, indicatively, Ralph Zacklin, ‘The Failings of Ad Hoc International Tribunals (2004) 2 *JICJ* 541, 541-5.

part of the international scene ...'.⁴⁸ At the time of writing, there are events taking place marking the 20th Anniversary of the adoption of the Rome Statute. It might now finally be time to determine the Court's success by what it helps to change on the ground. This is not to maintain belief in a utopian Court but, instead, is to recognise that the Court should strive to fully exhaust its potential. This study has demonstrated that reconciliation still offers, to quote the recent words of Judge David Baragwanath, 'immense potential' for international criminal justice.⁴⁹ It is hoped that the Court can begin taking some improved steps towards realising it.

⁴⁸ Phillippe Kirsch, 'The International Criminal Court: Current Issues and Perspectives' (2001) 64(1) *LCP* 3, 4.

⁴⁹ David Baragwanath, 'Reconciliation as a Philosophical Foundational Concept in International Criminal Law' Centre for International Law Research and Policy, New Delhi, India (26 August 2017) <<https://www.cilrap.org/cilrap-film/170826-baragwanath/>> accessed 31 July 2018.

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2. Bensouda. F, Statement: 'The Determination of the Office of the Prosecutor on the communication received in relation to Egypt' (8 May 2014).
3. — —, Speech: at the 52nd Munich Security Conference (15 February 2014).
4. — —. Speech: at a seminar hosted by the Attorney General of the Federation and Ministry of Justice of Nigeria International Seminar (24 February 2014).
5. — —, 'Reflections on Peace and Justice in the 21st Century: A Perspective from the Prosecutor of the International Criminal Court' Oxford Annual Global Justice Lecture (12 October 2017).
6. — —, Press Release: 'The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine' (16 January 2015).
7. — —. Statement: 'The Public Deserves to know the Truth about the ICC's Jurisdiction over Palestine' (2 September 2015).
8. — —, Press Release: 'The Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: justice will ultimately be dispensed for LRA crimes' (27 February 2015).
9. — —, Statement: on the opening of Trial in the case against Mr Ahmad Al-Faqi Al Mahdi' (22 August 2016).
10. Bensouda. F, Speech: Fifteenth Session of the Assembly of States Parties (16 November 2016).
11. — —, Statement: before the UNSC on the Situation in Darfur, pursuant to UNSCR 1593 (2005) (13 December 2016).
12. — —, ' Statement: 'Africa and the International Criminal Court (ICC): Lesson Learned and Synergies Ahead' Africa and the ICC: One Decade On' (9 September 2014)
13. — —, Statement: 'Ending Impunity for Massive Crimes: Prosecutorial Strategies' 'Africa and the International Criminal Court (ICC): Lesson Learned and Synergies Ahead' (9 September 2014).

14. — —, Speech: 'The investigation and prosecution of sexual and gender-based crimes: reflections from the Office of the Prosecutor' (24 August 2015)/
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16. Brammertz. S, 'Address of Mr. Serge Brammertz to the UN Security Council' (7 March 2017).
17. Cassese. A, 'The Tribunal welcomes the parties' commitment to justice: Joint statement by the President and the Prosecutor' (24 November 1995).
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21. Dyson (Lord & Master of the Rolls), Speech: 'Delay Too Often Defeats Justice' *The Law Society, London* (22 April 2015).
22. — —, 'The ICTY and the Legacy of the Past' (Speech at the NATO Parliamentary Assembly, 26 October 2007).
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24. Gallón. G, 'Deterrence: A Difficult Challenge for the International Criminal Court' (July 2000) The Helen Kellogg Institute for International Studies Working Paper 275
25. Gurmendi S F, 'End of Mandate Report by President Silvia Fernandez de Gurmendi' (9 March 2018).
26. Jennings. S, 'Plavsic reportedly withdraws guilty plea' *Institute for War and Peace Reporting* (31 January 2009).
27. Krutnes. A. R, Speech: 'Reconciliation vs. Accountability: Balancing Interests of Peace and Justice' Forum of International Criminal and Humanitarian Law (29 May 2015).
28. Neuberger. (Lord), Speech: 'Fairness in the Courts: the best we can do' Criminal Justice Alliance, London (10 April 2015).

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30. Rodger. (Lord), Speech: 'Bias and Conflicts of Interests—Challenges for Today's Decision-Makers' University of Malaya, Malaysia (2010).
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33. Stewart. J, Speech: 'Transitional Justice in Colombia and the Role of the International Criminal Court' (13 May 2015).
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2. Brady. H and Guariglia. F, 'An Insider's View: Consistency and Transparency While Preserving Prosecutorial Discretion' *American Bar Association-International Criminal Court Project* (15 December 2016).
3. — —, 'Our Resolve to Create a More Just World Must Remain Firm' *International Center for Transitional Justice Online Debate* (3 September 2015).
4. Charania. S, 'Without Fear or Favour—An Interview with the ICC Prosecutor Fatou Bensouda' *Justice in Conflict Blog* (15 October 2015).
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6. Elgindy. K, 'When Ambiguity is Destructive' *Brookings Institution* (22 January 2014)
7. Evenson. E and O' Donohue. J, 'States should use ICC budget to interfere with its work' *Open Democracy* (23 November 2016).
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9. Kay. S and Kern. J, 'Not Appropriate: PTC1, Palestine and the Development of a Discriminatory ICC Jurisprudence' *European Journal of International Law Talk!* (26 July 2018).
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4. Crown Prosecution Service (<https://www.cps.gov.uk>)
5. Forum for International Criminal and Humanitarian Law (<https://www.fichl.org>)
6. General Medical Council (<https://www.gmc-uk.org/>)
7. International Bar Association & International Criminal Law (https://www.ibanet.org/ICC_ICL_Programme/Home.aspx)
8. International Center for Transitional Justice (<https://www.ictj.org/>)
9. International Criminal Court (<https://www.icc-cpi.int/>)
10. International Criminal Court Forum (<https://iccforum.com>)
11. International Peace Institute (<https://www.ipinst.org/>)
12. United Kingdom Parliament (<https://www.parliament.uk/>)
13. Yale Law School Avalon Project (Documents in Law, History and Diplomacy) (<http://avalon.law.yale.edu/>)