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LARGE-SCALE VICTIMIZATION AND SMALL-SCALE TRIALS:

Selection Criteria and the Use of Sampling Techniques in the Investigation of International Crimes

1. Abstract

Large-scale victimization due to armed conflicts more often than not is related to acts that constitute international crimes (which for the purpose of this paper refer to war crimes, crimes against humanity and genocide). In the perspective of International Criminal Law (ICL), large-scale victimization will necessarily have to be accounted for selectively, and in small-scale trials, because of legal and practical limitations. This raises critical issues of legitimacy and representativeness at different levels.

First, at the broadest level, a situation will have to be selected from the universe of potential situations of international concern around the world. Then, cases consisting of particular offences and accused within the situation shall be selected. Finally, the selection of means of evidence to investigate and prove those cases will take place.

Issues specific to each of these levels need to be discussed in order to define the most objective and reliable criteria to select (in this order) situations, cases and means of evidence, as to optimize the representativeness of the proceedings vis-à-vis the broader reality of large-scale victimization. The credibility and legitimacy of international justice will be determined to a large extent by their real or perceived ability to represent in a fair and objective way the realities of large-scale victimization.

2. Introduction

"There are many ways to kill a person, but only some are illegal"
(Bertolt Brecht)

The idea that law is to be applied in some sort of neutral universal manner, as a kind of righteous epiphany, belongs in the field of magic beliefs rather than social conventions, and it is usually referred to as "the Kantian fallacy". Criminal Law is rather the result of the combination and tension between the two main pillars on which it is built, penal dogmatic and criminal policy, which roughly refer to the formal definition of the crime and its effective prosecution, or in other words the theory and practice of this trade.[2] Such distinction can be explained also in terms of primary and secondary criminalization, whereby the former is the "initial phase" of defining the crime, and the latter "comprises the control organs - judges, police, etc. - in the action of selecting which illegalities must be prosecuted and which individuals must hence be criminalized".[3]

Hence, the words that Brecht conceived for the national systems, acquire renewed and greater meaning in International Criminal Law (ICL), where the gap between grand dogmas and mundane policies grows conspicuous and "secondary criminalization" results from complex and widely discretionary processes of selection. Rather than following the Kantian ideal of universal and uniform rules, when applying ICL prosecutors will have to be reminded that, as in the play of words by Umberto Eco, "I can't be Kant".

Prosecutorial discretion is the margin of decision allowed to the prosecuting operators by the law for its implementation, in issues such as the choice of the matter to be investigated, the profile or level of the suspects, as well as the choice of the charges and penalties to be pursued. While prosecutorial discretion is inherent to criminal justice, its limits and criteria need to be clearly identified and publicized. The principle of "mandatory prosecution" prevails in some systems, where prosecutors are supposed to act on every crime known to them (for example in Germany and Spain). Other systems are closer to a concept of "opportunity" where a variety of reasons permit deferral of prosecutions of known crimes in the name of "public interest" (as largely accepted in The Netherlands, USA and England and Wales).[4]

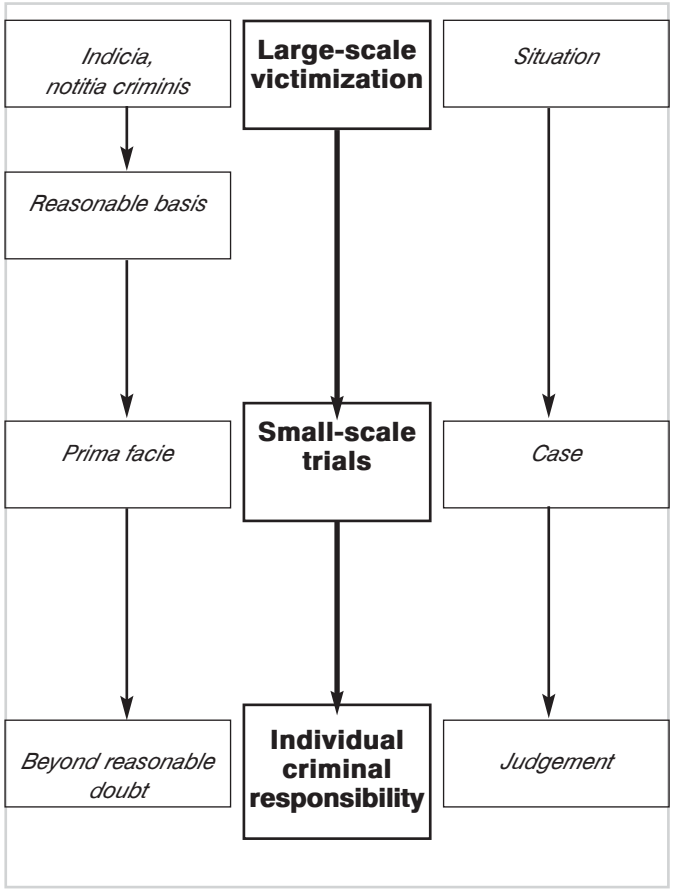
"Compulsory prosecution" should be the guiding principle for particularly serious crimes as opposed to mere "opportunity", because of the very gravity and offensiveness of the criminal conduct. Nevertheless, international crimes entail the paradox of deserving "compulsory prosecution" due to their seriousness, while being handled typically with a high sense of "opportunity" as a result of legal lacunae, resource limitations, plurality of competent fora, and political interference.

Broad prosecutorial discretion is characteristic of ICL, whether implemented by national or international jurisdictions. In the words of the Prosecutor of the ICTY, "the main distinction between domestic enforcement of criminal law and the international context rests upon the broad discretionary power granted to the international Prosecutor in selecting the targets for prosecution", since at the international level "the discretion to prosecute is considerably larger, and the criteria upon which such prosecutorial discretion is to be exercised are ill-defined, and complex".[5] It should be noted though that such discretion is not distinctive of international prosecutors, since national prosecutors implementing ICL (possibly on

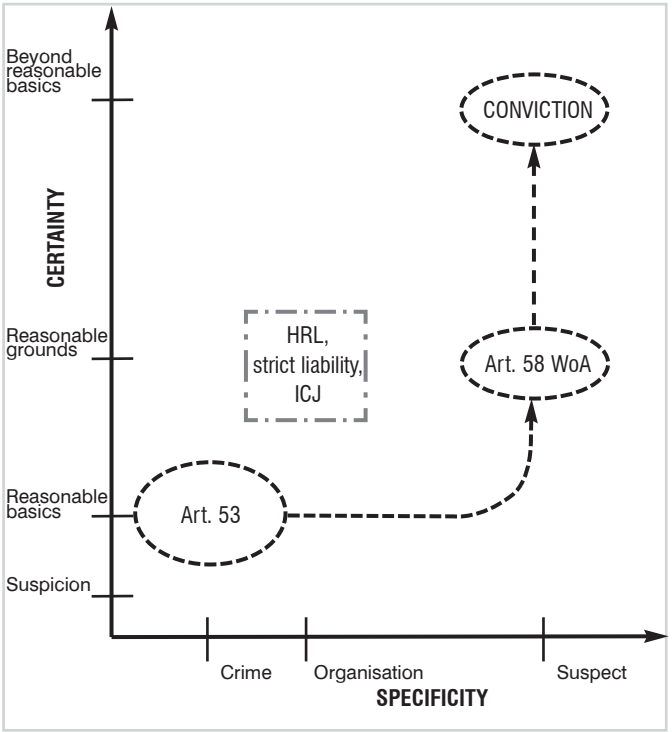
the basis of universal jurisdiction) would have about the same discretion and dilemmas.

Such broad discretion implies ample room for selection, which will take place as a transition, a linear development, from the realities of large-scale victimization to the end result of attributing individual criminal responsibility, through the venue of small-scale trials. Two parallel lines referring to the scope and the standards of the evidence guide this transition. The first one consists of the progressive narrowing of the scope of the cognitive and legal processes, from the large-scale reality, to the concise set of facts specifically attributed to the suspect by the accusation, and to the eventually narrower judicial findings. The second one is drawn by the gradual rise of the standards of evidence, from mere indicia derived from the *notitia criminis*, to some reasonable basis required to initiate an investigation, to the more categorical or prima facie foundations of an accusation, up to the standard of certitude beyond reasonable doubt which is defined (in common law practice) as essential for a finding of guilt.

This is a cumulative process. Each level of selective decisions is built on the previous one, so that the initial decisions may determine to a large extent the final outcome. At the end of the process the scope may become so small that such gross reduction of the reality will be regarded as credible and legitimate only if it has been constructed as a valid sample, following criteria of empirical rigor and procedural fairness. The key for the validity of the final sample-judgement will be a growing level of exigency in the standards of evidence; the final sample may be very small, but it should be also very strong because it has been consolidated through the process of investigation, litigation and judicial examination.



Within the Statute of the ICC this progression would take the following form:



The square box indicates the kind of responsibility characteristic of International Human Rights Law for claims against State institutions, or forms of strict liability, or forms of State responsibility by criteria of international public law within the jurisdiction of the Inter-

national Court of Justice. These forms of responsibility typically focus on institutions, rather than individuals, and require standards of evidence lower than criminal law (hence the different shape and location in the diagram). It is important to differentiate the differences with this "box" to manage the expectations raised by international criminal law and prevent misunderstandings.

The experience of national and international jurisprudence (both historical cases and the recent UN ad hoc tribunals), as well as the legal framework of the ICC, allows for the identification of a number of selection criteria characteristic of the different phases of the process (see table below). Some of the criteria that guide the cumulative selection may be pervasive and recurrent at every level (such as gravity and practical viability), while others may be specific to a particular moment of the procedure.

Phase of selection	Criteria of selection
Situation	1. Gravity of the crime 2. Judicial ability 3. Judicial willingness 4. Interest of Justice 5. Interest of victims 6. Practical viability
Case	1. Gravity of the crime 2. Responsibility of the suspect 3. Impartiality 4. Specific policies 5. Practical viability
Evidence	1. Representativeness 2. Source evaluation 3. Practical viability

3. The Selection of Situations

"Situation" is the term used by the ICC Statute to refer to the factual and legal context specific to the crimes that "appear to have been committed" (as in arts. 13, 14, 15, 18 and 19). For the purpose of this paper the term "situation" will be adopted with that meaning and used for any jurisdiction concerned with ICL. A situation is often determined factually by reference to a given armed conflict, a geographical area where the crimes have been committed, as well as a given time frame.

The selection of a situation is the first choice to be made in the process of judicialization before national or international jurisdictions, and as such it may be the most decisive one for the legitimacy of the process. Political considerations of one kind or another will be virtually unavoidable when selecting a situation for several reasons. Firstly, because States remain the main subjects in the definition and implementation of International Law, and as such their representatives are entitled to a number of opportunities to affect the design of such law, and its enforcement by other fellow States or surrogate international institutions. Secondly, for practical reasons, because judicial powers, no matter national or international, operate in a state of structural weakness that makes them dependent on political support to carry out their mandate, and such support is most often conditional on the compatibility of the judicial exercise with the objectives of political actors.

Examples of fully politicized selection of situations abound. Consider the criminal procedures initiated by Nazi authorities for "breaches of International Law" allegedly committed against the German minority in Poland. As early as November, 1939 the Nazi investigating officers reported several thousands of killings of Germans and were able to compile a comprehensive file "based upon documentary evidence", including judicial records, sworn state-

ments, pictures, maps, open source, autopsies, crime scene reports, victimization statistics, as well as rather systematic analysis.[6] The contrast with the impunity of subsequent crimes committed by Nazi forces in Poland hardly needs to be mentioned. Indeed prosecutorial discrimination of this kind was explicitly enacted in the Barbarossa Jurisdiction Order issued by the German High Command in May, 1941. Section I of this Order referred to "Treatment of Crimes Committed by Enemy Civilians" and provided for "ruthless liquidation" and "collective coercive measures to be applied summarily. Section II of the same Order dealt with "Treatment of crimes committed against inhabitants by members of the Wehrmacht and its auxiliaries", indicating in sharp contrast that "prosecution is not obligatory" and will take place if necessary for "the maintenance of discipline or the security of the Forces".[7]

The "Causa General" promoted by the Spanish government at the end of the war of 1936-39 is a similar example of selective prosecution: crimes committed in the Republican side were thoroughly documented and prosecuted, and reparations were provided for the victims, while those committed in the side of Franco were ignored.[8] In a way the "Causa General" was Franco's Nuremberg avant la lettre, where the loosing party of the war was prosecuted and convicted, and the winning party was not even investigated, while prosecuting the losers implied preventing any scrutiny of the winners.

In the case of the UN ad hoc Tribunals, the situations of the former Yugoslavia and Rwanda were selected by the Security Council in 1993 and 1994, following a combination of formal legal criteria, considerations of the gravity of the crime, as well as political considerations. That the Security Council applies political criteria is normal, being an organ political in essence, with a mandate to forge consensus and decisions among State representatives. For the establishment of the ad hoc Tribunals, the Security Council

(SC) invoked the threat to "international peace and security" within Chapter VII of the UN Charter, which is an essentially political concept open to broad discretion in its interpretation. Compared to the precedents of Nuremberg and Tokyo, the UN ad hoc Tribunals had the significant advantage of having competence over crimes committed by any of the parties of each situation (as opposed to being merely the "justice of the victors" imposed after World War II). And yet, the decisions of the SC begged the question of why those two particular situations and not others of similar characteristics, a very legitimate and fundamental question that ultimately triggered the process of establishment of ICC.

The ICC provides a complex system for the selection of situations, determined by criteria of gravity and substantive definitions of the crimes and their elements, the principle of complementarity and the "issues of admissibility" (art. 17), and a series of procedural safeguards granted to the Pre-Trial Chamber, the victims and the accused. This unique system integrates a definite framework of substantive law, the prosecutorial discretion of an independent prosecutor, and the option of the State parties and the UN Security Council to contribute to the selection of situations through referrals (art. 13 and 14).[9]

Compared to the precedents of other prosecutions of international crimes (whether Nuremberg and Tokyo, other international tribunals, or national prosecutions based on universal jurisdiction), the ICC Statute represents a significant progress towards a greater objectivity and preponderance of the principle of legality in the selection of situations. Nevertheless, inevitably the ICC selection of situations still will be conditioned by a number of political factors, including the following:

a) *Ratification* - Competence is to a large extent conditional to State ratification, which is an essentially political decision within

the domain of State sovereignty. If a State makes the political decision of not ratifying the Statute, the chances of having a situation related to that State selected are very limited (only if its nationals commit a crime in the territory of a State party, or through Security Council referral, as per art. 12 of the ICC Statute). As of today 97 States have ratified the Statute, which comprises about half of the existing States (192), only two of the five permanent members of the UN Security Council, and some 25% of the world population. This may be the main political factor affecting the ICC selection of situations.

b) *Referrals* - The Statute grants the UN Security Council and the State parties the option to pre-select a situation and refer it to the Court, which is likely to be an essentially political decision. The first two investigations initiated by the ICC Prosecutor are based on State referrals (Uganda and Democratic Republic of Congo). Nevertheless, such political influence may be legally controlled, since the Statute makes referrals subject to legal review by the Prosecutor, the Pre-Trial Chamber, as well as possibly legal challenges by the accused or a competent State before the Trial Chamber (under the requirements of admissibility of art. 17, as well as the procedural provisions of art. 19).

c) *Substantive competence* - The fact that some of the crimes are not applicable (e.g., aggression) or have been defined in terms that are very difficult to apply (e.g., war crime of disproportionate attack, art. 8-2-b-iv) may project a political bias in the selection, if in a broad criminological sense such crimes tend to be significantly associated to a certain profile of perpetrators or States. If such crimes are typically committed by perpetrators of rich and powerful States, while other crimes that are easier to determine are related to poor and marginal States, this would carry a political bias into the process of situation selection. This is a hypothesis that should

be tested against the available evidence, in terms of empirical-criminological research.

d) *State support* - The ICC investigations will need to rely to a large extent on State support. Such support depends on political will, it will need to be assessed a priori, and it may have a positive or negative influence (to promote or deter the selection of a given situation), through means of operational or budgetary assistance.

Accordingly, for a greater fairness and objectivity in the ICC process of situation selection most important will be to expand the number of State parties (including permanent members of the Security Council), emphasize the duty of the Court to subject referrals to objective legal evaluation, provide an applicable definition of aggression and other crimes currently defined in very restrictive terms, and provide appropriate support to the Prosecutor by budgetary and operational means.

3.1. Gravity of the crime

ICL has been conceived only for cases of extraordinary gravity, when crimes are so grave that they are considered to be offensive not only for the national society, but for the international society as a whole. The ICC Statute defines a requirement of "sufficient gravity" (art. 17.1d) in order to restrict and focus the action of the Court on the gravest instances of crime. This requirement is consistent with the references in the Preamble of the Statute to "the most serious crimes of concern to the international community as a whole" and past "unimaginable atrocity that deeply shock the conscience of humanity".

Different criminal types incorporate qualifiers of gravity that operate as elements to restrict international criminalization to exceptionally grave allegations. That is the case of the definition of war

crimes in art. 8-1 of the ICC Statute, with its "particular" consideration of "when committed as part of a plan or policy or as part of a large-scale commission". Concerning crimes against humanity, there is an equivalent reference in the elements to a "widespread or systematic attack" of art. 7-1 of the ICC Statute. The rationale of the concept of crimes against humanity in Nuremberg was to open a window for international intervention in crimes committed domestically (victims, perpetrators and territory of the same nationality), and the requirement of "widespread or systematic" operates as a restrictor of criminalization, to limit such judicial intervention to extraordinarily grave offences. Concerning genocide, the specific "intent to destroy" the protected group operates as an essential qualifier of gravity, and may become the main element to restrict the application of this provision. There is trend in the doctrine and the jurisprudence of the ad hoc Tribunals to consider it the gravest of crimes under their jurisdiction, typically (not necessarily) graver than war crimes and crimes against humanity. The Prosecutor of the ICC may well operate on the assumption that a prima facie case of genocide will meet the threshold of "sufficient gravity".

The existing ICTY and ICTR case-law may assist in identifying parameters of gravity. The offence of Persecutions within crimes against humanity has been a matter of discussion in different ICTY decisions that may assist in determining a lower threshold of gravity. One decision in particular has considered that systematic dismissals from work in public positions carried out on basis of ethnic discrimination "do not constitute persecutions as a crime against humanity because it does not rise to the same level of gravity as the other crimes against humanity". In the opinion of this Trial Chamber such acts would reach the requisite level of gravity only in cases of an "extremely broad policy", explicit governmental

decrees ordering massive dismissals on ethnic basis and "imposing enormous fines".[10]

Crimes resulting in death (murder or extermination as a crime against humanity, willful killing or attack on civilians as a war crime, killing as an act of genocide) and their number of victims may be considered as the main parameter of gravity for substantive and epistemic reasons. Firstly, because such crimes tend to be considered the gravest among all relevant crimes by the sources of law and public opinion. Secondly, because the information available on such crimes is often of better quality, and hence more reliable for systematic assessment.

Concerning gravity, to consider crimes resulting in death as the gravest is supported by the following; A) In most national systems willful killing is considered the gravest of crimes against persons; B) The right to life is the first one consecrated in the Universal Declaration of Human Rights (art. 3) and the paramount rule of International Human Rights Law; C) All situations that have invoked one way or another international criminal jurisdiction have implied the commission of thousands of killings (Armenia, Nuremberg, Tokyo, Argentina, Chile, Guatemala, ex-Yugoslavia, Rwanda, Sierra Leone, Cambodia, East Timor, Chad, Ituri, Uganda); D) Every international crime initiates the enumeration of constituent offences with reference to those resulting in death, suggesting a substantive hierarchy.[11]

Problems to assess the gravity of unlawful killings appear when the killings result from a fragmented pattern, or from the conduct of hostilities. An example of the former is the assassination of thousands of members of the UniÆn PatriÆtica political party in Colombia, which has been brought before the Inter-American Court of Human Rights as a case of Genocide: taken as a joint pattern, this is a very grave event, but the killings were dispersed

throughout a period of several years, committed by a variety of actors belonging to different groups, which diffuses the perception of gravity. Cases of area bombing (indiscriminate attack) may result in large numbers of unlawful killings, but the perception of gravity is conditioned by the allegations of military necessity, and the under-development of case-law on this matter.

The assessment of gravity may be more difficult in situations of systemic or customary violence, which may be very grave, but less conspicuous than mass killings. The crime of apartheid refers to situations of structural violence where possibly killings are not frequent, but fundamental rights are systematically denied. Many observers described the situation in Kosovo from 1981 to1999 in terms of apartheid because of the systematic discrimination of the majority of the population by the minority associated with the State. And yet the international community never considered an international tribunal for such a situation: the ICTY was established only when the open war and mass killings started, and still today is limiting the Kosovo cases to the armed conflict of 1999.

Concerning customary violence, the issue might be raised, for example, regarding female genital mutilation. There may be a prima facie case of widespread sexual violence, possibly involving social or State leaders. By international law standards this should be sufficiently grave a situation. By the standards of the national State this may bear no criminal gravity, being a lawful practice sanctioned by longstanding custom. In such cases possibly the implementation of ICL would require standards of gravity reflective of the "conscience of humanity" (as stated in the Preamble of ICC Statute), beyond the particular social perception in a given society.

In addition to the substantive definition of the crimes, national systems usually consider a set of aggravating circumstances, ranging from deliberate cruelty to abuse of power of State officials, to reoc-

currence, or a number of elements perceived to be particularly offensive by the incumbent society. Abuse of power is an aggravating factor acknowledged in national practice that may relate to the status of State officers or to other positions of authority established socially or in private institutions. There are cases, for example, in which such aggravating circumstances can be found against a guard of a private security company benefiting from that professional status to commit a crime. In the context of international law, the fact that the crime is committed by State agents may deserve specific aggravating consideration because the very authority of the State originates from international recognition. Since States become so only if and when recognized by other States, it is fair and coherent that the international community considers as particularly offensive the fact that a given State or its agents misuses the trust put on it by other States to commit crimes.

For the sake of fairness and objectivity, it is advisable for national and international jurisdictions to define parameters of gravity, which should be generic, explicit and public. The following may be considered as parameters of gravity that should inform the selection of situations as well as cases: a) Particular consideration to prima facie cases of genocide; b) Existence of "systematicity" or a "plan or policy"; c) Pattern of "widespread" or "large-scale commission"; d) Particular consideration of offences resulting in death; e) Particular consideration of crimes of sexual assault; f) Particular consideration of crimes against judicial and peace-keeping officers; g) Persistence and reoccurrence of the crime; h) Specific intent of a particularly offensive character (extermination or discrimination); i) Cruelty, deliberate causation of suffering or abuse of defenseless individuals; j) Concurrence in a joint pattern of different offences under the Statute; k) Specific notice on the unlawfulness of the act prior to its commission; l) Impact on the

international peace and security (as in UN Charter Chapter VII); m) Deliberate involvement of State authorities or others in a leadership position (abuse of power).

3.2. Judicial ability or willingness

If criminal law is by definition an *ultima ratio*, the last resort, international criminal law is a kind of *ultimissima ratio* to be applied only in default of the national systems. This is the basis of the ICC jurisdiction and its principle of complementarity, but it is equally relevant to the use of ICL and universal jurisdiction by national jurisdictions, as well as to the establishment of the UN ad hoc tribunals and other hybrid national-international tribunals. In fact the judicial ability or willingness of the originally competent State has been discussed in Spain and Belgium regarding cases of universal jurisdiction.

Art. 17 of the ICC Statute determine as an "issue of admissibility" that "the State is unwilling or unable genuinely to carry out the investigation or prosecution". This function of the Court, to decide whether a State Party is unable or unwilling to genuinely investigate and prosecute, will be very sensitive, and possibly subject to changing assessments and judicial challenge by the incumbent State or accused (as in art. 19), hence the importance of objective and clearly elaborated criteria for determining the willingness and ability to genuinely investigate and prosecute.

Since most of the techniques of unwillingness and the attributes of inability are political phenomena, an analysis of the admissibility criteria requires more than just a merely normative approach. Nevertheless, only a few authors have seriously written about the criteria of admissibility and little progress have been made in the

definition of the terms unable, unwilling, "principles of due process", "genuinely", or "total or substantial collapse", actually mean.

Concerning the factual analysis of admissibility issues, the best guarantees of fairness and objectivity may be achieved by applying principles of investigative methodology similar to the principles of criminal investigation itself. The principle of objectivity dictated by Art. 54-1 (a) for the criminal investigation (considering evidence both supportive and dismissive of the allegations), should be extended to preliminary examinations, so that the concerned States may have the guarantee that their "willingness" and "ability" shall be objectively assessed, without prejudicing admissibility. In assessing a situation the Prosecutor should avoid a sample bias, i.e. extrapolating the assessment of a whole situation from a sample of cases that is not representative, because it either focuses on notably negative or positive cases.

3.3. The interest of justice

Many observers have voiced concerns that prosecutions for international crimes may interfere with a peace process or post-authoritarian transition in detriment of alternative forms of justice or conflict resolution. While these concerns sometimes are mere self-serving alibi or veiled threats by the perpetrators or their associates, on other occasions they may be legitimate claims from the victims or the larger victimized society. Therefore exceptions to the duty of prosecution may be justified on certain specific and restrictive grounds. This seems to be the main reasoning behind the provision for "interest of justice" in Art. 53(1)(c) and (2)(c) of the ICC Statute. This proviso may be equivalent to the "public interest" invoked in different national systems (which would have been a more felicitous definition, avoiding the contradiction in terms of declining judicial action in the name of justice).

The meaning of "public interest" may not be as clear as in national systems when the "public" is the humanity as a whole, with its inherent diversity and possibly conflicting interests. Sir Hartley Shawcross opposed the idea of "compulsory prosecution" as contrary to the discretion to which he was entitled as Attorney-General: "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution (...) public interest is the dominant consideration. So under the tradition of our criminal law the position is that the Attorney-General and the Director of Public Prosecutions only intervene when they consider it in the public interest so to do".[12] It was precisely Sir Hartley Shawcross who appeared as Chief Prosecutor of the British team in Nuremberg, which begs the question of how his concept of "public interest" would be ascertained in such cases of international concern.

Public interest could be, to a limited extent, a criterion acceptable within the scope of prosecutorial discretion for the prosecution of international crimes. Such public interest could possibly be argued in the form of the interest of "international peace and security", which are essentially political concepts, recorded in Chapter VII of the UN Charter and invoked for the establishment of the UN ad hoc Tribunals. Abusing these or similar criteria and transforming legitimate international public interest into self-serving political discretion would lead to illegitimate selective investigations. It may happen that the investigation is objective and the process fair, but the choice of the subject to be investigated is arbitrary, motivated by extra-judicial or merely political reasons. Such a scenario would amount to a fraud of law, i.e., a use of the law formally correct but essentially contrary to its purpose.

Concerning the implications of foreseeable litigation, in any transitional arrangement there may be persons who dissent with the measures of grace and ask for penal justice. It may easily happen

that those persons submit their individual or collective claims to the Prosecutor of the ICC or other national prosecutors on basis of universal jurisdiction. This scenario is illustrated by the precedent of certain victims of apartheid who challenged the Truth and Reconciliation Commission (TRC) before the Supreme Court of South Africa by invoking international law against the pardon of suspected perpetrators.

The following aspects will need to be considered when assessing a truth commission, amnesty or pardon affecting crimes under his jurisdiction: a) Rights of individual victims to justice and retribution, as communicated by themselves or their legitimate representatives; b) Interest of the victimized society, as communicated by its legitimate representatives; c) Gravity and offensiveness of the crime before the international society; d) Identity between beneficiaries and authorizers of measures of grace ("self-amnesties"); e) Procedural fairness and impartiality of the relevant measures; f) Compatibility of the conciliatory procedures with criminal justice; g) Consistency in the prosecutorial policy

3.4. Practical viability

Practical considerations related to the feasibility of an investigation may influence the selection of situations and cases. Such practical considerations may comprise the following: a) *Operational difficulties*, if due to on-going violence, no access to the relevant area or other operational problems it is not possible to collect duly the evidence; b) *Financial constrains*, if the investigating agency does not have sufficient resources to investigate a given situation or case; c) *Time*, when the alleged crimes where committed in such a distant time that witnesses or other means of evidence have perished; d) *Age, infirmity* or *death* of the suspect or suspects.

These criteria may affect the selection of both national and international operators. They may be legitimate reasons for precluding an investigation, no matter of the gravity and relevance of the allegations. Nevertheless, if a situation or case is not selected due to these reasons the incumbent officers need to acknowledge clearly that these and no other more substantive reasons caused such decision. For the sake of transparency and fairness it is important to avoid ex post facto rationalizations that would tend to hide such practical considerations behind a customized representation of the relevant facts. Operational and financial difficulties are often directly related to the agenda of the institutions that are supposed to finance or cooperate with the judicial project, and so may become a factor of political influence in the selection process.

The problem of time was manifested in a number of cases from World War II investigated by national agencies, as well as Soviet crimes.

Considerations of age, infirmity or death of the suspect are accepted as legitimate criteria of prosecutorial discretion in many national systems, as well as in the ICC Statute (art. 53-2-c, for age or infirmity). A case in point of case selection conditioned by the death of suspects is the Nuremberg IMT, since the loss of Adolf Hitler and Heinrich Himmler deprived the proceedings from the most notorious suspects, and further allowed other lower ranking accused to use them for alibi purposes. In the experience of ICTY this criterion has had a significant impact on the investigations related to crimes allegedly committed by forces of the Republic of Croatia and the so-called Republic of Herceg-Bosna, since it happens that sadly the main leadership suspects passed away before they could be prosecuted or brought to trial (including the President of the Republic of Croatia Franjo Tudjman, President of the so-called Republic of Herceg-Bosna Mate Boban, top commander

of the Army of Croatia Janko Bobetko, and Minister of Defence Gojko Susak, may they rest in peace).[13]

4. The Selection of Cases

Beyond the selection of the situation, in Nuremberg and Tokyo the selection of the cases also indicated a significant self-serving bias on the part of the Prosecution. The Nazi leaders were never accused for the indiscriminate bombing of London, Rotterdam and many other European cities, a rather blatant crime that resulted in the death of thousands of civilians. As Taylor explained, to understand why, "it was only necessary to look out the windows at bomb-ravaged Berlin".[14] Some similarity between the destruction caused by both sides in the war was in fact acknowledged by Justice Jackson in his opening statement: "It is true that the Germans have taught us the horrors of modern warfare, but the ruin that lies from the Rhine to the Danube shows that we, like our allies, have not been dull pupils".[15]

The following criteria identified in the practice of national and international jurisdictions may help to prevent such arbitrariness in the selection of cases.

4.1. Responsibility of the suspect

Precedents of national and international practice suggests that ICL should focus primarily on the higher levels of responsibility among the suspected perpetrators, which usually corresponds with higher organizational levels in political or military structures, or with notorious instigators of the crimes. The trials of Istanbul in 1919 of the top leaders of the Ittihad party and government for the massacres of Armenians provides with an early precedent on such emphasis

on "the big fish". In the same way the Nuremberg trials (both IMT and subsequent military trials) and the IMTFE Tokyo trial dealt with top leadership suspects, while lower ranking suspects were either neglected or handed over to the national jurisdictions. The trials of top military leaders in Argentina and Greece for offences tantamount to international crimes provide further examples of leadership cases in national jurisdictions. A similar trend can be observed in the prosecution of schemes of organized crime, where it often becomes evident that to counter effectively such criminality it is necessary to neutralize the individuals who lead the organization and plan or order the crimes.

In the case of ICTY the debate of "big fish vs. small fish" has been the matter of much controversy. Initially ICTY selected a number of low-level perpetrators, particularly from the Bosnian Krajina (such as the first indictee, TADIĆ, and a number or others involved in the detention camps). As early as 1995 the ICTY Prosecutor indicted the main Bosnian Serb leaders (KARADŽIĆ and MLADIĆ) and some mid-level leaders of the HVO (BLAŠKIĆ, KORDIĆ, ČERKEZ and others). A greater emphasis on leadership led the ICTY Prosecutor to withdraw fourteen low-level indictments in 1998. Furthermore, the requirements of the "completion strategy" have obliged the Prosecutor to consider leadership status as a decisive selection criterion, while leaving lower-level accused to the domestic courts. UN Security Council Resolution 1503 (28 Aug., 2003) describes the Completion Strategy adopted by the ICTY as focusing on "the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction".[16] A new provision of the ICTY Rules of Procedure and Evidence further grants the Bureau of the Tribunal the competence to review an indictment in order to determine whether it - prima facie - "concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal" (rule 28-A).

Significant differences appear when comparing two of the municipalities that attracted most ICTY attention, such as Prijedor and Srebrenica: in the former a number of low level perpetrators were indicted, while in the latter indictments focused on senior officers (with the exception of ERDEMOVIĆ). There are also significant differences in the level of indictees in relation to certain types of crime; rape and sexual violence have originated relatively lower level indictees and convictions (like FURUNDŽIJA and the Foča case), while crimes related to artillery attacks on cities have originated higher level indictees (like in the indictments for the shelling of Zagreb, Dubrovnik and Sarajevo). Further criminological research on these aspects would be interesting, in order to identify significant correlations between particular offences and levels of leadership of responsibility.

In the case of the Special Court for Sierra Leone (SCSL) its Statute specifically limits the jurisdiction of the Court to "persons who bear the greatest responsibility" (art. 1-1). A similar provision applies for the Extraordinary Chambers in Cambodia, whose competence has the statutory limitation to "senior leaders of Democratic Kampuchea and those who were most responsible" for crimes committed between 1975 and 1979. There is no such provision in the ICC Statute, but the Prosecutor has announced, as a matter of policy, that he intends to focus on "those who bear the greatest responsibility" (Policy Paper of 5 September 2003).

While it is clear that international crimes are usually the result of hierarchically organized action of one kind or another, it is also necessary to note that this perspective may lead to forging a kind of "class-suspect" category, or casting some objective suspicion criteria that may be detrimental to the presumption of innocence. This is in fact the representation in ICL of the dilemmas of suspect-driven vs. offence-driven investigations common in domestic practice.

Empirical research in domestic jurisdictions suggests that "the roots of many dubious convictions can be found in the police investigation, even in the early stages of investigation" because of the choice of "the starting point of the investigation".[17] There are two main strategies of initiation, focusing either on the offence or on a given suspect. In an *offence-driven* approach, the starting point is the evidence on the criminal action, and the identity of the suspect is to be inferred from such evidence at a later stage. In a *suspect-driven* approach, first someone is identified as a suspect on the basis of the available information or evidence, and then the investigative effort will focus in that particular person. The offence-driven approach tends to define a more objective investigation, to the extent that the selection of the suspect becomes dependent on the evidence derived from the material events. Nevertheless, empirical observation suggests that "all parties involved in criminal proceedings, with the possible exception of the defense, have a strong preference for suspect-driven search and verification, both in the investigative stage and during the construction of proof".[18] The reasons why the prosecution tends to prefer a suspect-driven approach are easy to understand: providing a focal point in the person of the suspect, it simply makes easier the investigation, it gives a more clear sense of purpose to the officers involved, and facilitates the management of resources.

A suspect-driven start may well be justified, when there are sufficient evidentiary grounds for such suspicion, derived either from the initial *notitia criminis* or from sound premises of contextual knowledge. If the information available at the initiation stage is considered sufficient and reliable, and it identifies clearly an individual as a suspect, there would be no reason not to proceed on a suspect-driven basis. However, it is important to be aware of the risks inherent to such strategy, because a premature identification of the suspects may develop a fatal cognitive bias (else known in

cognitive sciences as "corroboration bias"). Empirical research indicates that in many cases "the suspects became suspects because of their criminal records" or "the first suspicion was based on outer appearance, while nothing else related the suspect to the crime".[19] Such tendencies may be equally present in investigations of international crimes, only at a different level, since the perception of the suspected international criminal is certainly conditioned by his or her antecedents and public image, besides or prior to the acquisition of relevant evidence. The problem is that once the suspect is identified (and possibly labeled as a "target"), the investigation tends to develop a "target-oriented" inertia, a deliberate or unconscious assumption that the suspicion is to be corroborated, rather than tested objectively. In other words, "as the case against a particular person begins to take shape, so (in most cases) does the investigator's belief that that person is guilty".[20] From that point on, the more time and resources are invested in that path, and the more the officers get personally involved in the exercise, the higher is the risk of losing the broader objective perspective, getting trapped in a "tunnel vision", and projecting the investigative machinery towards the accusation and conviction like an automaton. Tendentially, not necessarily, the conclusion is that "suspect-driven searches appear to promote unsafe convictions".[21]

Examples of miscarriages derived from suspect-driven investigations are known in, among others, The Netherlands, US and the United Kingdom. In the latter, the examples refer particularly to cases of terrorism or murder, where the investigation was conducted in an atmosphere of public outcry derived from the gravity of the crime (cases of the "Guildford Four", the "Birmingham Six", and the "Maguire Seven", all of them resulting in mistaken convictions only reversed after years of imprisonment).[22] The British cases of miscarriage have been compared with the Demjanjuk case,

both having in common a problem of heavily suspect-driven investigation (Demjanjuk was wrongly accused before the jurisdiction of Israel of manning a Nazi gas chamber). The defense counsel of Demjanjuk observed that "these cases exposed the weakness of many of the judicial procedures in Britain, particularly with reference to crimes that inflame public opinion".[23]

A possible answer to the dilemma between offence-driven and suspect-driven approaches could be to open parallel lines of investigation, focusing on both the offence and suspect simultaneously but separately. However, this would only postpone the problem, which will inevitably resurface at the stage of the investigation when decisions need to be made on the "suspect" status of certain individuals, and how to continue from that point on. Another option could be an organization-driven investigation, which would be a kind of a compromise, whereby the initial focus of the investigation would be the organization allegedly associated to the crime (either political, military or other), and the identification of individual suspects is postponed until such organizational aspects are properly investigated and analyzed.

4.2. Impartiality

Within situations in which different opposing parties are allegedly responsible for crimes, prosecutors will feel compelled to follow a sense of impartiality when selecting the cases, to avoid focusing exclusively or disproportionately on a given party. Impartiality being a fundamental principle of criminal law, in cases of international crimes the degree of polarization and mistrust that often prevails in the victimized society makes strictly impartial conduct particularly important. This should not mean that all parties are treated homogeneously or equally regardless of the weight of the evidence, which would be contrary to due fairness. This would

only mean than no party can be granted impunity, and that for effective deterrence, a perception of impartiality is indispensable. It may well happen that, although the responsibility of the relevant parties appears to be very different in levels of gravity, it is advisable to select cases related to each of the parties, and once the investigations are completed such differences will show in the charges (if any) to be formulated (both in the offences and the modes of liability attributed).

The Prosecutor of ICTY and ICTR did follow a certain criterion of impartiality, by selecting for investigation cases related to the different parties. In spite of the criticism received because of this criterion (particularly from the parties purported to be the "less responsible"), overall this seems an unavoidable element of credibility and legitimacy before the victimized societies and the international community. This criterion affected the selection of cases related to Central Bosnia (including crimes allegedly committed by the two main warring parties, HVO and ABiH), Srebrenica (ABiH and VRS), Croatia (HV and RSK) and Kosovo (FRY and KLA). Upon investigation this selection led to specific and significantly different charges. For example, in Srebrencia the evidence granted charges of genocide on grounds of ordering or other active participation (art. 7-1 of the ICTY Statute) against a number of senior officers and the highest commanders of the VRS (Army of the Republika Srpska) and political leaders of the RS (Karadžić) and Serbia (Milošević), while concerning the ABiH the evidence granted a case of significantly lesser gravity with charges limited to war crimes and against a single local military commander (Orić) on grounds mainly of superior omission to prevent or punish (art. 7-3 of the ICTY Statute).[24] A notorious gap of impartiality appeared in relation to Kosovo, where the ICTY Prosecutor selected top leadership cases for crimes allegedly committed by Serb forces, while decided not to select for investigation any case for crimes allegedly

committed by NATO, which has been the cause of extensive criticism and a serious deficit of credibility before the Serbian society.

In one ICTY case an accused convicted in first instance raised the issue of the Prosecutor's selection criteria as a ground of appeal, for reasons related to a certain sense of impartiality followed in the selection of his case. The accused defined as "selective" a prosecution "in which the criteria for selecting persons for prosecution are based, not on considerations of apparent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience".[25] The accused argued that he was the victim of "selective prosecution" in view that the Prosecutor had withdrawn the indictments in an unrelated case against fourteen accused, of a similar hierarchical level but different nationality, because of reasons of "prosecutorial strategy". The accused alleged that "prohibition of selective prosecution is a general principle of customary international criminal law" and that he was prosecuted "simply because he was the only person the Prosecutor's office could find to 'represent' the Bosnian Muslims", with the aim to give an appearance of "evenhandedness", which in his view amounted to a "discriminatory purpose".[26] The Prosecutor responded that such contrast was within her statutory "broad discretion in deciding which cases should be investigated and which persons should be indicted".[27] The judges dismissed the claim of the accused because of the gravity of the offences, the fact that the accused had been arrested and put in trial (while the fourteen persons that benefited from the withdrawal of the indictments were at large), and because the accused had not presented sufficient evidence that the prosecution acted improperly in his particular case.[28] The decision hence avoided a substantive review of the criteria of case selection used by the Prosecutor.

The Prosecutor of the Special Court of Sierra Leone (SCSL) similarly applied a criterion of impartiality, selecting cases for each of

the three major armed groups of the conflict, and issuing one indictment for the leaders of each of the groups.[29] This criterion caused some controversy when it came to cases related to the party that was perceived by the national society as bearing a lesser responsibility, which is the pro-government Civil Defense Forces (CDF), winners of the conflict and considered positively by the national society because of defeating the notoriously criminal rebel forces.[30] Regarding Sam Hinga Norman, the main leader of the CDF indicted by the SCSL, reportedly he "is regarded by some in Sierra Leone as a hero for standing up to the rebels who were trying to oust an elected government and his supporters are angry that he is being placed in the same bracket as the rebels".[31]

The Prosecutor of the ICC has faced similar dilemmas in every situation under investigation. Concerning the Democratic Republic of Congo, the gravest crime were reported in the region of Ituri as the result of an "ethnic conflict" between the Lendu and Hema communities, which has put pressure on the Prosecutor to investigate both parties of the conflict. Concerning Northern Uganda, the Prosecutor decided to focus primarily on the crimes committed by the rebel forces of the Lord's Resistance Army because those were the gravest offences; this decision was subject to criticism by national and international NGOs, who demanded a similar investigative emphasis for the crimes allegedly committed by the national army of Uganda (UPDF).[32] Concerning the Sudanese region of Darfur, the issue may be less significant, since all available sources attribute the overwhelming majority of the alleged crimes to one side of the conflict, the forces of the Government of Sudan. It should be noted though that in the case of the ICC the discretion of the Prosecutor is subject to greater scrutiny by the judges, as well as possibly challenge by the accused (as per the "Issues of Admissibility" determined by the Statute, arts. 17, 19 and 53)

4.3. Specific policies

Specific prosecutorial policies may affect the selection of cases, when it is decided that certain offences are particularly relevant to the national or international society, or possibly to the development of international law. If the judicial operators take a gender perspective, it may be decided that rape and sexual violence are particularly offensive crimes and cases representative of such criminality should be selected. If the prosecutor realizes that disproportionate or indiscriminate bombardment resulting in the death of large numbers of civilians has gone grossly under-reported in the judicial record, cases to this effect could be selected in order to address such a gap of impunity. If the prosecution adopts a certain class or materialistic perspective (like certain officers of different prosecution teams did in Nuremberg), the selection of cases may focus on economic leaders, crimes of enslavement or looting, or objectives of economic reparation.

One of our distinguished colleagues in this seminar has referred to the case of FURUNDZIJA to question the ICTY case selection criteria. He has highlighted that the accused was only a mid-level officer, and the case involved a single victim. The criterion that is missing in his assessment is that FURUNDŽIJA is a case of rape aggravated by a context of captivity, interrogation and the status of command of the accused. The emphasis on sexual violence in the policy of the ICTY Prosecutor was dictated by several resolutions of the UN Security Council and General Assembly, and led to the selection of cases like FURUNDŽIJA and the rapes and sexual enslavement committed in Foca. Contrary to the perception of our colleagues, women's groups have considered FURUNDŽIJA as a very appropriate choice of a case and a significant contribution to the fight against impunity for sexual violence.

5. The Selection of Evidence

The key to construct a series of offences as a consistent international crime is the concept of pattern, i.e. the existence of sufficient elements in common among individual offences so as to consider them as a whole like a single and greater criminal entity. Constructs of this kind are not alien to criminal law, such as the institution of *Fortsetzungstat (infraction continue)*, whereby a number of criminal incidents with a commonality of key elements are considered jointly as a single crime.

Such a pattern may be an objective element of the crime, required by the applicable law. The ICC Elements of Crimes require a "context of a manifest pattern of similar conduct" as an element common to the five specific offences comprised by the crime of Genocide.[33] Concerning "widespread" or "systematic", commission is required as an objective element of the crime by the ICC Statute regarding crimes against humanity (art. 7.1), and a similar element of "large-scale commission" is mentioned for War Crimes (art. 8), which will require evidence and analysis on the existence of a pattern of crime. The concept of "Evidence of Consistent Pattern of Conduct" is considered in the Rules of Procedure and Evidence of ICTY and ICTR. By referring to such "pattern evidence", Rule 93 of both Tribunals provides for an understanding of the crime beyond every particular incident, in the broader context of multiple incidents with common features. The judgements of these tribunals use often terms such as "campaign", "common design", "plan" and the alike to describe the relevant crimes, which is an indication of the importance of the underlying concept of crime pattern and its acceptance in international jurisprudence. The common denominators that show the existence of a pattern may refer to the victims, the geographical area of commission, the chronology, or the purpose and modus operandi of the perpetrators.

A critical issue in the selection of evidence to investigate the existence or not of a pattern of crime will be the use of sampling techniques more or less consistent with standards of empirical research.

5.1. Concept and precedents of sampling in international justice

Sampling is a technique of empirical research consisting of the choice of a subset of evidence able to represent the overall relevant scope (while the whole scope is referred to as "universe", "population" or "sampling frame"). Sampling is a term common in social science research, but not utilized in regular criminal investigations. Referring to examples is a very common exercise in legal rhetoric. Attorneys are so trained and used to it that often they just use examples as rhetorical tools without really feeling a need to justify the correlation of the "example" to the broader scope of evidence. In empirical research there is no room for such lenient use of "examples": if something is presented as an example, it is necessary to establish why and how exactly that exemplifies a broader picture, why is it a valid example and not an anomalous or accidental event. It is a well-known principle in social sciences that sampling is not an innocent operation, it may easily carry biases that would misrepresent the analyzed universe, and the validity of a sample will depend on the application of complex criteria of selection known as sampling techniques (random, stratified, cluster, snowball samples, etc.).[34]

A certain type of sampling is a very common technique to build cases of international crimes, in order to avoid the burden of presenting evidence for each and every relevant incident, which would be materially impossible. Typically first the existence of some common plan, intent or policy is established, to which the

criminal incidents are proved to be logically instrumental, and then a sample of incidents is presented in representation of the overall scope of crime. The incidents are chosen in a way like "case studies" representative of the overall picture. This approach was used, among other examples, in the Junta trials in Argentina, by the Truth Commissions of Guatemala and Peru ("illustrative cases" is how they called their samples), by the Commission of Enquiry of the Human Rights Commission of Indonesia (they refer to "primary cases") and in a number of leadership cases before ICTY and ICTR.

The quality of a given sample is likely to become an issue in contest in any leadership case for widespread or large-scale offences. That was the case in the EICHMANN trial, where not all victim testimonies were accepted as valid samples of a broader pattern attributable to the accused. Testimonies about crimes that were not immediately attributable to the accused were accepted in terms of sample or pattern evidence as long as they referred to crimes related to the camps, since the camps were organizationally linked to the accused (through the SS scheme of arrest-deportation-imprisonment-extermination). Testimonies about crimes unrelated to the camps system did not have the same acceptance by the judges, because although they could be understood in a broad sense as part of the Nazi pattern of persecutions, there was not such a clear organizational link to the accused: they were not seen as a representative sample of a pattern attributable to the accused (as in the testimonies about the crimes committed in the Warsaw ghetto). Hence, the record of the EICHMANN case shows that a victim of Auschwitz could be presented as a valid sample of the relevant crime, but not necessarily so a victim from the destruction of the Warsaw ghetto.

In the case against BLAŠKIĆ (a commander of a military operational zone) before ICTY the Prosecutor developed a "widespread and systematic" project to gather pattern evidence beyond the mil-

itary AOR (area of responsibility) of the accused in support of charges of crimes against humanity. One of the witnesses presented in court to this effect testified about a certain massacre, committed by members of the same army of the accused, against victims of the same ethnicity, in the same period, and in an area that was allegedly within the higher plans for military occupation, but outside the AOR of the accused. In cross-examination the defense pressed the point that the massacre was an exceptional event because, in spite of all the abovementioned elements in common, the fact remained that the witness had no knowledge (not direct, nor by reference) about any other massacre committed by the forces associated to the accused, and the fact appears to be that there was no pattern *of massacres* as such. The judges of the Trial Chamber did find that there was a (widespread) pattern of mass arrests, expulsion, torture and destruction, which was instrumental to a higher policy of territorial conquest and was implemented methodically (systematic), and convicted the accused accordingly.

The question still remains, was the massacre in question a valid sample to exemplify the pattern of crime? There is no univocal answer to this. The problem is that the "pattern" is a procedural construct, a concept shaped by the process, often of fuzzy boundaries. The prosecution will tend to highlight the most dramatic, the gravest aspects of a purported overall picture, even if they are not central to the pattern. Conversely the defense will either challenge completely or press for a restrictive understanding of the pattern. For an objective prosecutor, bound to represent objectively the material facts (as claimed by the civil-law tradition and required by the ICC Statute), evidence central to the pattern should prevail over evidence that is more dramatic but less representative. In the ICTY cases the contentions about crime patterns were conditioned, first, by a highly adversarial prosecutorial policy, and then

by the application of the "persecutions" overarching charge, which aimed at the fuzziest possible boundaries for the concept of pattern. Ultimately the initial conviction of BLAŠKIĆ was severely reviewed by the Appeals Chambers on different substantive and procedural grounds.

In cases against civilian leaders the crime pattern argument is of special importance, because frequently, in the absence of direct evidence of involvement in the executing structure, a strong basis of crime becomes crucial for an inference of superior responsibility. The limits of the argument by "sampling & pattern" show in two unrelated cases against civilian leaders before ICTY with opposite results. In the STAKIĆ case the Trial Chamber convicted the accused for a massacre about which no evidence of orders or any other form of direct evidence was produced, because the judges understood that it was part of a consistent pattern of violence caused by policies to which the accused leader had contributed (Mount Vlasic massacre, killing of more than 200 prisoners in August, 1992). In the KORDIĆ case the Trial Chamber refused a similar argument by the prosecution and acquitted the accused because the judges did not see that the massacre in question was a valid sample of a broader pattern, but rather an extraordinary event whose attribution to the accused could not be merely inferred from the material events (the Stupni Do massacre, killing of 16 villagers in October, 1993).

While the abovementioned examples show that it is possible and necessary to utilize sampling strategies in the investigation of international crimes, there is a need to systematize this practice and to establish standards of higher empirical quality. This is not exact science; it would be fallacious to pretend so. This is an effort to get as close as possible to an objective and scientifically respectable method of collection of evidence, integrating the most reliable methods from social research and criminal investigations.

This is not necessarily statistics either, which when possible may need to be developed as a separate project. It is not intended to estimate the precise number of the overall population (like a demographic study would do), but merely to prove a certain size, spread and features of the victimized population in the relative broader terms required by the elements of the crimes (by the criteria of "widespread" and similar, which is a rather generic category).

5.2. Sampling frame, data validity and verification

The sampling frame is the scope *from which* you take the sample, and *to which* you generalize from the sample. This is somehow an epistemological paradox, since you need to pre-define the scope to be represented before you define the sample, but that is how research works, you cannot take a "positivistic" view of taking "blindly" samples without a preliminary concept of the frame.

The sampling frame may be defined on the basis of prima facie evidence derived from secondary sources, such as NGO and media reports, overall monitoring reports, allegations from victims, etc. The frame needs to be used at a level of working hypothesis or provisional concept, to be further tested against sources of higher quality as they are collected. It may be defined by the following parameters (all or some of them, as appropriate): a) *Type of crime* - murder, rape, etc.; b) *Victim profile* - gender, ethnicity, social, and other possibly relevant features; c) *Chronology* - relevant period and significant sub-segments; d) *Geography* - relevant area and sub-segments; e) *Perpetrating units* - relevant parties and units; f) *Perpetrating levels* - possibly differentiating areas with different degrees of closeness and control of the suspects.

A series of segments are to be defined by these parameters, with the aim of collecting valid samples from all, or as many as possible, or those of them that are considered as relevant (which is equivalent to the techniques known as "cluster sampling" with a probabilistic approach, or "quota sampling" with a non-probabilistic approach). Graphically this can be represented by a table crossing in the two axes the list of all parameters and their segments.

The next step would be to define the number of statements (or other items of evidence) to be collected for each relevant segment, for example, for murders in X area and Y period and Z victim group, or committed by X unit in Y period. The number of statements should be proportionate to the size of the segment (a requirement otherwise known as PPS, Probability Proportionate to Size) and to the centrality of the segment to the pattern. The latter requires a preliminary assessment on which crimes seem to be central to the pattern, as opposed to those that appear to be accessory, anecdotal or less representative.

Usually not all statements taken become valid witnesses before the court. For a number of reasons many witnesses will not be available or willing for testimony in trial. It may well happen that witnesses will have a provisional residence or nomadic status, so that it will be very difficult or impossible to locate them again at the trial stage (which may arrive long time after the statement was taken). It is necessary to factor in these difficulties and to estimate a ratio statement/witness. Alternatively, a legal assessment on the admissibility of affidavits is necessary, as to submit before the Chamber statements even if the witnesses are not available.

The quality of the sources needs to be assessed as a preliminary matter in the design of the sampling project: if sources of acceptably good quality cannot be obtained, there is no point in launching a sampling project. Sampling sources are not necessarily only witnesses, forensic and other evidence may be equally valid. The parameters to assess data validity include the following: a) *Imme-*

diacy - primary or secondary sources, chronological closeness, linguistic mediation; b) *Reliability* - background, cognitive ability and other subjective features of the source; c) *Credibility* - external corroboration, internal consistency, and other objective features of the information; d) *Completeness*, of the knowledge vis-à-vis the incident as a whole; e) *Availability and admissibility* - if the source will be available for testimony, and admissibility in court.

Sample bias is known as the influence of the criteria of selection and collection of the sample on the extrapolated picture. Samples may be biased for many reasons, deliberate or not, in good or bad faith, from lack of access to certain segments, to the methods of collection, to the agendas of persons/institutions that mediated in the collection process. Local or other agents mediating in the collection process may carry their own deliberate or unconscious biases. Some persons or institutions may have a specific interest on certain types of offences or victims, or may be conditioned by their means of communication with the primary sources. Such biases may fall in the category of the unavoidable ones, in which case control bias measures will be necessary (neutralization with alternative mediators or alternative sources, explicit mention, or others). Consider a list of victims provided by a certain association of victims: in order to be used for sampling purposes it is necessary to analyze any potential bias related to the area and timing of activity of the association, its method of registering the information, its agenda or its ideological profile. Sometimes mediating agents may want to present isolated incidents as samples of a broader campaign, with the aim of manipulating the investigation to fit their own agenda.

The result of the sampling project, the extrapolated picture, needs to be tested and verified against sources with comprehensive or panoramic knowledge, else known as pattern sources. These are sources that may deliver credible statements on the pattern as

such, because they had access to several or most segments of the sampling frame. These may include the following kinds of witnesses (and their reports): IGO and NGO field workers; health workers; journalists; social leaders; local authorities; missionaries or religious leaders.

Notes

1 This paper has been written by the author in his personal capacity, and does not represent necessarily the views of the ICC. The author is grateful for their comments and corrections to Eric Manton, Roberta Belli, Hans Uwe Ewald, Paul Seils and Claudia Angermaier.

2 See for example LANDECHO VELASCO C.M. and MOLINA BLÁZQUEZ C. *Derecho Penal Español. Parte General.* Madrid: Tecnos, 2000, Chapter III "Las ciencias penales".

3 PAVARINI M. *Control y dominación. Teorías criminológicas burguesas y proyecto hegemónico.* México: Siglo XXI, 1998, p. 147 (translation of the original in Italian of 1980).

4 See FIONDA J. *Public Prosecutors and Discretion: a Comparative Study.* New York: Oxford University Press, 1995. The German Code of Criminal Procedure s. 152 (II) states that "the Public Prosecutor is required to take action against all prosecutable offences, to the extent that there is a sufficient factual basis". The Dutch Code of Criminal Procedure art. 167 states that "the Public Prosecutor decides to prosecute in the case where a prosecution seems to be necessary regarding the result of the investigations. Proceedings can be dropped for reasons of public interest", and the Ministry of Justice approved a (unpublished) list identifying more than fifty such factors of "public interest". See also Roberta Belli, *To Prosecute or Not To Prosecute? A Comparative Study of Prosecutorial Discretion at the National and International Level,* LLM Thesis (Utrecht University, unpublished), and Matthew R. Brubacher "Prosecutorial Discretion within the ICC", in *Journal of International Criminal Justice,* Vol. II (2004), p. 71-95.

5 L. Arbour, statement before the ICC Preparatory Committee, December 8, 1997.

6 *The Polish atrocities against the German minority in Poland*. Berlin: German Foreign Office, 1940. Reliable sources coincide in reporting that, in reaction to the aggression of September 1939, several thousands of Germans were murdered and a greater number was deported by the Polish governmental and non-governmental forces.

7 "Decree on Exercising Military Jurisdiction in the Area of Barbarossa and Special Measures by the Troops" issued on 13 May 1941. This Order was pre-

sented as evidence against the German High Command in their Nuremberg trial. See *The German High Command Trial. Law Reports of Trials of War Criminals.* New York: Howard Ferting, 1994 (reproduction of the original publication of 1949), p. 29-31.

8 See CASANOVA J., ESPINOSA F., MIR C. and MORENO GÓMEZ F. *Morir, Matar, Sobrevivir. La violencia en la dictadura de Franco.* Barcelona: Crítica, 2002, p. 30-33. The "Causa General informativa de los hechos delictivos y otros aspectos de la vida en la zona roja desde el 18 de julio de 1936 hasta la liberación" was established by decree of the Ministry of Justice of 26 April 1940 with the purpose of "investigar cuanto concierne al crimen, sus causas y efectos, procedimientos empleados en su ejecución, atribución de responsabilidades, identificación de las víctimas y concreción de los daños causados".

9 For the ICC system of situation selection and admissibility see M. Bergsmo and J. Pejic, "The Prosecutor", in Triffter (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, (Baden-Baden 1999), C.K. Hall, "Challenges to the Jurisdiction of the Court or the Admissibility of a Case", in Triffter (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, (Baden-Baden 1999), J. T. Holmes, "Jurisdiction and Admissibility", in Lee (ed.), *International Criminal Court: Elements of Crimes & Rules of Procedure*, (Transnational Publishers 2001), at 321-348 and "Complementarity: National Courts versus the ICC", in Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (Oxford 2002), at 667-686, S. Williams, "Issues of Admissibility", in Triffter (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, (Baden-Baden 1999), and A. Zimmermann, "The Creation of a Permanent International Criminal Court", Max Planck Yearbook of United Nations Law 1998, at 169-237.

10 IT-95-14/2/T.

11 As in ICC Statute, "Killing members of the group" as an act of genocide (art. 6-a), "Murder" as a crime against humanity (art. 7-a, followed by "extermination" art. 7-b), "Wilful killing", "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as war crimes (art. 8-a-I, and art. 8-c-i).

12 House of Commons Debates, vol. 483, col. 681, 29 January 1951, as quoted in the *Code for Crown Prosecutors,* of the Crown Prosecution Service of England and Wales, section VI "The Public Interest Test".

13 The condition of suspects of Tudjman, Boban and Susak is confirmed by their mention in indictments, evidence and public arguments put forward by the Prosecutor in public for a number of related Croat and Bosnian-Croat cases. Bobetko was indicted (case IT-02-62) for crimes allegedly committed in the Medak Pocket, but his surrender was postponed for reasons of health, and he died before he could be transferred to The Hague.

14 TAYLOR T. *The Anatomy ...* , p. 126. The Soviet prosecutor suggested to his British colleagues to include a charge for the German indiscriminate bombing of London with the V1 and V2 rockets, which was considered "inappropriate".

15 JACKSON R.H. *The Nurnberg Case as Presented by Robert H. Jackson Chief of Counsel for the United States.* New York, Alfred A. Knopf, 1947, p. 36.

16 See C. del Ponte, "Prosecuting the individuals bearing the highest level of responsibility", *Journal of International Criminal Justice* 2 (2004) p. 516-519.

17 VAN KOPPEN, op. cit., p. 210

18 VAN KOPPEN, op. cit., p. 213.

19 VAN KOPPEN, op. cit., p. 211.

20 ASWORTH, op. cit, p. 91.

21 VAN KOPPEN, op. cit., p. 211.

22 For a summary of the "Birmingham Six" case see GUDJONSSON, op. cit., p. 445-457. For a summary of the "Maguire Seven" case see ASHWORTH, op. cit., p. 11.

23 SHEFTEL, op. cit., p. xiv.

24 Furthermore, of all the cases selected from different republics and parties, the Prosecutor only found sufficient evidence for charges of genocide against civilian and military leaders from Bosnia-Hercegovina and Serbia, which is a significant feature of her findings. See official site of ICTY at http://www.un.org/icty/ .

25 Appeals judgement, case IT-96-21-A, para. 596.

26 Idem., para. 598 and 612.

27 Idem, para. 600.

28 Idem, para. 615-619.

29 The CDF (Civilian Defence Forces), RUF (Revolutionary United Front) and the AFRC (Armed Forces Revolutionary Council). See official site of SCSL at http://www.sc-sl.org/ .

30 See *Washington Times*, 06 Jan. 2005.

31 See BBC report of 10 June 2004 "Sierra Leone war 'hero' on trial at http://news.bbc.co.uk/1/hi/world/africa/3793727.stm . Norman was indicted on 7 March 2003, while two other CDF leaders Moinina Fofana and Allieu Kondewa were indicted on 26 June 2003. On 28 February 2003 the Trial Chamber ordered the joint trial of Norman, Fofana and Kondewa, and on 5 March prosecutors issued a consolidated indictment. The "CDF trial" was the first trial of SCSL, beginning on 3 June 2004.

32 See commentary by T. Allen in his book *Trial Justice. The ICC and the Lord's Resistance Army.* London; Zed Books, 2006.

33 Killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures intended to prevent birth, forcibly transferring children.

34 See for example chapters VI "Sampling" and VII "Sampling Theory" of BERNARD H. R. *Research Methods in Anthropology. Qualitative and Quantitative Methods.* Walnut Creek, CA: Altamira Press, 2002.