

Selection of Cases or Selected by Cases: Prosecutorial Ecology and Agency in *Al Hassan* Before the ICC

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On 14 November 2024, the Central African Republic ('CAR') filed an admissibility challenge in the Edmond Beina case before the International Criminal Court ('ICC').¹ The ICC Office of the Prosecutor ('OTP') is seeking custody of Beina, who is held by the CAR Special Criminal Court where the investigations of the *Beina* case and other related cases have been completed and trial is pending.² Why would the ICC-OTP openly compete with a national jurisdiction in this manner? The complementarity principle requires the ICC to "complement, not replace, national courts".³ A closer look at situations before the ICC suggests that there are only a few defendants in the custody of the Court. At the time of writing, both the prosecution and the defence have just withdrawn their appeals in the *Al Hassan* case.⁴ Additional cases in the Mali and other situations are either closing or waiting to have suspects in custody.

Given the nature and scale of atrocity crimes, it is reasonable to think that the OTP needs proper selection and prioritization so that it is not overwhelmed by cases. This may not be true in all phases of prosecutorial decision-making. Despite multiple ongoing investigations, the potentiality of a case can only materialize when the suspect is alive and in the Court's custody. In addition, the OTP can only take a case forward when it is able to collect sufficient evidence. These practical constraints diminish the actual opportunities of trial. At the end of the day, the OTP's problem is not having too many, but too few, trial-ready cases. This becomes a court-wide problem because without cases in trial, judges do not have enough work to do.

This policy brief describes how lack of trial opportunities affects decision-making, in particular the OTP's exercise of agency in pursuit of institutional interest. Is the selection of cases over-determined by the availability of defendants and evidence? Are selection criteria deliberate policy design or after-the-fact rationalization? How does this affect defendants at trial and ICC observers? I view these questions in light of the Mali situation, in particular the recently closed *Al*

Hassan case.

1. Availability of Suspect and Evidence as Preconditions to Trial

Currently, the ICC cannot try a defendant *in absentia*. This means that having the suspect in custody is essential to the functioning of all Court organs. Worse than a suspect at large is, of course, a suspect dead. Where the main suspects are all dead or missing, atrocities in a situation cannot be accounted for through criminal trials. Justice cannot be rendered, at least not by the ICC. This is the ecology of prosecutorial decision-making. The Court's functioning and relevancy depend on elements beyond its control. This does not mean, however, that the Court cannot exercise "institutional agency".⁵ Within a small margin, the Court can still operate in a way that maximizes its institutional interest.

The Court needs to be seen to be busy. Sufficient workload is crucial to justifying budget request and sustaining the Court's self-image as a justice dispenser in atrocity situations. When 'ideal' suspects cannot be apprehended, the Court may be inclined to secure custody of whoever is available in a situation, especially if costly investigations have been going on for several years. This can stimulate a kind of "first come, first served" approach.⁶ A former ICC-OTP staff says that it is better to charge someone within reach than going after a suspect "who will likely become just another fugitive".⁷ Prosecutorial decisions can be expedited when a suspect in national custody faces imminent release, as was the case of Thomas Lubanga Dyilo.⁸

The Mali situation was generated by a civil war between the government and Islámic groups. Atrocities were committed in Northern Mali where the rebels took control. Over time, the ICC secured custody of two mid-level members of an extremist group, Ansar Dine, which controlled the city of Timbuktu on behalf of AQIM (al-Qaeda in the Islámic Maghreb) for 10 months. The two suspects were considered small fish, previously unknown to close observers. One big fish, Iyad Ag Ghaly, features in the third of the three cases in the Mali

¹ ICC, Pre-Trial Chamber II, *Situation in the Central African Republic II*, Transmission of Public Redacted Version of the Admissibility Challenge Received from the Central African Republic, 15 November 2024, ICC-011/14-194 (<https://www.legal-tools.org/doc/o50ryv8b/>).

² ICC, Pre-Trial Chamber II, *Situation in the Central African Republic II*, Order on the reclassification of the warrant of arrest for Edmond Beina and on other procedural matters, 7 November 2024, ICC-011/14-192 (<https://www.legal-tools.org/doc/0w8467fh/>); Cour Penale Speciale, "Clôture de l'instruction préparatoire de l'affaire dite « Guen »", 12 December 2024, Communiqué de presse CPS no. 121224 (<https://www.legal-tools.org/doc/3wkbgr01/>).

³ See ICC, "About the Court" (available on its web site).

⁴ ICC-OTP, "Statement of ICC Prosecutor Karim A.A. Khan KC on the discontinuance of appeals filed in the case against Mr Al Hassan", 17 December 2024 (<https://www.legal-tools.org/doc/5milscbi/>).

⁵ Mark Kersten, "Taking the Opportunity: Prosecutorial Opportunism and Case Selection at the International Criminal Court", in Margaret M. deGuzman and Valerie Oosterveld (eds.), *The Elgar Companion to the International Criminal Court*, Edward Elgar Publishing, Cheltenham, 2020, p. 185 ('Kersten, "Taking the Opportunity").

⁶ Morten Bergsmo, "On the Theme of Selection and Prioritization Criteria", in *id.* (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Third Edition, Torkel Opsahl Academic EPublisher ('TOAEP'), 2024, p. 8 (<https://www.toaep.org/ps-pdf/4-bergsmo-third/>).

⁷ Alex Whiting, "The First Case for the ICC Prosecutor: Attacks on Cultural Heritage", in *Just Security*, 29 September 2015.

⁸ James A. Goldston, "More Candour About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 2, p. 12.

situation. He is 70 years old and still at large – no one knows which will come first, death or custody. In the *Al Hassan* Trial Judgment, the Chamber gives a detailed account of all the crimes charged, mentioning several Ansar Dine members who would seem to bear much greater responsibility than Al Hassan. These other persons are not charged – they are either dead or unavailable for trial.⁹

In terms of evidence, the resolve to “deliver results in the courtroom”, that is, higher conviction rates, makes the OTP focus on cases where international co-operation and conditions for investigation are good.¹⁰ In the Mali situation, evidence has been sufficient to take the two above-mentioned suspects to trial. In the *Al Mahdi* case, where the defendant was charged with “intentionally directing attacks against religious and historic buildings in Timbuktu”, the proof of crime is quite straightforward: there was video recording of the destruction of monuments and public admission of responsibility.¹¹ In *Al Hassan*, the OTP was able to call multiple witnesses and present documentary evidence. Al Mahdi and Al Hassan may be the best the Court can get in the Mali situation.

2. Three Ways to Rationalize Case Selection

While sometimes case selection is overdetermined by availability of suspects and evidence, there is still a need to make selection look rational, or create an appearance that there *was* selection. Otherwise, case selection could be seen as arbitrary and unpredictable. That is, the ‘cart before the horse’ practice needs to be rationalized as ‘horse driving the cart’. There is a further need to make the most out of these resource-intensive cases, that is, pressing for maximum accountability and impact. As such, the ICC-OTP strategizes around available opportunities, seeking to not only justify case selection in a principled manner, but also maximize its influence and relevancy. This is in the interest of the Court as an institution, and sometimes also desired by the civil society and victims.

Let me consider three common rationalizations of opportunity-driven prosecution.

2.1. Gravity

The ICC-OTP considers gravity “the predominant case selection criteria”.¹² It means two things: the crimes in question should be grave; and the suspect’s responsibility should be great.¹³ This follows the assumption that the Court should use its limited resources on cases that can have the biggest impact. Another consideration is that there are many lower-level perpetrators, the lower in hierarchy, the more. When the OTP starts going after one or several of them, it is difficult to justify the neglect of others. While high-level perpetrators are typically few. The Court has capacity to try all leaders if they are available. These are reasonable arguments, in theory.

The Prosecutor does pursue senior leaders, such as heads of State. When he does so, he is not expecting their immediate surrender. Surrender is only possible after they step down. In these cases, pursuing senior leaders typically serves a political function. By imposing a political cost through legal action, Court officials seek relevancy in major global events and approval of like-minded actors.

But hypothetical cases are not enough. The Court needs actual trials to be a full-time court. Given how unpredictable the surrender of defendants is, and how senior suspects are often not apprehended,

⁹ For example, Abdallah al-Chinguetti and Abdelhamid Abou Zeid are dead, see the respective pages on the English *Wikipedia* web site (as of 13 December 2024).

¹⁰ “Prospect of success” is an important factor, see ICC-OTP, “Strategic Plan 2023–2025”, 13 June 2023, paras. 22–24 (<https://www.legal-tools.org/doc/mu9jlt/>); see also ICC-OTP, “Policy Paper on Case Selection and Prioritisation”, 15 September 2016, para. 51 (‘OTP Policy Paper on Case Selection and Prioritisation’) (<https://www.legal-tools.org/doc/182205/>).

¹¹ Whiting, 2015, see *supra* note 7.

¹² OTP Policy Paper on Case Selection and Prioritisation, para. 6, see *supra* note 10.

¹³ *Ibid.*, paras. 35–44.

the key criterion of gravity has to be interpreted somewhat arbitrarily to fit individual cases.¹⁴ In other words, arbitrary occurrence of surrender results in arbitrary interpretation of policy and rules. Instead of norms regulating facts, facts on the ground may affect how norms are applied.

After the surrender of Al Mahdi to the ICC, a local observer comments that Al Mahdi is a small fish and that “in Mali it is the little fish who are caught”.¹⁵ As long as one can avoid being captured, one can avoid trial. One way to achieve this is to climb up to senior positions so that one has more resources to evade capture or negotiate a political settlement.¹⁶ Those at lower levels are easily ‘sacrificed’. This is not to say that they do not deserve to be tried and punished. It merely suggests that they may be tried at the ICC just because they are more readily available.

2.2. No Gravity: Trying Lower-Level Perpetrators as a Means to an End

Given the reality of how suspects come before the Court, sometimes even creative interpretation cannot make certain defendants fit the gravity standard. These may be the only possible cases to take forward in a given situation at a given time. The Court needs to work with what it has, to fill the workload and render *some* justice. How to justify prosecuting people who are obviously not the most responsible in a given situation, like Al Mahdi and Al Hassan? The OTP adopts a clever theory to deviate from the gravity standard while giving the appearance of conforming to it. This is formulated as “a strategy of gradually building upwards”. Prosecuting lower-level perpetrators is supposed to build evidence and legal precedents which may help eventual conviction of those bearing greatest responsibility.¹⁷ In other words, it is a means, not an end in itself.

This approach is not new. The International Criminal Tribunals for the former Yugoslavia (‘ICTY’) and Rwanda used a “bottom up approach”¹⁸ in their early days, when only small fish were available.¹⁹ At the ICTY, senior perpetrators were eventually apprehended – although it is questionable whether their prosecution is result of the Tribunal’s incremental strategy or simply made possible by political developments. For the ICC, there are more uncertainties as it deals with multiple situations and changing prospects of co-operation from different actors. It is essentially a gamble. The OTP assures stakeholders that trying lower-level perpetrators is not as trivial as it looks: it will lead to something bigger; it is worth the resources. Whether such promises can be delivered depends on many factors and is a

¹⁴ See for example, William A. Schabas, “Selecting Situations and Cases”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015.

¹⁵ Akshan de Alwis, “Is the ICC Fishing in the Right Pool?”, in *Diplomatic Courier*, 6 February 2017.

¹⁶ More on merits of international criminal justice intervention, see David Mendeloff, “The Coercive Effects of International Justice: How Perpetrators Respond to Threats of Prosecution”, in Susanne C. Knittel and Zachary J. Goldberg (eds.), *The Routledge International Handbook of Perpetrator Studies*, Routledge, Abingdon, 2019.

¹⁷ ICC-OTP, “Strategic Plan 2012–2015”, 11 October 2013, paras. 4, 22 and 43 (<https://www.legal-tools.org/doc/954beb/>); “Strategic Plan 2016–2018”, 6 July 2015, paras. 13, 17 and 34 (<https://www.legal-tools.org/doc/7ae957/>); “Strategic Plan 2019–2021”, 26 July 2019, paras. 5 and 24 (<https://www.legal-tools.org/doc/7ae957/>). See also Rod Rastan, “Case Selection and Prioritization at the International Criminal Court”, in Bergsmo (ed.), 2024, see *supra* note 6.

¹⁸ Morten Bergsmo and Maria Paula Saffon, “On the Nature of Selection and Prioritization Criteria: An Analysis of Select Documents”, in Bergsmo (ed.), 2024, p. 120, see *supra* note 6, where it describes the initial case selection criteria as fragmented and practice-guided.

¹⁹ For example, for the first ICTY ICTR indictees, Tadić and Akayesu, the “main selection merit was simply that they could be detained”, see Bergsmo, 2024, p. 8, *supra* note 6. See also Claudia Angermaier, “Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia”, in the same book.

matter of chance.

2.3. Thematic Prosecution

A third justification for case selection is the thematic importance of certain crimes.²⁰ The OTP's policy papers have laid out a number of themes such as gender-based violence, crimes against children, and attacks against special-status objects.²¹ These themes are informed by past and ongoing cases. Moreover, as these themes are quite common in most international crimes, it is not clear whether subsequent case selection operationalizes a pre-existing policy or the policies stand to justify whichever case that comes before the Court.

Al Mahdi was hailed as the ICC's first case on attacks against cultural heritage. This is particularly relevant in light of international concern over previous destruction of ancient sites and artifacts by ISIS in the Middle East.²² *Al Mahdi* extends the Court's influence to a new area – protection of cultural heritage – alongside the usual actors such as UNESCO.²³ *Al Hassan* was presented as the first ICC case where the crime against humanity of persecution on gender grounds was charged, in addition to other gender-based crimes such as rape and sexual slavery as crimes against humanity and war crimes, and forced marriage as an inhumane act under crimes against humanity.²⁴

In a way, the 'firsts' increase the importance of these and other cases despite that they are against lower-level perpetrators. Thematic emphasis sensitizes observers to the Court's role in protecting the most vulnerable persons and objects. By adopting a victim-centred perspective, the Court shifts attention to the values it upholds from how effectively it upholds them. By foregrounding specific crimes, the OTP downplays value trade-offs in resource distribution.

3. Risk of Proxy Prosecution and Pressure for Thematic Conviction

The way the OTP rationalizes and strategizes around a few available cases is understandable and even necessary for the institution's survival. Yet, it may have other unexpected consequences. Building cases upwards can turn into 'proxy prosecution', where a defendant is made to take responsibility for basically all the crimes in one situation.²⁵ Highlighting certain categories of victims may create pressure to convict some crimes more than others. From an institutional point of view, the defendant is less important. What matters is that international criminal justice, with the ICC acting as its primary institution, recognizes the victims' grave sufferings and condemns atrocities.²⁶

The *Al Hassan* case shows such a tendency. No doubt many serious crimes have been committed in the city of Timbuktu during the

²⁰ More on this topic see Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, Second Edition, TOAEP, Brussels, 2018 (<https://www.toaep.org/ps-pdf/13-bergsmo-second/>).

²¹ The ICC-OTP seeks to prioritize its work on sexual and gender-based crimes and crimes against children, see "Strategic Plan 2023–2025", para. 59, *supra* note 10. See also other OTP policy documents: OTP Policy Paper on Case Selection and Prioritisation, para. 46, see *supra* note 10; "Policy on Cultural Heritage", 14 June 2021 (<https://www.legal-tools.org/doc/lu5x3g/>); "Policy on the Crime of Gender Persecution", 7 December 2022 (<https://www.legal-tools.org/doc/ps5f17fe/>); "Policy on Gender-Based Crimes", December 2023 (<https://www.legal-tools.org/doc/bovm57a1/>); "Policy on Children", December 2023 (<https://www.legal-tools.org/doc/g8r40dhh/>); "Policy on Slavery crimes", December 2024 (<https://www.legal-tools.org/doc/4iafrmo/>).

²² Whiting, 2015, see *supra* note 7.

²³ Kersten, "Taking the Opportunity", p. 198, see *supra* note 5.

²⁴ Valerie Oosterveld and Nicole Dotson, "Gendered Crime as a Central Focus in the ICC's Al-Hassan Case", in *Armed Groups and International Law*, 31 July 2023.

²⁵ Charles A. Taku and Beth S. Lyons, "Ongwen: A Stain on International Criminal Justice", in *Journal of International Criminal Justice* (advance article), 5 November 2024.

²⁶ More on prosecuting lower-level perpetrators and moral expediency, see Song Tianying, "The Ordinary Soldier in Military Organization: Is International Criminal Law Delusional About Human Agency?", in *Journal of International Criminal Justice* (forthcoming).

10 months of rebel governance. For the two perpetrators in ICC custody, Al Mahdi had only been convicted of the war crime of attacking religious and historic buildings, through a guilty plea; Al Hassan was the only one left in the Mali situation, at least for the foreseeable future. Given the gravity of crimes and unavailability of other perpetrators, the OTP has incentive to charge a wide range of crimes, with thematic emphasis; and the Court may end up feeling that it has to convict accordingly. Indeed, Al Hassan was charged with fourteen counts of crimes against humanity and war crimes, many of which are based on the same facts.

In most incidents described in the Trial Judgment, Al Hassan did not make the decisions and had little personal involvement. His contribution to the crimes as the Islāmic Police deputy was mostly indirect and even thinly stretched in some instances. The Judgment describes his job as "writing and signing police reports, taking part in the transfer of accused persons to the Islamic Court and implementing the judgments and sentences handed down by it".²⁷ Crimes of rape in detention, for example, were committed by members of another agency – *Hisbah*, the 'Morality Police' – with approval of its leader, Mohamed Moussa.²⁸ As Judge Akane points out in her dissenting opinion, Al Hassan as an Islāmic Police leader had no authority to instruct the head of the *Hisbah*.²⁹ Moreover, Al Hassan and other Ansar Dine members were explicitly opposed to these acts of sexual violence, which were considered against group ideology and policy.³⁰ As to the crime of forced marriage and associated acts of rape and sexual slavery, Al Hassan's contribution is limited to requesting allowances for police officer who wished to marry and the mediation of a marriage between a police officer and a local woman, in which context no evidence of crimes was presented. In the other instance relating to the forced marriage charge, Al Hassan's mediation was unsuccessful and no marriage took place.³¹

Now consider the local community's attitude towards Al Hassan. Al Hassan was well-known among the locals before the takeover of Ansar Dine or AQIM. In his role as the Islāmic Police deputy, he often interacted with the population, "speaking to victims" and "mediating disputes".³² The Judgment confirms that he was "well liked by the population" and "considered by many as someone who would (try to) help the people who sought him out".³³ The Chamber also acknowledges that, after his surrender to the Court, the local community expressed their forgiveness and hoped that Al Hassan would return to them.³⁴

The Judgment gives the impression that indeed grave crimes have been committed, and there is a need to convict *someone* of these crimes. Moral expediency is imminent. The sophisticated modes of liability in international criminal jurisprudence come handy. For example, Al Hassan was charged of the crimes of rape, sexual slavery and forced marriage through sharing a common purpose of the Islāmic group, Ansar Dine, under Article 25(3)(d) of the ICC Statute. Even if the legal technicalities stand – whether they do is not the focus of the current discussion – one cannot but ask: Why Al Hassan? Why the ICC? One can only think that he happened to be at the right place at the right time. No other person was. The OTP cannot explain, in a

²⁷ ICC, *Prosecutor v. Al Hassan ag Abdoul Aziz ag Mohamed ag Mahmoud*, Trial Judgment, 26 June 2024, ICC-01/12-01/18-2594-Red, para. 1697 ('Al Hassan Trial Judgment') (<https://www.legal-tools.org/doc/o613gxre/>).

²⁸ See *ibid.*, paras. 534–543.

²⁹ Separate and Partly Dissenting Opinion of Judge Tomoko Akane, para. 45 ('Judge Akane Opinion') (<https://www.legal-tools.org/doc/46ggbug/>).

³⁰ Al Hassan Trial Judgment, paras. 466 and 666, see *supra* note 27. Mohamed Moussa was eventually removed from his position as head of *Hisbah*.

³¹ Judge Akane Opinion, para. 54, see *supra* note 29.

³² Al Hassan Trial judgment, paras. 1070, see *supra* note 27.

³³ *Ibid.*

³⁴ *Ibid.*, para. 1087.

principled manner, why a certain person was charged, while others of comparable or greater responsibility were not.

Al Hassan was eventually acquitted of the gender-violence crimes, for complicated technical reasons. In particular, Judge Akane says that these crimes were not part of the common purpose and Al Hassan did not make any contribution to them.³⁵ Another judge, Judge Mindua, excludes Al Hassan's responsibility for these and other crimes on the ground of duress.³⁶ The two judges form a majority in the acquittal decision, but for completely different reasons. As both sides have discontinued their appeals, the judgment is now final.

4. Cognitive Bias and Motivated Reasoning in the Pursuit of Institutional Interest

What has been achieved in prosecuting and convicting Al Hassan? At least the ICC's institutional interest has been served. The OTP has created another 'first' in thematic prosecution. And it has generated work – and budgetary justification – for the whole Court. For some, it is more important “to keep the trials going” than dwelling on “who is prosecuted and for what”.³⁷ The *Al Hassan* trial also produces a positive performance record for the OTP as convictions were secured, although the acquittal of gender-based crimes was a disappointment. Civil society approves, except for the acquittal part. While the victims may have wished to see direct perpetrators or those bearing greater responsibility punished, their sufferings have been heard in court proceedings and confirmed by an international judgment.

The efforts to rationalize case selection and maximize institutional interest may have resulted from both *strategic* and *motivated* thinking. First, they are often seen as strategic moves to gain relevance and resonance. As such, these moves may be inconsistent with the OTP's obligation to conduct its work in an impartial manner, such as assessing “incriminating and exonerating circumstances equally”.³⁸ This is a cynical, but common interpretation of behaviour: decision-makers are just consciously self-serving. What is typically overlooked is that self-serving reasoning can be done at the unconscious level. When one has an interest in believing something is true, one might as well adopt such a belief despite that it is a distortion of reality.³⁹ This interest can be practical usefulness or value affirmation, or both. Motivated reasoning is therefore a pattern of irrational thinking that has a function: it meets “the need to maintain psychological well-being and a desired self-image”.⁴⁰

The decision-maker may be motivated to think in line with the institutional interest and values of criminal justice, without being aware of it. “Self-justification, if not self-righteousness”,⁴¹ can lead prosecutors and judges to see moral expediency as serving the interest of justice. The OTP's stated goal is to cover “as much as possible [...] the

³⁵ Judge Akane Opinion, para. 2, see *supra* note 29.

³⁶ See Opinion individuelle et partiellement dissidente du juge Antoine Kessa-Mbe Mindua (<https://www.legal-tools.org/doc/zlv5eyl2/>).

³⁷ Bergsmo, 2024, p. 8, see *supra* note 6.

³⁸ ICC Statute, 17 July 1998, Articles 45 and 54 (<https://www.legal-tools.org/doc/7b9af9/>).

³⁹ Robert Jervis, *Perception and Misperception in International Politics*, Princeton University Press, 2017, p. lxxx.

⁴⁰ Robert Jervis, *How Statesmen Think: The Psychology of International Politics*, Princeton University Press, 2017, p. 100.

⁴¹ *Ibid.*, p. 122.

criminality [...] within a given situation” and to ensure accountability for the most serious crimes.⁴² Decision-makers may have incentive to think that this goal must be achieved through available opportunities, even if it entails distortion of reality. Think about the drunkard who looks for his keys under the lamp post simply because there is light. ‘The Drunkard's Search’ reminds us of the natural bias to look at information – in our context, cases – that is most readily available and easiest to process.⁴³ Decision-makers may give cases excessive meaning and importance just because they are there.

This does not mean that the decisions are made in bad faith. As motivated reasoning happens unconsciously, it is very difficult for the thinker to scrutinize the thinking process and correct irrationalities. Decision-making, therefore, is at least partly influenced by an automatic bias in favour of institutional interest and personal values.

5. Conclusion

This policy brief steps outside of the ICC-OTP's own narrative in case selection. It describes the OTP's exercise of institutional agency in light of scarce opportunities to have trials. I argue that the availability of defendants and evidence plays a more important role than what is commonly assumed. I examine the selection process in a reverse order compared to standard criteria discussion. Instead of policy guiding action, I highlight how opportunity shapes formulation and interpretation of policy. Strategic planning and normative design should be seen in light of actual opportunities. Norms may serve the function of after-fact rationalization rather than restricting a highly discretionary selection process. This is not to deny that there are many other considerations in case selection and prioritization. All these factors may affect decision-making differently as the work on a situation progresses. And what externals see – be they academics or local victims steeped in the facts of the situation – will only be the tip of the iceberg of the OTP's extensive work over a long period. The degree to which practical constraints affect each case also varies.

The actual value of normative positions of the ICC and other actors needs to be assessed in concrete contexts. The Court sees that it needs to hold on to a grand narrative while avoiding having no day-to-day business. Grand narrative is attractive, but not enough to mobilize consistent support and co-operation. Many factors intervene between talk of support and actual support. This creates an incentive for the OTP to take whatever prosecution opportunity that is feasible and make the most out of it. Decisions are made following both strategic thinking and motivated reasoning.

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⁴² OTP Policy Paper on Case Selection and Prioritisation, para. 45.

⁴³ Jervis, 2017, p. 7, see *supra* note 40.



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