



Lexsitus Lecturer: Professor Jens M. Iverson (Leiden University)

Topic: ICC Statute Article 15

Level: Advanced

Date of recording: 13 June 2017

Place of recording: The Historical Reading Room, Peace Palace, The Hague

Duration of recording: 14:24

PURL of film: www.cilrap.org/cilrap-film/15-iverson/

PURL of English transcript: www.legal-tools.org/doc/c52b60/

Morten, Carsten, thank you. This is a great project. I can't wait to read everybody's chapters.

Imagine, if you will, two overworked, under resourced OTP team leaders. They're working on alleged crimes in different countries. Ashraf has to decide whether to prioritize destruction of a Temple in Palmyra or a barrel bomb campaign that has killed at least 300 people. Beatrice has to look at the destruction of a magnificent cathedral or an orphanage that has allegedly killed 300 children. Whatever choice they make, whatever they prioritize or deprioritize, they will be criticized.

So how can we help Ashraf and Beatrice? What guidelines should they use to guide their use of prosecutorial discretion? I suggest we can help Ashraf and Beatrice in part by preventing the conversation about prosecutorial discretion from collapsing into accusations of politicization on one hand, and then declarations that the OTP follows the law and evidence on the other. I'll explain this more in a second, but this is what I mean by disarming the trap in my title. To allow discourse that goes beyond a mechanical application of the law or detestable politics. To put it more simply, we should welcome the OTP's increased desire for transparency to speak about the value choices it's making. We should encourage this, and we should listen to them, especially when we disagree with the value choices they express. Ashraf and Beatrice should approach these problems in part by paying careful attention to what is valued by affected individuals and communities in reflecting on what a possible conviction for those crimes would mean for those specifically affected. Or, again more simply, Ashraf and Beatrice should ask those affected as directly as possible using tools of social science to get quantitative and qualitative responses and listen to what they say. So, the meaning of quality and quality control has to in part be defined by those actually affected by criminal conduct.

So, at its heart, this chapter is a plea for a more open discussion of the trade-offs inherent in pursuing international criminal justice. Particularly with a limited budget and limited resources, too much time is wasted in unsubstantiated allegations of politicizations – I have to say not in this room today, much to my delight – and unsatisfying indications of simply following the evidence. Generally, too much we are still stuck in a rhetorical trap that ill serves the goals of making and explaining and improving our value choices and critiques. So, the chapter as I've submitted it and I would love feedback now, or given the limited time, at the dinner – it largely builds upon the work of Mirjan Damaška, Amartya Sen, and John Dewey,

as well as other really valuable contributions from other scholars. I don't really have time to fully outline why I think their thinking is helpful here, but I'll just introduce their basic thoughts in order to prompt further discussion.

So, I endorsed Damaška's powerful argument echoed by many others, including Carsten this morning, that international criminal justice is expected to do too much. That it has an overabundance of goals. These goals are in tension with each other, and I further want to emphasize that when it comes to which goals to prioritize, I concur with Damaška that in general default response should be the didactic effect of international criminal law related to performative or expressive function of international criminal law. It scales up well. It scales up better than deterrence or incapacitation or many of the other utilitarian functions isolated for criminal justice given the extremely limited function and capacity of the ICC. And because of international criminal law's ability to express and reinforce our fundamental values, at the heart of what Mirjan has identified as the humanization of international law is so important, is so central to what we are doing in international criminal law.

With regards to Sen, I stole the example of Ashraf having to respond to two difficult to compare events from him. I cite him properly, but Sen argues that Ashraf has to be able to pick one or the other, if that's all he's really able to do in the limited space available. And his choice doesn't have to be a priority, the best choice. So, Sen is really useful because he provides us an ethical theoretical foundation to create a space in which we can actually talk about contrasting values in a world of constrained choices. And Dewey, like many pragmatists, very difficult to parse let alone summarize, but I'll just say if you agree with Damaška and follow this idea that reinforcing these values at the heart of international criminal law is important, then there's a powerful rationale for listening very carefully and intentionally to different local communities and realize that it's okay if those local communities are coming up with different value choices on their own.

The end of the day if Ashraf and Beatrice come to starkly different answers to their dilemma: Ashraf focuses on the destroyed Temple; Beatrice focuses on allegedly murderous orphanage. That's not a sign of contradiction on its face. It's not a sign that the OTP has been politicized or that they're failing to follow where the evidence leads them, even if these are highly charged, highly political issues domestically. It could mean – it hopefully means – that they are listening. The different choices and varied communities may be a sign that they are doing their job, but it will be hard to know unless we disarm the trap of thinking that everything is either politics or law.

I'm going to go back to my argument, my main argument, because this all comes from noticing a pattern in the OTP's response to allegations of politicization. When particular charges in the first trial of the ICC are questions, emphasize their following the lead of the evidence. When members of one side of an armed conflict are charged but not the other – say, we're not going to balance – that wouldn't be following the evidence, that would be a political choice. We must avoid politicization. When the question of whether there is tension between prosecution and peace, OTP spokesman might point to the UN Security Council's power to pause investigation and prosecution saying: "that's where political choices are going to be made not the OTP." The entire structure of their response is focused on avoiding this allegation of politicization.

I'm really sympathetic with the OTP's rhetorical approach towards this threat of politicization, but what is needed I suggest is a conversation where those interested in the OTP's decisions can discuss them without quickly falling into an artificial dichotomy where everything is either political or legal with no room for additional criteria to be considered or applied. Because you look at the substance, the horrors of what we work with forcing children to kill, the structural threat of election violence, the specific values threatened by forced mar-

riage, or other forms of sexual and gender-based violence – choosing to prioritize addressing one of these at the expense of another in our world must unfortunately be done. Prioritization must happen. Not only at the OTP, at the ICC, but really in any criminal law response to mass atrocities with mass victims and mass perpetrators. Even combined, the legal and political frameworks merely provide a needlessly binary worldview, and this dichotomy places the OTP in a position of unnecessary opacity. So functionally, too often, they're quiet. The tension between the two frameworks of law and politics is a real one. Virtually any choice by the OTP can usefully be analyzed both in terms of its relations to specific legal texts, and its effects in power relations, but the analysis need not and should not stop there. The prosecutor may choose within the legal limits of her discretion, not merely or always just to further a particular legal theory or approach or to advance the power of one group over another, but also to express, to reinforce, sets of human values which are reflected in law and politics, but which are not wholly legal or political.

So, to bring up back to Lubanga for example, charging an accused for recruitment of child soldiers, but not for gender sexual based violence despite evidence of both to take a notorious example – can be thought of not only as a legal or political choice, but also as an expressive, didactic, performance choice and critiqued or praised on that basis. The OTP could be praised for delivering a message with special emphasis that the recruitment of child soldiers is wrong and may have repercussions for the perpetrator. The OTP may be criticized by implicitly sending a message that gender and sexual based violence is not important enough to investigate, to charge, these victims are not worth listening to, even when it would not necessarily involve additional accused or evidence. Now either of these statements has legal or political ramifications, but at their core do not have to be categorized as legal or political, regardless of one's opinion on the choice, the conversation about prosecutorial discretion is enriched by consciously avoiding unnecessary simplification into a political legal dichotomy.

So, in order for the OTP to use its discretion in the best possible manner and for international criminal law to best address the terrible issues necessarily in its portfolio, we should have a richer, franker discussion over what to do with limited resources. This may not only promote the values behind each of the options as they're discussed, enrich our understanding of them, and help us come to better decisions, it may ultimately result in greater support and financial backing for the project of international criminal law to minimize the necessity of such incredibly difficult decisions. Then again, it may not. Discussing these trade-offs may not, for example, motivate proper funding of the ICC. There will be disagreement inevitably and lack of consensus, but that lack of consensus is more of a good place to start as we evaluate different value choices in local communities and more broadly. Isaiah Berlin once stated that: "collisions of values are the essence of what they are [meaning values] and what we are".

So, this chapter is arguing that we should directly confront the collisions of values inherent in the use of prosecutorial discretion, but we can only really do so once we've disarmed the trap of imagining that everything can be reduced to law or politics. By addressing the collision of values beyond law and politics hopefully we'll get closer to the heart of what we as international criminal lawyers, and indeed all who participate in international criminal justice, think we are doing and think, ultimately, we should be doing.

Thank you very much.