Article:
Batesmith, A orcid.org/0000-0002-0997-3154 (2021) International Prosecutors as Cause Lawyers. Journal of International Criminal Justice. mqab068. ISSN 1478-1387

https://doi.org/10.1093/jicj/mqab068

International Prosecutors as Cause Lawyers

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Abstract

This article contributes to the developing socio-legal perspectives on the practical realities, power dynamics and external perceptions of international criminal law (ICL) by exploring the professional sense of self amongst international prosecutors. Drawing upon original interviews with 'everyday' practitioners, the article uses the prism of 'cause lawyering' — the practice of law primarily for a lawyer's moral, political or ideological commitments — to illustrate the struggle between ICL's legal professionals within Bourdieu's concept of the juridical field. As a majoritarian practice among international prosecutors, cause lawyering evidences the position-taking of actors who look to assert their authority over and distinction from others within the field, whilst also exemplifying the strong correlation between professional role and personal identity. Identifying some of the consequences of cause lawyering for ICL, the article concludes by considering the broader implications of a relational study of the discipline's legal professionals.

1. Introduction

'This cause…is the cause of all humanity'

Originally addressed to the institution's newly appointed international judges upon their inauguration in 2003,[1] Kofi Annan's words are now immortalized in the entrance foyer of the International Criminal Court (ICC) in The Hague. The quote appears without attribution or further elaboration, although its location opposite the public

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[1] *International Criminal Court Judges Embody Our "Collective Conscience" Says Secretary-General to Inaugural Meeting in The Hague*, United Nations Press Release, UN Doc. SG/SM/8628-L/3027, 11 March 2003.

exhibitions and *en route* to the staff-only spaces of the Office of the Prosecutor speaks directly to an apparently self-evident reason for 'doing' international criminal law (ICL). In the academic community, adherents and critics alike have long discussed rationales for the evolution of this complex and expensive architecture, such as 'ending impunity', 'justice for victims', 'prevention and deterrence', 'creating a historical record' and so on.[2] Practitioner viewpoints on these issues are typically voiced by ICL's apex (or 'elite'[3]) professionals, who look to present consistent narratives of legalism, normative force, accountability and progress.[4] However, the influence of what might be styled ICL's 'everyday' practitioners — those prosecutors, defence counsel and victims' lawyers whose daily work at the international criminal tribunals keeps the process of investigations, trials and appeals moving — is being revisited,[5] as the scholarship continues its socio-legal turn.

This article contributes to perspectives on the practical realities, power dynamics and external perceptions of ICL by exploring the professional sense of self amongst international prosecutors. I use the prism of 'cause lawyering' to analyse their practices, motivations and self-perceptions, drawing upon original qualitative interviews. Considered in opposition to conventional, client-driven lawyering, and as a challenge to the neutrality, political agnosticism and formalist understandings of traditional legal professionalism, cause lawyering in a domestic setting has very much been viewed as a minority practice.[6] In contrast, cause lawyering appears to be a natural 'fit' for ICL

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[2] The literature is vast on these topics. For a sample, see G. Robertson, 'Ending Impunity: How International Criminal Law can Put Tyrants on Trial', 38 *Cornell International Law Journal* (2005) 649; L. Moffett, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague' 13 *Journal of International Criminal Justice* (2015) 281-311; D. Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', 23 *Fordham International Law Journal* (1999) 473; R.A. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011).

[3] M.J. Christensen, 'The Creation of an Ad Hoc Elite and the Value of International Criminal Law Expertise on a Global Market', in K.J. Heller et al. (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 89-105.

[4] As summarized, for example, in J. Dobson and S. Stolk, 'The Prosecutor's Important Announcements; the Communication of Moral Authority at the International Criminal Court', 16 *Law, Culture and The Humanities* (2016) 1-20.

[5] N. Eltringham *Genocide Never Sleeps: Living Law at the International Criminal Tribunal for Rwanda* (Cambridge University Press, 2019). See also J. Hagan, *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal* (University of Chicago Press, 2004); J. Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials', 48 *Vanderbilt Journal of International Law* (2007) 529-594; and M.J. Christensen, 'From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and its Professional Practices', 43 *International Journal of Law, Crime and Justice* (2015) 609-625.

[6] A. Marshall and D. Crocker Hale, 'Cause Lawyering', 10 *Annual Review of Law and Social Science* (2014) 301-320; S.A. Scheingold and A. Sarat, *Something to Believe In: Politics, Professionalism, and*

and its overtly 'cause-ist' foundations. My own data indicate that cause lawyering particularly resonates with international prosecutors, whereas many (more conventionally minded) defence counsel strongly reject it as unprofessional, overly emotional and dangerously irrational. Situating this enquiry in Pierre Bourdieu's relational theory of the field as it applies to ICL,[7] I explore how and why cause lawyering is such a dominant practice. Whilst it may be unremarkable to assert that ICL's principal 'causes' can be seen as part of the unchallengeable core rules of the field,[8] cause lawyering offers a new insight through which to analyse the pre-existing dispositions of and power dynamics between ICL practitioners more generally.

The article begins with a brief outline of the methodology and the data. After an initial framing within the literature of cause lawyering and prosecutors' motivations in both domestic and international practice, I introduce Bourdieu's concept of the juridical field as it applies to ICL, highlighting a number of key themes identified in recent scholarship. I then discuss the findings from the data conducted for this research: firstly, how prosecutors' own dispositions inform their views of ICL's causes; secondly, that cause lawyering is a majoritarian but polarising practice for ICL's prosecutors; and, finally, that cause lawyering is both an expression of prosecutors' core identity and a form of 'position-taking' in which they distinguish themselves from other, less 'committed', actors to assert their dominance over the field. Finally, I sketch out some of the potential consequences of cause lawyering for ICL, including its impact on adversarialism, over-promising and decision-making. The article concludes with some reflections on the broader implications of such a relational study of the discipline's legal

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Cause Lawyering (Stanford University Press, 2004); A. Sarat and S.A. Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press, 1998); A. Sarat and S.A. Scheingold (eds), *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice* (Stanford University Press, 2005).

[7] J. Hagan and R. Levi, 'Crimes of War and the Force of Law', 83 *Social Forces* (2005) 1499-1534; P. Dixon and C. Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', 7 *International Journal of Transitional Justice* (2013) 393-412; F. Mégret, 'International Criminal Justice as a Juridical Field', XIII *Champ Pénal/Penal Field* (2016); M.J. Christensen, 'The Emerging Sociology of International Criminal Courts: Between Global Restructurings and Scientific Innovations', 63 *Current Sociology* (2015) 825-849; K. Campbell, 'The Making of International Criminal Justice: Towards a Sociology of the "Legal Field"', in M.J. Christensen and R. Levi (eds), *International Practices of Criminal Justice: Social and Legal Perspectives* (Routledge, 2017). C. Stahn, 'Justifying International Criminal Justice: Towards a Relational Approach', available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3483669, (visited 25 June 2021).

[8] Mégret; Dixon and Tenove; Christensen; all *ibid*.

professionals, as we look to develop sociological perspectives on the practical realities, power dynamics and external perceptions of this unique and changing juridical field.[9]

2. Methodology and Data

This article is based on data obtained in semi-structured interviews conducted with international criminal justice practitioners: prosecution, defence and victims' lawyers currently or formerly practising at the international criminal tribunals.[10] In common with other qualitative projects on lawyers' motivations,[11] the aim was to identify relevant themes through individual practitioner narratives, and, as Jens Meierhenrich suggests, to take seriously the 'everyday life' of international lawyers given its 'explanatory potential'.[12] As with other fieldwork-based research, this study is centred on the interviewees' subjective oral representations rather than on any objectively verifiable reality. In the absence of any broader observational or longitudinal data, the interviews for this article capture the narrative responses of practitioners at a particular moment in time.[13] The interviews explore a long-held interest in the motivations of ICL's practitioners. Acknowledging the influence of my own positionality as a former ICL prosecutor, it had always appeared that cause lawyering chimed with the distinct cause-ist narrative in the public communications of apex professionals as well as finding expression in the preambular language of core texts.[14] However, an interrogation of the extent to which *everyday* practitioners idealize, internalize and reproduce 'cause lawyer' motivations and identities is at the heart of this enquiry. The process was not entirely deductive; keeping an open mind to theories that 'emerge from

[9] M. Bergsmo et al. (eds), *Power in International Criminal Justice* (Torkel Opsahl Academic EPublisher, 2020).
[10] The term 'ICL practitioner' refers to those who were working, or who had previously worked, in the various international criminal tribunals. I interviewed a total of 62 practitioners: 26 prosecutors, 25 defence counsel, eight victims' lawyers, with three in other legal professional positions. Interviewees were drawn from a cross-section of seniority, previous professional background and institutional experience.
[11] For example, M. Etienne, 'The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers', 95 *Journal of Criminal Law & Criminology* (2004-2005) 1195-1260; R. Wright and K. Levine, 'Career Motivations of State Prosecutors', 86 *George Washington Law Review* (2018) 1667-1710; D. NeJaime, 'Cause Lawyers Inside the State', 81 *Fordham Law Review* (2012) 649-704.
[12] J. Meierhenrich, 'Foreword: The Practices of the International Criminal Court', 76 *Law and Contemporary Problems* (2013) i-x.
[13] W. Randall and C. Phoenix, 'The Problem with Truth in Qualitative Interviews: Reflections from a Narrative Perspective', 1 *Qualitative Research in Sport and Exercise* (2009) 125-140, at 137.
[14] Dobson and Stolk, *supra* note 4.

the data', some research themes surfaced inductively,[15] including the role of emotion in ICL decision-making as I discuss below.

3. Framing the discussion: Cause Lawyering, Prosecutors and International Criminal Law

A. Distinctions: Cause vs. Conventional Lawyers

Traditional understandings of legal practitioners position them as detached professionals, exercising their technical legal skill for paying clients to provide zealous representation and objective, dispassionate advice.[16] Conventional lawyers are expected to work within established professional ethical rules, without a personal interested in, or an accountability for, the causes of their client. They are not expected to use the law for moral or political advocacy, nor to make any value judgments on the organization of society through their legal practice.[17] In requiring lawyers to be neutral, clients expect to be given the best, most objective advice; untainted by lawyers' own personal views and interests. Equally, understanding legal representation as a detached professional service in which the lawyer is not (unless she chooses to be) associated with her client's cause classically ensures that there is protection for, and no disincentive to, lawyers representing litigants with unpopular causes, thereby guaranteeing (in theory at least) access to justice for all.[18]

In contrast, cause lawyers use their legal skills 'to pursue ends and ideals that transcend client service',[19] in search of 'the good society',[20] negotiating the boundaries between

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[15] For an example of using both inductive and deductive approaches in qualitative research, see J. Fereday and E. Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development', 5 *International Journal of Qualitative Methods* (2006) 80.

[16] Two classic texts on the subject are W. Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics', 1 *Wisconsin Law Review* (1978) 29-144 and D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press 1988).

[17] For an overview of the cause/conventional lawyer debate, see Scheingold and Sarat, *Something to Believe in, supra* note 6, at 1-22.

[18] S.A. Scheingold and A. Bloom, 'Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional', 5 *International Journal of the Legal Profession* (1998) 209-253, at 213.

[19] Scheingold and Sarat, *Something to Believe in*, *supra* note 6, at 3.

[20] A. Sarat and S.A. Scheingold, 'Cause Lawyering and the Reproduction of Professional Authority: An Introduction', in Sarat and Scheingold (eds), *Political Commitments*, *supra* note 6, 3-30 .

law and politics at the 'intersection of lawyering and social action'.[21] The law is instrumentalized in pursuit of a social good, rather than exclusively in the service of a client. Although something of a contested concept, the classic formulation is that cause lawyering provides practitioners with 'something to believe in'; a 'reconnection' of law and morality[22] expressing an authentic emotional and personal connection to their work beyond mere professional pride or diligence. Whilst people are rarely motivated by a single issue, cause lawyers typically espouse broader, altruistic, goals over and above client-centredness.[23] Clients are a means to achieving a greater end:[24] cause lawyers are willing to view their legal practice as part of a wider political stratagem to bring about social change. This political stratagem is widely recognized as the key distinguishing feature of the cause lawyer.[25] This places cause lawyering at odds with neutral legal professionalism;[26] it is seen as 'transgressive',[27] a 'deviant strain' of legal practice,[28] and a mistrusted, or at best, barely tolerated praxis that goes against the grain of the majority of the organized profession. Although a definitive characterization and precise scope of cause lawyering is sometimes viewed as elusive,[29] cause lawyers fundamentally believe in their own distinctiveness, often as a way of 'reclaiming' the profession through taking an overtly moral position in relation to the issues they champion. As I will discuss in relation to international prosecutors, such self-distinction is a form of position-taking within any given field of legal practice.

B. Cause Lawyering Within the State?

[21] T.M. Hilbink, 'You Know the Type …: Categories of Cause Lawyering', 29 *Law & Social Inquiry* (2004) 657-698, at 658.
[22] Sarat and Scheingold, *supra* note 20, at 6; R. Abel, 'Speaking Law to Power: Occasions for Cause Lawyering', in Sarat and Scheingold (eds), *Political Commitments*, *supra* note 6, 69-117.
[23] Scheingold and Bloom, *supra* note 18 at 218; C. Menkel-Meadow, 'The Causes of Cause Lawyering: Towards and Understanding of the Motivation and Commitment of Social Justice Lawyers', in Sarat and Scheingold (eds), *Political Commitments*, *supra* note 6, 31-68, at 38.
[24] Scheingold and Bloom, *supra* note 18, at 209.
[25] Etienne, *supra* note 11, at 1200.
[26] Sarat and Scheingold, *supra* note 20, at 3.
[27] Scheingold and Bloom, *supra* note 18.
[28] Sarat and Scheingold, *supra* note 20, at 3.
[29] For a recent summary of the broader literature on cause lawyering, see Marshall and Crocker Hale, *supra* note 6. Also see K. McEvoy, 'What did the Lawyers do during the 'War'? Neutrality, Conflict and the Culture of Quietism', 74 *The Modern Law Review* (2011) 350-384, at 354

Cause lawyers are archetypally characterized as both actors outside the state[30] and in 'adversarial tension' with government lawyers:[31] they do not benefit from state power but, rather, are forced into opposition against it, traditionally taking a 'defensive' position to protect their clients from executive or judicial overreach.[32] In contrast, prosecutors, as one of the categories of government lawyers, are the quintessential 'insiders': their primary task is 'to carry out the interests of the state'.[33] Although there are significant differences in how different legal traditions conceive the prosecutor's role and prosecutorial culture more broadly, a prosecutor's principal function is to enforce society's rules.[34] All prosecutors are mandated by the state, affording them a powerful position in the legal system relative to other actors. Although there is a strand of scholarship exploring how prosecutors and other lawyers working within the state can be cause lawyers, the concept is not straightforward.[35] Lawyers working within a state's prosecution service owe contractual loyalty to, and are limited by the bureaucracy of, the offices within which they work. Any activist disposition will be met with opposition from the 'orthodoxy of the system'.[36] As David Luban notes, causes typically exist 'because the dominant institutions of society have failed to represent the interests and ideas of some subgroup … and government is the most dominant of dominant institutions'.[37] In other words, in the domestic sphere being a cause lawyer and a government lawyer are essentially opposite identities, and those who seek to be

[30] P. Nolette, 'Law Enforcement as Legal Mobilisation: Reforming the Pharmaceutical Industry Through Government Litigation', 40 *Law and Social Inquiry* (2015) 123-151, at 137.
[31] NeJaime, *supra* note 11, at 649 (NeJaime explores the impact of cause lawyers when they are hired to work for the state).
[32] K. McEvoy, A. Bryson and A. Batesmith 'Cause lawyering in Conflicted, Authoritarian and Transitional Societies: Politics, Professionalism and Gender', in R. Abel et al. (eds), *Lawyers in 21st Century Societies: Vol. 2: Comparisons and Theories* (Hart Publishing, forthcoming 2022).
[33] Nolette, *supra* note 30, at 138.
[34] E. Luna and M. Wade, *The Prosecutor in Transnational Perspective* (Oxford University Press, 2012) 432; M. Tonry, 'Prosecutors and Politics in Comparative Perspective', 41 *Crime and Justice* (2012) 1-33. The extent to which prosecutors do in fact uphold their state-mandated obligation to be neutral 'ministers of justice' is a perennial source of comment — even in inquisitorial legal systems: L. Soubise and A. Woolley, 'Prosecutors and Justice: Insights from Comparative Analysis', 42 *Fordham International Law Journal* (2018) 587.
[35] NeJaime, *supra* note 11.
[36] M. Christensen, 'International Prosecution and National Bureaucracy: The Contest to Define International Practices Within the Danish Prosecution Service', 43 *Law and Social Inquiry* (2018) 152-181, at 164.
[37] D. Luban, 'The Moral Complexity of Cause Lawyers within the State', 81 *Fordham Law Review* (2012) 705-714, at 705.

both will need to compromise their ideology and/or strategy.[38] They will, as Luban puts it, stand 'on a kind of moral knife-edge'.[39]

C. Domestic Prosecutors: Identity, Motivations and Dispositions

In addition to legal traditions, principles and procedural rules, prosecutors are also governed by their own dispositions — by their individual ethical framework, beliefs and personal priorities.[40] Exploring prosecutors' inclinations, professional self-perceptions and motivation, there are some interesting parallels with cause lawyering, as the scholarship on US practitioners demonstrates.[41] Dominated by the 'irreducible conflict'[42] between the obligations to do justice and to act as an adversarial advocate, an American prosecutor's identity expresses the country's traditional 'muscular' prosecutorial culture. This 'fight between the good and the guilty' as Alafair Burke describes it, is routinely supplemented by a prosecutor's 'passion' to secure a conviction,[43] although the line between zealous yet professional prosecution and those who impermissibly prioritise convictions over justice is not always clear.[44] In their recent empirical work, Kay Levine and Ronald Wright argue that prosecutors' core personalities as well as the managerial ideology or workplace structure within a particular prosecution office contribute to how individuals resolve the inherent tension within their role.[45] Levine and Wright explore the images and expressions US prosecutors use to portray their own professional self-image.[46] For example, their interviewees frequently described themselves as 'wearing the white hat' — a reference to the 'good guy' in Westerns, and a symbol of higher ideals, a normative obligation and a badge of honour. Overly zealous lawyers (on both the prosecution and defence)

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[38] NeJaime, *supra* note 11, at 704
[39] Luban, *supra* note 37, at 713
[40] Tonry, *supra* note 34, at 26.
[41] The bulk of the scholarship on prosecutor identity and culture emanates from the United States, although there are notable exceptions: Soubise and Wooley, Luna and Wade, Tonry *supra* note 34.
[42] For a summary of the literature on this point, see Soubise and Woolley, *supra* note 34 at 595.
[43] A. S. Burke, 'Prosecutorial Passion, Cognitive Bias, and Plea Bargaining', 91 *Marquette Law Review* (2007) 183, 187-9.
[44] K. Levine and R. Wright, 'Prosecutor Risk, Maturation, and Wrongful Conviction Practice', 42 *Law & Social Inquiry* (2017) 648-676, at 650, 657.
[45] *Ibid.* at 667.
[46] K. Levine and R. Wright, 'Images and Allusions in Prosecutors' Morality Tales', 5 *Virginia Journal of Criminal Law* (2017) 38, at 40.

were described as having 'drunk the Kool-Aid'[47] or as being 'true believers', blinded by their feelings and unable to neutrally evaluate a case.[48] For Levine and Wright, such images are the expressions of prosecutors seeking affirmation of their social contributions.[49] Indeed, in more recent research, they note how prosecutors are particularly motivated by the fact that prosecuting reflects a 'core absolutist identity' and a desire to perform public service,[50] inclinations that ring true for international prosecutors, as we will see. Prosecution work, in other words, expresses practitioners' commitment to rules, accords with their beliefs or personal morality, and is bound up with a narrative of altruism and 'making a difference' as 'champions of the community' for 'people who cannot stand [up] for themselves.'[51]

Domestic prosecutors' professional self-perception is thus on its face consonant with a cause lawyer identity. However, passion, conviction and a sense of mission to uphold and enforce the law is only part of the definition: for prosecutors to be cause lawyers they must also have a clear intention to effect social or political change. The zealous prosecutor who vigorously pursues her aim of seeking to convict as many of the guilty as possible would not fall within the definition — though the prosecutor determined to change the way in which, for example, sexual crimes are investigated and prosecuted to improve the conviction rates and change society's attitudes to gender-based violence may well be. Essentially, however, domestic prosecutors do not face existential challenges to their core role: the state will always need a system of criminal justice to enforce society's rules. Within the specific context of international criminal tribunals, these issues play out somewhat differently on account of how the field is constituted and the forces at play within it.

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[47] This is a reference to what has become known as the Jonestown Massacre, where a leader of a religious cult persuaded nearly a thousand of his followers to drink lethal poison; as Christine Leigh Heyrman explains, 'Drinking the Kool-Aid has come to refer to an inability or unwillingness to be disabused of falsehoods — even when confronted with facts — often out of a sense of loyalty to group identity. The phrase implies the complicity of an individual or a group of people in their own deception': C. L. Heyrman, 'Drinking the Kool-Aid', 47 *Reviews in American History* (2019) 458-63 at 458-9.

[48] Levine and Wright, *supra* note 46 at 56-60. As I discuss later in this article, these exact turns of phrase were used spontaneously by participants interviewed for my own research.

[49] Levine and Wright, *supra* note 46, at 62-63.

[50] R. Wright and K. Levine, 'Career Motivations of State Prosecutors', 86 *George Washington Law Review* (2018) 1667-1710. On public service being key to prosecutor motivation, see D. Sklansky, 'The Problems with Prosecutors', 1 *Annual Review of Criminology* (2018) 451-469.

[51] Wright and Levine, *supra* note 50 at 1688-1690.

D. Cause Lawyering Within International Criminal Law

The prevalence of cause lawyering in any given environment — and the specific practices of cause lawyers — is inherently linked to the social and political contexts within which the law is mobilized on behalf of a cause.[52] ICL was founded upon and continues to be driven by the celebrated political and ideological causes earlier identified: activist missions of faith,[53] of hope for humanity and for victims of mass atrocity, and other expressions of the desire to bring about social and political change at a global level.[54] There is obvious thematic resonance between ICL and cause lawyering, specifically on the interplay of legal careers, practice settings and professional identities with the causes themselves.[55] Yet the scholarship on cause lawyering within international criminal law is relatively sparse. Debates on issues of legal activism or otherwise mobilising the law to address global causes tend to focus upon defence lawyers and their professional ethics. Some argue that ICL's particular socio-political context requires lawyers to take account of its broader causes;[56] others maintain that a lawyer's overwhelming ethical and professional obligation is to their client.[57] In the empirical literature, studies of the incidence of 'activist' or 'political' defence lawyers in ICL suggest that few are motivated by a commitment to causes over and above the duty to their client;[58] the minority who do self-identify as 'political' are

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[52] Marshall and Crocker Hale, *supra* note 6, at 313.
[53] D. Koller, 'The Faith of the International Criminal Lawyer', 40 *New York University Journal of International Law and Politics* (2008) 1019-1069.
[54] Some key examples include: M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', 59 *Law and Contemporary Problems* (1996) 9-28; A. Cassese, 'Reflections on International Criminal Justice', 61 *The Modern Law Review* (1998) 1-10; P. Hayden, 'Cosmopolitanism and the Need for Transnational Criminal Justice: The case of the International Criminal Court' 51 *Theoria* (2004) 69-95; D. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press, 2013).
[55] Eltringham, *supra* note 5, at 47; L. Jones, 'Exploring the Sources of Cause and Career Correspondence among Cause Lawyers' in Sarat and Scheingold *The Worlds Cause Lawyers Make, supra* note 6, at 203-238; A. Southworth, 'Professional Identity and Political Commitment among Lawyers for Conservative Causes' in Sarat and Scheingold *The Worlds Cause Lawyers Make, supra* note 6, at 83-111, 96; Marshall and Crocker Hale, *supra* note 6, at 310-313.
[56] J. Temminck Tuinstra, 'Defending the Defenders: The Role of Defence Counsel in International Criminal Trials', 9 *Journal of International Criminal Justice* (2010) 463-486; J. Turner, 'Legal Ethics in International Criminal Defense', 10 *Chicago Journal of International Law* (2010) 607-703.
[57] M. Karnavas, 'Defence Counsel Ethics, the ICC Code of Conduct and Establishing a Bar Association for ICC List Counsel', 16 *International Criminal Law Review* (2016) 1048-1116.
[58] J. Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials', 48 *Virginia Journal of International Law* (2008) 529-594.

viewed with scepticism by the majority who prefer to see themselves as legal 'technicians'.[59]

As to cause lawyering amongst ICL's prosecutors, the references are even more scant. In one notable exception, Birju Kotecha argues that (former) ICC Prosecutor Fatou Bensouda is a cause lawyer because both her projected identity and principal activities are essentially political and activist, notwithstanding her professed obligations to the law and legalism.[60] For Kotecha, that such apex international prosecutors are indeed cause lawyers appears self-evident. In their official appearances, conference presentations and opening speeches, senior international prosecutors tend to follow a common narrative and a standard rhetorical tone speaking to ICL's higher moral, ideological or political purposes.[61] The long-term 'mission' of international justice appears from these public statements to be superordinate to the individual criminal cases themselves, thereby establishing the basic conditions for cause rather than conventional lawyering.

However, we should pause to consider the very different structural environment within which international prosecutors operate in contrast to their domestic counterparts. Frédéric Mégret highlights the 'founding paradox' at the heart of ICL: that it is a system of criminal law without a state.[62] Unlike domestic criminal law, ICL's rules are neither backed by the force of a sovereign state nor any state-like entity, and at the level of international justice, there is no exact parallel to the domestic relationship between the government lawyer or prosecutor and the nation state. The entire project of ICL is driven by political, normative, social and economic considerations that are far looser and less certain than they would be if pegged against a domestic state and its constitution, where the boundaries of legalism and popular cause-ism are more defined,

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[59] Eltringham, *supra* note 5, at 47-51; N. Eltringham, 'The Judgement is not Made Now; the Judgement Will be Made in the Future': "Politically Motivated" Defence Lawyers and the International Criminal Tribunal for Rwanda's "Historical record"', *Humanity* (2017) n.p.

[60] B. Kotecha, 'The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism', 31 *Leiden Journal of International Law* (2018) 939-962, at 954; see also brief references to cause lawyering and prosecutors in Christensen, *supra* note 36 at 168.

[61] For typical examples of senior prosecution narratives, see E. Addley, 'Fatou Bensouda, The Woman Who Hunts Tyrants' *The Guardian* 5 May, 2016; D. Crane, *Every Living Thing: Facing Down Terrorists, Warlords, and Thugs in West Africa — A Story of Justice* (Carolina Academic Press, 2019); D. Crane, L. Sadat and M. Scharf, *The Founders: Four Pioneering Individuals Who Launched the First Modern-Era International Criminal Tribunals* (Cambridge University Press, 2018).

[62] Mégret, *supra* note 6, at §2.

and the bureaucracy more restrictive. Taking the example of the ICC, although specifically created to address violations of ICL, it is designed as a jurisdiction of last resort, and the onus on national courts to investigate and prosecute allegations of genocide, crimes against humanity, war crimes and (hypothetically) aggression. However, as Mikkel Jarle Christensen notes, domestic prosecutors often find it extremely difficult to undertake such cases in offices that are constrained by municipal procedures, processes and priorities that are both ill-suited and hostile to dealing with ICL.[63] It is for this reason that activism on behalf of ICL's causes is a far more straightforward proposition in the 'structurally uncoupled' international criminal tribunals. Before turning to my data, it is here where applying Bourdieu's theory of the juridical field is most relevant to understanding the socio-legal dynamics of ICL, and the role of cause lawyering within it.

4. A Bourdieusian Perspective of ICL

Bourdieu theorizes that any given site of social interaction functions as a distinct 'field' — the space where actors within it transact with and struggle against others.[64] Understanding any given field requires an analysis both of how it relates externally to competing fields as well as an examination of how the various actors internally relate to one another, the positions they take, the practices they employ and the advantages they seek to gain.[65] Each field also has its own internal logic or fundamental beliefs, those operating rules of the game or '*doxa*' as Bourdieu describes them, according to which the discipline functions.[66] Bourdieu explains how actors assert their dominance within a field through a process of position-taking *in relation* to others — as he puts it, 'it is the state of the relations of force between players that defines the structure of the field.'[67] At the heart of this process of position-taking is Bourdieu's foundational concept of 'distinction',[68] according to which actors seek to differentiate themselves

[63] Christensen, *supra* note 36.
[64] P. Bourdieu and L. Wacquant, *An Invitations to Reflexive Sociology* (Polity Press 1992), 94-98; P. Bourdieu, *Outline of a Theory of Practice*, (R. Nice (trans.), Cambridge University Press 1977).
[65] Bourdieu, *supra* note 64.
[66] C. Deer, 'Doxa' in M. Grenfell (ed.) *Pierre Bourdieu: Key Concepts*, 2nd edition (Routledge 2014) 114-125.
[67] Bourdieu and Wacquant, *supra* note 64, at 99, 105.
[68] As Bourdieu expresses most authoritatively in P. Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (R. Nice (trans.), Routledge 2010).

from others by asserting that their own culture or practices are superior to the culture or practices of others.[69] Practices are informed not only by the field and its rules within which an actor operates, but also by their own dispositions and tendencies with which they enter the field — what Bourdieu described as *'habitus'*.[70] Actors in the field compete for the acquisition and accumulation of 'symbolic capital' — the requisite 'authority, knowledge, prestige, reputation' (among other resources) — necessary to prevail.[71] Each of these three concepts — field, *habitus* and capital — are inter-dependent and at the heart of a relational analysis of any given social space. In relation to domestic law, Bourdieu focuses on how it operates as a juridical field in conjunction, and in competition with, other social spaces, in particular the operation of the state.[72] For Bourdieu, lawyers are both sustained and defined by their resistance to state power, and their position in relation to it.[73] He asserts that the central purpose of the competition between actors in a juridical field is for ultimate control of the narrative – a battle for the 'identity' of the law.[74]

Since the turn of the millennium, socio-legal scholars have increasingly drawn upon Bourdieu's theories and analytical tools in an effort to explain the forces exerted both upon ICL, and from within it.[75] Hagan and Levi, and Dixon and Tenove among others, discuss how ICL exists in varying states of tension and competition with other fields such as global politics, international relations, national interests, domestic criminal justice and human rights advocacy.[76] However, of more relevance to the issues discussed in this article are the *internal* dynamics of ICL as a juridical field. It is uncontroversial to suggest that the *doxa*, or core rules, of the ICL field are predominantly aligned to its central 'causes': individual criminal responsibility, retribution and deterrence, and justice for victims.[77] These rules of the game, as Mégret

[69] N. Crossley 'Social Class' in Grenfell, *supra* note 66, at 94.
[70] Bourdieu, *supra* note 64, at 214; K. Maton 'Habitus' in Grenfell, *supra* note 66, at 48-64.
[71] P. Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field' 38 *Hastings Law Journal* (1986) 805-853, at 812.
[72] *Ibid.*
[73] *Ibid.* at 808.
[74] *Ibid.* at 822.
[75] See note 7.
[76] Hagan and Levi, *supra* note 7, at 1524; Dixon and Tenove, *supra* note 7, at 411.
[77] Dixon and Tenove (*Ibid.* at 394) argue that ICL's focus on victims is key to understanding the discipline's rules of the game.

suggests, include 'a real sense of mission to enforce certain norms, and a belief that the international legal order will break apart if that responsibility is not enforced'.[78]

As my research data suggests, ICL's legal professionals enter the field with already-formed inclinations. Within the ICL field, they also seek to leverage their symbolic capital brought into ICL from international law and human rights, diplomatic service and successful domestic practice.[79] Dixon and Tenove argue that this struggle plays out by practitioners competing for different (and potentially conflicting) forms of authority. Of particular relevance are what they describe as *legal authority*, whereby practitioners communicate and adopt both international and domestic norms and practices; *moral authority*, through which ICL is proposed as the solution for victims of mass violence; and *expert authority*, where problems are solved by deploying specialist knowledge.[80] These themes resonated with the interview participants in the current research. Taking up positions in relation to their competitors and employing particular practices to gain influence over them, we will return later to the idea that international criminal lawyers are not only seeking to assert their own professional identity but are also fighting for control of this specific juridical field of law.

The absence of any equivalent parallel to Bourdieu's lawyer/state relationship of resistance in the domestic juridical field undoubtedly influences the objective relations of ICL's various actors, as well as the positions they seek to take. From ICL's inception, judges and prosecutors have been seen as instrumental in driving the institutions forward through the investigation and trial processes.[81] More recent perspectives on ICL's power dynamics continue to focus on its 'high officials' who remain both the public face of the tribunals and the power-holders.[82] Although defence counsel are rather more external to the process,[83] their marginalization within ICL's institutions in tension with the fact that they are said to be fundamental to the discipline's 'liberal

[78] Mégret*, supra* note 7, at §42.
[79] *Ibid.* at §31.
[80] Dixon and Tenove, *supra* note 7, at 403-5.
[81] Hagan and Levi, *supra* note 7, at 1505.
[82] Bergsmo, *supra* note 9, at 5.
[83] In most international criminal tribunals, defence offices do not form part of the core administrative divisions within the institution: R. Wilson, '"Emaciated" Defense or a Trend to Independence and Equality of Arms in Internationalized Criminal Tribunals?', 15 *Human Rights Brief* (2008) 6-10.

credentials'.[84] This ambiguity places defence counsel in a conflicted objective position within the ICL field — symbolically essential yet functionally on the periphery — and is a major factor in determining the dynamics with other actors, particularly prosecutors.

Having sketched out these objective relations, the issue remains precisely how ICL's various actors subjectively seek to position themselves within the field. Without any support from a state-like entity, Mégret argues that international criminal lawyers must engage in a range of 'self-sustaining' extra-legal practices. Such quasi-diplomatic, bureaucratic, rhetorical functions are broader and contribute more to the creation of the ICL field than would be the case in a domestic legal setting.[85] Straddling the legal and the rhetorical, the practice of cause lawyering is employed as the principal tool for prosecutors to distinguish themselves from others within the field. Morten Bergsmo notes that Bourdieu's theory of distinction could be applied to 'the profligate practice of separate and dissenting opinions' at the ICC: a wry observation on how ICL's judges compete for intellectual authority.[86] As the data for this article suggests, not only is cause lawyering a practice to which many international prosecutors interviewed for this article were inclined, cause lawyering appeared to justify the taking of a position of superiority over those who may be (or appear to be) more sceptical of or less committed to ICL's principal causes. It is to the findings that we now turn.

5. Findings: International Prosecutors as Cause Lawyers

A. Practitioners' Dispositions Align with ICL's Causes

The aim of this research was to explore the personal motivations and professional self-perceptions of those who might be classed as ICL's 'everyday' practitioners. Acknowledging that a lawyer's dispositions and motivations may be varied and may change over time,[87] previous empirical or ethnographic studies, as noted above, have

[84] Mégret, *supra* note 7, at §37; M. Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law* (2002) 1-35, at 32.
[85] Mégret, *supra* note 7, at §7 and §45-50.
[86] M. Bergsmo, 'Unmasking Power in International Criminal Justice: Invisible College vs. Visible Colleagues' in Bergsmo, *supra* note 9, at 16 fn. 18.
[87] Étienne, *supra* note 11, at 1208; Eltringham, *supra* note 5, at 47-48.

found that the principal reason lawyers enter ICL practice is for professional curiosity rather than for any political or moral crusade.[88] The data for the current study was somewhat different. A thread runs through many of the interview responses: that practitioners enter ICL's juridical field not only *with* their pre-existing (and divergent) dispositions, but *because* of them. Whilst curiosity was an important factor, for many interviewees the 'causes' of international justice were a strong motivating force. Prosecutors frequently stated that it would be virtually impossible to work without fully subscribing to ICL's causes of ending impunity, justice for victims, deterring potential perpetrators and so on. Such causes were the main reason why prosecutors worked in ICL said one (ICL7);[89] another expressed the view that these causes *"completely shape the institution and everything that we do"* (ICL17). Mirroring the studies on domestic prosecutors discussed above, a major motivation expressed by international prosecutors was altruism and public service. They typically saw ICL as a tool to "*change the world"* (ICL7), to "*contribute to the world being a better place"* (ICL13 and ICL26) or *"to help the needy and people who can't help themselves" (ICL9),* by *"bringing justice to victims"* (ICL23) and by *"working for … communities and victims and fairness and underdogs: ... voiceless people."* (ICL24). Another prosecutor put it even more starkly: *"I felt that I had a million clients which were the dead people in the ground in Rwanda and I owed them a great duty ... to try and see that they got some modicum of justice"* (ICL34). These inclinations express what Immi Tallgren has described as the 'absoluteness of humanitarian altruism',[90] where 'humanity' is projected as both an orienting principle and a moral community dependent on the 'assumed innocence' of the victim.[91]

Victims' lawyers spoke in similarly positive terms of ICL's causes: practitioners of all kinds needed to have a *"basic belief"* in ICL and its principal causes, said one (ICL52). Another was of the view that the causes helped them endure: *"you can at least remind yourself why you're actually here and doing it"* (ICL45). One victims' lawyer went

[88] Turner conducted her studies in 2006 (Turner, *supra* note 5, at 548); Eltringham conducted his in 2005 (Eltringham, *supra* note 5, at 35).
[89] All participants consented to being interviewed on condition of anonymity. I have standardized the identifying code for each participant as "ICL n" to denote 'international criminal lawyer'.
[90] I. Tallgren, 'The Voice of the International: Who is Speaking?', 13 *Journal of International Criminal Justice* (2015) 135-155, at 147.
[91] R.A. Wilson and R.D. Brown (2008) *Humanitarianism and Suffering: The Mobilisation of Empathy* (Cambridge University Press), at 24.

further still, remarking that if more practitioners were committed to ICL's causes, the institutions would be better able to achieve their ultimate goals (ICL53). In contrast, defence lawyers tended to be more circumspect of ICL's causes. As one defence counsel put it, *"no one would describe domestic justice as a cause, and … I don't view [ICL] as a cause"* (ICL10). Another put it more bluntly, *"I'm very suspicious of the causes of ICL…"* (ICL19), an illustration of a wider point that defence lawyers understandably tended to emphasize the overriding importance of procedural fairness (ICL21), and cautioned against a focus on issues other than client representation: *"I mean, the cause for me is only ever the best representation possible of my client"* (ICL19).

Most practitioners unsurprisingly had worked previously for the same 'side' domestically as they had gone on to practise internationally. However, some had switched roles when leaving domestic practice — particularly if they were seeking to maintain their desire to work for what they viewed as the *"morally right side"* (ICL55), resulting in instances where civil liberties and domestic defence lawyers became international prosecutors. When describing ICL prosecuting, one former domestic defence lawyer explained, *"I mean, it's just like feeling you have a client, something I brought from my public defender days into my representing victims and seeing their perpetrators prosecuted, I felt that was a strong sort of connection there"* (ICL34). The parallels between the disposition to work for the underdog at domestic level in defence work and working on behalf of the victim community as an international prosecutor were summarized as a desire to work for those *"put upon by a much stronger force"* (ICL3).

These responses illustrate how professionals' identities tend to align with the organisations within which they work, or in Bourdieusian terms, this is lawyers with a particular *habitus* gravitating to a particular juridical field. As Karl Maton notes, actors are drawn to certain fields because of their own personal dispositions,[92] to which they also bring relevant symbolic capital to further enhance their standing relative to others. Writing about cause lawyering more generally, Lynn Jones characterizes this as

[92] Maton, *supra* note 70, at 58.

'identity correspondence',[93] whereby lawyers 'self-select into certain specialties of law or particular work settings, hoping to find organisational roles that fit with their own view of what it means to be a lawyer, or what a lawyer "should be".'[94] For many practitioners interviewed in this research, such self-selection corresponded with a strong cause lawyer identity.

B. Cause Lawyering is a Majoritarian but Polarising Practice Among ICL Prosecutors Surveyed

Those interviewees most motivated by the causes of ICL — principally prosecutors and victims' lawyers — were first to self-identify as cause lawyers. One prosecutor explained that being a cause lawyer was 'required' for practice in ICL, as protection against the disappointments of bureaucracy (or, as ICL37 added, the field's limited successes); another explained, *"I think by and large that we [prosecutors] are cause lawyers frankly"* (ICL23). Even more emphatically another prosecutor said, *"the cause is so pervasive that I just can't imagine in the Prosecutor's Office a way to do this work without it being lawyering for a cause"* (ICL17). When presented with a choice between defining themselves as cause or conventional lawyers (or something in the middle), many prosecutors alluded to an additional dimension of connection to the work that did not exist in their home jurisdictions: *"[I wanted] to be involved in ... meaningful events, being able to use my skills in a way that might influence outcomes..."* (ICL15). ICL prosecution in other words called for 'something more' than dedication to the role and the mere application of legal skill.

On the contrary, a majority of defence practitioners interviewed expressed a strong professional antipathy towards cause lawyering. Most of these self-styled conventional practitioners objected to cause lawyering because they believed it to be unprofessional and lacking in integrity.[95] They also believed that cause lawyers fall prey to excessive ego and hubris, something with which ICL's apex practitioners and spokespersons are

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[93] L. Jones, 'Exploring the Sources of Cause and Career Correspondence among Cause Lawyers' in Sarat and Scheingold *The Worlds Cause Lawyers Make, supra* note 6, at 203-238, 213, citing D. Snow and D. McAdam, 'Identity Work Processes in the Context of Social Movements: Clarifying the Identity/Movement Nexus' in S. Stryker et al. (eds), *Self, Identity and Social Movements* (University of Minneapolis Press 2000) 41-67.
[94] Jones, *supra* note 93, at 221 and 233-4.
[95] See Karnavas, *supra* note 57.

regularly charged.[96] As one interviewee said, *"believing that you are helping foster reconciliation or that you're helping to make a historical record is a natural extension of your own ego"* (ICL6). Another explained how *"other people are a little bit there for the fame and money"* (ICL32), whilst a former defence lawyer talked of how some practitioners *"are doing it for their own personal glory"* (ICL47). Ego was described in terms of what Koskenniemi described as the 'messianic imperialism'[97] of the saviour, particularly in relation to prosecutors. This was pejoratively described by some interviewees as variously a *"superman complex"* (ICL37), a *"God complex"* and *"the work of an angel"* (ICL40), and *"doing God's work"* (ICL47).

There were some, although rare, exceptions to this broad prosecutor/defence lawyer split. Some defence lawyers explained that the 'cause' of international justice *"helps keep you motivated"* (ICL31), and that *"you have to be at least somewhat engaged with the cause…[and it means that] you work harder"* (ICL50). Another defence lawyer lamented, *"I wish defence lawyers were <u>more</u> idealistic and cause-driven"* (ICL51). Conversely, a small minority of prosecutors expressed their disquiet of ICL's causes and its cause-ist agenda. One prosecutor explained how they believed ICL would not be a healthy environment were it to be inhabited exclusively by believers in causes (ICL25). Another prosecutor argued that although causes might legitimately be the concern of those who had created the system of international justice, it was unproductive for everyday prosecutors to focus on these wider issues: *"You know, the boat has been pushed from the shore, let's just paddle, I mean, point it at something but then paddle, and think about paddling and being great paddlers. More than thinking about, you know, how do the wind or the ocean currents affect trajectories. I don't know, just like 'no, just do your job'"* (ICL29).

Several participants coincidentally used the language of Levine and Wright's domestic prosecutor interviewees,[98] speaking of the tendency of ICL's *"true believers"* to

[96] J. Silk, 'International Criminal Justice and the Protection of Human Rights: the Rule of Law or the Hubris of Law?', *Yale Journal of International Law Online* (2009) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459513 (visited 25 June 2021); Stephanos Bibas and William Burke-White refer to a 'troubling missionary ideology' within ICL: S. Bibas and W. Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism', *Duke Law Journal* (2010) 637-704.
[97] M. Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870–1960*, (Cambridge University Press, 2001), at 600; Koller, *supra* note 53, at 1067.
[98] Levine and Wright, *supra* note 46, at 56-60.

regularly *"drink the Kool-Aid"* (ICL10, ICL22 and ICL23). Another experienced practitioner noted how the *"personal legacy"* of *"getting your name on the judgment"* resulted in people seeing themselves (and being seen) *"very much as rock stars …[which] contributes to the arrogance of some people and to the development of their own personal egos"* (ICL26). Other prosecutors were at pains to distance themselves from such critiques, arguing that *"you can't take yourself too seriously"*. There was a recognition that getting carried away by the cause was a risk: *"…a couple of us have had to say 'guys, just bring it down, OK?' I mean, we're not superheroes, this is not the Justice League, we're prosecutors trying to get a job done, period"* (ICL11).

The struggle between the proponents and detractors of cause lawyering echoes Kotecha's point on the clear tension at the heart of current ICL practice. On the one hand, the traditional understanding of a practitioner's professional ethos is grounded in apolitical legalism, the basis upon which prosecutors seek credibility among those external to the law. On the other, a prosecutor's credibility among both their own and the victims' communities is dependent on her 'situated ethos' of activism and a desire for social change.[99] Very few interviewees in the current research acknowledged this problematic dual identity. In a rare exception, one former prosecutor-turned-victims' lawyer put it this way, *"I want to call myself cause lawyer definitely but I recognize that there is danger with that kind of lawyer, and I like the sort of professional, more distance, other side. I'm trying to at least [maintain] that professionalism and not be sort of blinded by the cause"* (ICL58). The conflicting dangers of over-engagement with or under-commitment to ICL's causes as articulated by different legal professionals in the interviews speak not only to the complexities of practice but also to the range of personal motivations and professional self-identities. Although, as Carrie Menkel-Meadow notes, self-identification as a cause lawyer is never completely dispositive of the subject,[100] the interview responses revealed that prosecutors were not simply impassioned by their work, they considered that it had a *purpose* and that they saw themselves as agents of social, political and moral change. Such responses demonstrate the importance for international prosecutors of having 'something to

[99] Kotecha, *supra* note 60, at 953-954.
[100] Menkel-Meadow, *supra* note 23.

believe in' — a key tenet of cause lawyering for Scheingold and Sarat,[101] and at the heart of identifying what function it plays for ICL's cause lawyers.

C. The Purposes of Cause Lawyering in ICL: Identity and Meaning, Distinction and Position-Taking

Cause lawyering appears to be serving two principal purposes for international prosecutors. Firstly, it is an essential component of a prosecutor's core identity: it is the practice through which the personal and the professional converge, through which practitioners fulfil a need for meaning, and for connection to ICL's narrative. The prosecutors interviewed for this study alluded to their identity in terms of how the job fulfilled a set of fundamental needs: the need to help, the need to feel significance, meaning or validation. These themes have been well-ventilated in the literature. Sarah Nouwen suggests that ICL fulfils the needs of 'idealist lawyers' — specifically that such practitioners undertake legal work that they consider both meaningful and historic, that ICL addresses a need to belong to an international community, and that the work 'assuage[s] the moral hunger for a response to visible yet unimaginable human suffering.'[102] Together with Sara Kendall, Nouwen also explains how, fundamentally, international criminal lawyers may be motivated more by their own need to help rather than the need of others to be helped. This neediness on the part of the helpers is, they argue, 'driven by an attempt to transcend their national identities and situated lives in order to be part of something larger, a "desire for the world outside".'[103] David Koller writes of communal identity formulation amongst international criminal lawyers, and the role of 'belief' or 'faith' in the system of ICL to sustain the professional community.[104] The search for meaning, or, as Immi Tallgren (citing Freud) writes, the

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[101] Scheingold and Sarat, *Something to Believe In*, *supra* note 6; Koller, *supra* note 53.
[102] S. Nouwen, 'Justifying Justice' in J. Crawford and M. Koskenniemi (eds) *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 327-351, at 330; Elies Van Sliedregt refers to the need for more scholarship on how certain ICL lawyers advance 'a normative, idealist or political agenda': E. Van Sliedregt, 'Editorial: International Criminal Law: Over-Studied and Under-Achieving?' 29 *Leiden Journal of International Law* (2016) 1-12, at 5.
[103] S. Kendall and S. Nouwen 'International Criminal Justice and Humanitarianism' in K.J. Heller et al. (eds) *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020), at 719-747. Kendall and Nouwen cite the ethnographic work of Liisa Malkki on Finnish humanitarians: L. Malkki, *The Need to Help: The Domestic Arts of International Humanitarianism* (Duke University Press 2015).
[104] Koller, *supra* note 53.

appeal to an 'oceanic feeling' of a higher power or collective[105] was a commonly expressed theme, with prosecutors frequently speaking of a *"higher purpose"* (ICL24) and of being motivated by a *"higher reason… [and] higher goals"* beyond success in a specific case (ICL7). Another prosecutor explained, *"I was drawn to … something more universal…I think most people you'll speak to will have a higher drive, something that unites us"* (ICL37). This confirms that which others have previously argued as being the identity and moral authority imagined and projected by prosecutors.[106]

Cause lawyer prosecutors also explained how their values defined their identity — as one put it, *"by nature I've always been sensitive to injustice, to abusers"* (ICL7). Another explained, *"I feel that I'm working for things like communities and victims and fairness … For me personally it's very much those types of values that I feel I'm trying to bring to the forefront, because that's my personality"* (ICL24). Others spoke of the inevitability of the work 'becoming' who they were, how belief in the causes of ICJ *"is an important part of you [and] it very easily and in many ways very quickly can become kind of part of… your core beliefs and a real sense of who you are and what you do"* (ICL26). Taken together, these prosecutors are expressing a sense of connection beyond obligation to a specific case. For them, it is important not only to have a cause, but to be part of causes past, present and future, to seek meaning from something that will outlive them and to be part of the well-storied post-Nuremberg narrative, the lineage of ICL itself. ICL practitioners are here articulating personal fulfilment as well as simply projecting an outward professional identity. Cause lawyering is thus justified as being a (perhaps *the*) key facet of many prosecutors' identities, based on a desire for authentic connection between the professional and the personal. In other words, ICL's prosecutors do not consider themselves to be at odds with the rest of the conventional profession at all. Not every cause lawyer feels conflicted with the conventional mainstream: as Lynn Jones notes, some have simply 'defined and created a positive alternative to the traditional profession of law.'[107] For many international prosecutors, cause lawyering *is* the mainstream, a part of their core *habitus*.

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[105] I. Tallgren, 'Who are "we" in International Criminal Law? On Critics and Membership' in C. Schwöbel (ed.) *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014) 71-95; S. Freud, *Civilization and its Discontents* (Hogarth Press, 1973); see also Tallgren, *supra* note 90 at 136.

[106] As communicated through (for example) press releases from the International Criminal Court's Office of the Prosecutor: Dobson and Stolk, *supra* note 4.

[107] Jones, *supra* note 93, at 233-4.

The second purpose that cause lawyering seems to be fulfilling for ICL prosecutors is as a form of distinction-making from other professionals in the field who do not share their commitment to the cause(s). In taking a position as a cause lawyer in relation to other actors, prosecutors assert their legal, moral and expert authority, regardless of the relative weakness of the field more broadly. As discussed above, organisational culture and workplace structure influences the individuals who work there.[108] At the international criminal tribunals, the respective Offices of the Prosecutor outwardly project[109] a strong image of work ethic, public service and vocation. These themes were commonly referenced in the interviews conducted for this research. Numerous references were made to putting in "*very very long hours, a lot of preparation"* and *"a lot of hard work"* (ICL26, ICL17), *"going the extra mile …[because] you understand the importance of what you're doing"* (ICL55), *"going through really hard times… it's like really working in war trenches"* (ICL23) and giving *"everything [we] can really"* to the job (ICL7). The causes were seen as being essential to sustaining the work ethic of the 'driven' prosecutor. Hard work and long hours were considered necessary for developing and deploying specialist knowledge: prosecutors were asserting their connection to their causes and their authority as experts in the field, and therefore as professionals to be taken seriously. As one prosecutor described, *"[the] sense of mission … is particularly mobilising … people have a sense of commitment and a drive that probably goes beyond what you have in a normal domestic Office of the Prosecutor"* (ICL11).

One striking aspect of the data for the current research was the percentage of international prosecutors that had formerly practised domestically as corporate lawyers.[110] For such practitioners, many of whom explained they had struggled to fit in or to match corporate values with their own, they saw their career in ICL as more meaningful than, or even redemptive of, their prior corporate practice. One interviewee explained that they wanted to feel that they were "*getting up for something more than earning somebody anonymous some money and pouring my heart and soul into*

[108] Levine and Wright, *supra* note 44.
[109] Dobson and Stolk, *supra* note 4.
[110] Although the sample cannot be considered statistically significant, seven out of the 26 prosecutors interviewed had previously practised in domestic corporate law.

something that I didn't feel deserved it" (ICL4). These former corporate lawyers brought a particular work ethic to their prosecution practice: *"I think that people that have worked in [a corporate law] culture do bring a work culture and work ethic that is both good but also … it strives for perfection and strives for excellence"* (ICL17). The combination of work ethic plus belief in a cause was essential for many prosecutors, as another corporate-lawyer-turned-prosecutor explained, *"If you don't have the cause in addition to your professionalism maybe …when there is a weekend that you have to spend in the office, maybe you don't do it because you don't care"* (ICL7).

In contrast, for those practitioners who did not subscribe to the work ethic or who refused to work weekends, not only was their commitment doubted, their competence (and their expert authority) was also questioned. As one prosecutor said, *"there are some people here whose work rate is certainly not what it should be and … so is their competence [sic]"* (ICL15). Such disparaging of those without the appropriate *habitus* — those who do not demonstrate the sufficient commitment to the cause or display the expected work ethic — is part of the distinction-making in the competition for symbolic capital within the field of ICL. Those who were not particularly invested in their work, or who treated ICL as a nine to five job, were dismissed as mere *"functionaries"* (ICL57), bureaucrats that do not care for the causes for which the institutions were created. Those who are only in it for the money *"don't have to worry about a cause at all"*, as one prosecutor put it (ICL41).

Cause lawyering is a practice that enables prosecutors to simultaneously claim all three forms of authority — legal, moral and expert — for which Dixon and Tenove argue ICL practitioners are in competition.[111] Unlike in domestic practice where cause lawyering is for the minority or marginalized, the paradigm is inverted: in ICL it becomes a dominant practice and an important component of the discipline's legal authority by expressing unshakeable commitment to accountability. Similarly, by practising cause lawyering, prosecutors are asserting moral authority. Returning to the epigram on the walls of the International Criminal Court, 'This cause…is the cause of humanity' articulates the assumed moral authority of the work of the cause lawyer. The

[111] Dixon and Tenove, *supra* note 7, at 403-5.

'cause of humanity' is *"a very powerful motivator … to continue to do the best that you can"* in a role that according to one prosecutor interviewed, "*is one of the most noble pursuits that humanity could possibly have"* (ICL23). Finally, cause lawyering is central to sustaining the work ethic of the 'driven' prosecutor, as discussed above: it is synonymous with the commitment necessary for developing and deploying specialist knowledge, which is itself constitutive of Dixon and Tenove's 'expert authority'. Such expert authority gained through knowledge specialization enables prosecutors to claim that they 'do it better'.[112] ICL prosecutors' practice of cause lawyering, with its assertion of legal, moral and expert authority, is thus the ultimate manifestation of what Bourdieu called 'position-taking' in relation to all other actors within the field. Rather than a defensive stance as it is in a domestic setting,[113] cause lawyering in ICL becomes an 'offensive' practice. In the struggle for dominance within a field weakened by an absence of state power, cause lawyering underpins the faith in the field for those within it as well as to those outside it. Similarly, Bourdieu talks of how actors competing for symbolic capital within any legal system must 'ceaselessly reproduce' the 'tacit grant of faith in the juridical order.'[114] Cause lawyering therefore fulfils both a legal and a quasi-legal role, rhetorically 're-enchanting' the field by asserting the essential 'right-ness' of its causes;[115] in Bourdieusian terms, cause lawyering is the central practice through which its proponents assert distinction. This practice inevitably comes with certain consequences, as the final section of this article will discuss.

6. The Consequences of Cause Lawyering in ICL

A. The Impact of Cause Lawyering on Adversarialism

In the recent Independent Experts' Report, the ICC was criticized for having a 'highly litigious, adversarial atmosphere',[116] a charge particularly levelled at the workplace culture of the Office of the Prosecutor.[117] The interviews conducted for the current

[112] Dixon and Tenove, *supra* note 7, at 404.
[113] McEvoy, Bryson and Batesmith, *supra* note 32.
[114] Bourdieu, *supra* note 71, at 844.
[115] I. Tallgren "The Sensibility and Sense of International Criminal Law" (2002) 13 *European Journal of International Law* 561-595; Mégret, *supra* note 7.
[116] ICC Assembly of States Parties, *Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020*, ICC Doc. ICC-ASP/19/16, at §70.
[117] *Ibid.* at §209.

research pre-dated the fact-finding for the Experts' Report, and the issue of adversarialism was not specifically discussed with practitioners at the ICC or other tribunals. However, the extent to which ICL professionals aligned with cause lawyering (or did not) elicited very strong reactions. As discussed above, cause lawyers were disparaging of 'functionaries' — those considered to be soulless bureaucrats who 'simply' worked a nine-to-five, who did not appear particularly invested in the motivating forces of the causes of international justice. Similarly, self-styled conventional practitioners (who did not identify as 'functionaries') were highly critical of the professionalism of those cause lawyers who had 'drunk the Kool Aid', 'true believers' who repeated without question the rhetoric of ICL's most ardent followers.

Cause lawyering is by very definition not a 'moderate' practice — in a domestic setting it involves an anti-authority stance, quintessentially a minority practice in defence of individual rights for a broader social cause. As it exists in ICL, cause lawyering translates into a majoritarian practice among prosecutors, engaging in a self-described fight against the impunity of authoritarian civilian and military leaders. Much has been written of the 'reputational incentives' of conviction-friendly interpretations of ICL, as Daryl Robinson puts it.[118] With its mission to effect global social change (anti-impunity, justice for victims, peace and reconciliation, and so on), prosecutorial cause lawyering is inevitably driven by guilty verdicts, fuelled by a culture of hard work and zealous altruism. Barrie Sander notes that ICL is characterized by 'binary adversarial categorisations,'[119] to which we can add the opposites of cause and conventional lawyering. The antagonism between cause and conventional lawyers as expressed by interviewees in this research appears grounded not just in how the law should be practised, but the acceptable scope of the juridical field itself.

Mikkel Christensen writes of the 'gravitational pull'[120] on practitioners from opposing forces that structure the field, and how this determines the way in which different actors

[118] D. Robinson, 'The Identity Crisis of International Criminal Law' 21 *Leiden Journal of International Law* (2008) 925-963, at 929; see Bibas and Burke-White, *supra* note 96, at 662.
[119] Sander refers to Mark Osiel's description of the 'bipolar logic of criminal law…dividing the world into mutually exclusive categories of people: legally, into guilty and innocent; sociologically, into blamers and blamed' B. Sander 'The Anti-Impunity Mindset' in Bergsmo, *supra* note 9, at 333 and M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers 1997) at 159.
[120] M.J. Christensen 'The Poles of Power in the Field of International Criminal Justice' in Bergsmo, *supra* note 9, at 263.

relate to one another. ICL's practitioners, whether cause or conventional, are caught up in the existential debate as to whether ICL is either too political or insufficiently militant, which takes us back to Kotecha's argument of how ICL's high officials, such as the ICC Prosecutor, are caught between twin identities of rational legalist and political activist.[121] However, ICL's cause lawyers are situated in a field the adversarialism of which they significantly contribute to.

B. The Impact of Cause Lawyering on Over-Promising

In their survey of the criticisms of cause lawyering, McCann and Silverstein identify how cause lawyers are said to be overly-reliant on litigation as the solution to any given problem, an outlook rooted in dispositions that are said to 'frequently cultivate an unduly optimistic, even naively romantic view of law's transformative potential'.[122] Considering factors such as the high costs of litigation, the inefficient use of resources, the inhibition of other (non-legal) strategies, the narrowing of possible solutions and ideological biases, McCann and Silverstein summarize how critics accuse cause lawyers of being 'caught up in the myth of rights…[and] the misleading and mythical promise of legal justice.'[123] Even before taking into consideration the incidence of cause lawyering in international justice, similar critiques have been, and continue to be, levelled at ICL's institutions and the discipline itself, particularly in relation to the limited 'justice' that has been secured for victims.[124]

As many have remarked, ICL operates upon the basis of a significant discrepancy between reality and expectation.[125] Cause lawyering at the level of international justice

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[121] Kotecha, *supra* note 60, at 954.
[122] M. McCann and H. Silverstein 'Rethinking Law's "Allurements"' A Relational Analysis of Social Movement Lawyers in the United States" in A. Sarat and S.A. Scheingold (eds) *Cause Lawyering: Political Commitments and Professional Responsibilities*, *supra* note 6, at 261-292. See also J. Krishnan, 'Lawyering for a Cause and Experiences from Abroad', 94 *California Law Review,* 575-615, at 581.
[123] McCann and Silverstein, *supra* note 122, at 263.
[124] M. Damaška, 'What is the Point of International Criminal Justice?' 83 *Chicago-Kent Law Review* (2008) 329-365; S. Kendall, 'Critical Orientations: A Critique of International Criminal Court Practice' in Schwöbel, *supra* note 105, at 54-70; J. Handmaker, 'The Legitimacy Crisis Within International Criminal Justice and the Importance of Critical, Reflexive Learning' in B. Jessop and K. Knio (eds), *The Pedagogy of Economic, Political and Social Crises: Dynamics, Construals and Lessons* (Routledge, 2018), 189-206; B. Sander, 'International Criminal Justice as Progress: From Faith to Critique', in M. Bergsmo et al. (eds) *Historical Origins of International Criminal Law: Volume 4* (Torkel Opsahl Academic EPublisher, 2015), 749-835
[125] Stahn, *supra* note 7, at 173.

does little to bridge that gap. If anything, it further instantiates the highly ambiguous goals[126] of 'ending impunity', finding 'justice for victims', 'promoting reconciliation' and so on, upon which so much has already been written. The interviewees for the current research expressed stark differences of opinion on ICL's causes. On the one hand, self-styled cause lawyers viewed 'humanity's causes' simply as laudable aspirations: *"clearly motivational goals"* the language from which is used to make people feel that they are contributing, as one former senior prosecutor explained [ICL26]. Conversely, for many defence lawyers the causes are problematic, a lightening-rod for unrealistic or nebulous expectations. As was suggested by a former defence counsel, *"the best contribution to [ICL's] overarching goals is for courts to be humble and focused in their mission, which is to ensure a fair trial and decide whether or not the charges against an accused are founded"* [ICL10]. On this view, cause lawyering is inconsistent with the reality of what its institutions can achieve. If it is not realistic to prosecute every crime — as, according to Todd Buchwald, even the recent Independent Experts' Report seems to concede[127] — it is not rational in the broadest sense for ICL's cause lawyers to insist on 'ending impunity'.

The responses from ICL's cause lawyer prosecutors bring to mind Bourdieu's comment that within any juridical field, dominant groups tend towards ethnocentrism, where the force of law becomes a universal and exemplary reality,[128] as actors compete for monopoly of the 'right to determine the law.'[129] Many prosecutors interviewed appeared to insist on the inherent and exclusive validity of lawyering for a cause. This risks perpetuating an unchallengeable view of ICL, a narrative that fails to take account of the changed world order and the structural and ideological critiques that question the very foundation of international justice and its institutions. The dispositions with which many international criminal lawyers entered the field from the millennium onwards — the altruism, idealism, belief in the rightness of the 'causes' — do not necessarily correspond as neatly to the ICL field as it exists today, its structure disrupted by critique

[126] Stahn, *supra* note 7, at 174.
[127] T. Buchwald 'Part I: What Kinds of Situations and Cases Should the ICC Pursue? The Independent Expert Review of the ICC and the Question of Aperture', 30 November 2020, available online at https://www.justsecurity.org/73530/part-i-what-kinds-of-situations-and-cases-should-the-icc-pursue-the-independent-expert-review-of-the-icc-and-the-question-of-aperture/ (visited 25 June 2021), citing ICC Assembly of States Parties, *Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report*, *supra* note 116.
[128] Bourdieu, *supra* note 71, at 847.
[129] *Ibid.* at 817.

and political change. Bourdieu writes of *'hysteresis'* — the alienated state in which an actor's *habitus* no longer matches the field in which they work, either because of the subjective changes to their disposition, or because of the objective changes to the field.[130] For ICL practitioners, recognition that there may be a disconnect between their original motivations and the field as it has now become calls for a degree of reflexivity, and perhaps a re-interpretation of the causes through which they have sought to bring about change.

C. The Impact of Cause Lawyering on Decision-Making

In their trenchant criticism of cause lawyering, the conventional lawyers interviewed for this research argued that an emotional appeal to 'causes' was unprofessional and improper. As one practitioner put it, *"you don't want a system driven by emotion: you want it driven by law"* (ICL3). One defence lawyer expressed very serious reservations about whether prosecutors were making rational decisions on disclosure of evidence.[131] The lawyer believed that prosecutors were investing insufficient effort in the process of identifying and then disclosing evidence that might be helpful to the defence, because they were *"true believers"* rather than detached ministers of justice capable of taking balanced decisions (ICL10). Although this was the only specific such example mentioned by interviewees in this research, and the lawyer conceded that it was a difficult allegation to prove, this speaks to the principal fear that, in an ICL dominated by cause lawyer prosecutors, the key investigatory and prosecutorial decisions may not be based on objective assessments. It raises the broader issue of the impact of cause lawyering, as an emotionally engaged practice, on legal decision-making.

As discussed above, law has traditionally been viewed as an exclusively rational process, because as Andrea Bianchi and Anne Saab summarize, 'reason reflects the law's claim to objectivity and neutrality, and it helps keep sentiment, interest, and

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[130] C. Hardy 'Hysteresis' in Grenfell, *supra* note 66, at 144-5.

[131] Article 54(1) of the Rome Statute of the International Criminal Court requires the Prosecutor to 'investigate incriminating and exonerating circumstances equally'; Article 67(2) requires the Prosecutor to 'as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.'

power at bay.'[132] Emotion is thus seen as the antithesis of reason and as such should play no part in a lawyer's dispassionate evaluation. Writing about international law, Vesselin Popovski notes that whilst emotion might be helpful in creating the laws and normative framework, the process and practice of law should be 'de-emotionalized', to ensure that judges 'remain un-biased, non-emotional, looking only at facts and laws when delivering sentences.'[133]

Nevertheless, drawing upon research from neuroscience, behavioural economics and psychology, emotion is now considered an integral and inescapable component of the cognitive process in legal decision-making,[134] an aspect of the wider law and emotion scholarship that has become a well-developed field of academic enquiry.[135] Surprisingly, notwithstanding its visceral subject matter and narratives of 'unspeakable evil', 'unimaginable atrocities' and 'immeasurable suffering', there has been very little analysis of the impact of emotional factors on legal decision-making in international justice, nor any systematic debate about the place of emotion in ICL practice more broadly.[136] A handful of scholars have begun to address this issue. Moa Lidén acknowledges the risk of emotion-influenced cognitive bias and error that constitutes a threat to the rule of law.[137] Confirmation bias, she writes, 'may be stronger in investigations into core international crimes…not only because of the gravity of the crimes, but also for example the added pressure to identify and charge those responsible as well as the large financial investments into specific lines of inquiry.'[138] Similarly, Josh Pallas discusses how the sentencing phase of international criminal trials is particularly susceptible to the influence of emotions, given the consideration of

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[132] A. Bianchi and A. Saab 'Fear and International Law-Making: An Exploratory Enquiry' 32 *Leiden Journal of International Law* (2019) 351-365.
[133] V. Popovski, 'Emotions in International Law' in Y. Ariffin, J-M. Coicaud and V. Popovski (eds), *Emotions in International Politics: Beyond Mainstream International Relations* (Cambridge University Press, 2017) 184-206, at 185.
[134] Bianchi and Saab, *supra* note 132, at 359; K. Tiscione, 'Feelthinking Like a Lawyer: The Role of Emotion in Legal Reasoning and Decision-Making' 54 *Wake Forest Law Review* (2019) 1159-1195.
[135] For a summary of which, see T. Maroney 'Law and Emotion: A Proposed Taxonomy of An Emerging Field' 30 *Law and Human Behaviour* (2006) 119-142.
[136] J. Pallas: 'Emotions in International Criminal Law: Reckoning With the Unknown' in H. Cullen, P. Kastner and S. Richmond (eds) *The Politics of International Criminal Law*, Studies in International Criminal Law, Volume 2 (Brill Nijhoff 2021); M. Lidén, 'Emotions and Cognition in International Criminal Justice: An Exploration from Cognitive Biases to Emotional Intelligence', 9 *Forensic Science International: Mind and Law* (2020) 1-10.
[137] Liden, *supra* note 136 and M. Lidén 'Confirmation Bias in Investigations into Core International Crimes: Risk Factors and Quality Control Techniques' in X. Agirre et al. (eds) *Quality Control in Criminal Investigation* (Torkel Opsahl Academic EPublisher, 2020) 461-528.
[138] Liden, *supra* note 136.

'inherently emotional factors such as the suffering of victims, impact on communities, and remorse from the defendant'.[139] Exploring the role of emotions in international law more broadly, Bianchi and Saab argue that excluding the relevance of emotions from legal decision-making is unrealistic. Of particular relevance to a Bourdieusian analysis of ICL, they make the point that emotions are not simply the expression of individual reactions but also 'play a major part in determining social identities and culture, in shaping beliefs and collective attitudes.'[140] It is clear, in other words, that emotions develop relationally, both informing the juridical field and influencing the dispositions of its actors. Lidén suggests it may be presumed that there are 'added emotional dimensions' to ICL practice, but the currently unanswerable question is whether ICL's lawyers are more emotional than their domestic counterparts.[141] As was apparent during interviews conducted for this research, lawyers of all persuasions powerfully expressed a range of emotions when discussing their practice, motivations and professional self-perceptions. The impact of (variously) compassion, righteousness, determination, enthusiasm, disappointment, frustration, outrage, engagement, indifference, optimism, resignation, burn-out, dissatisfaction and scepticism upon legal decision-making is certainly worthy of further study.

Given the recent literature linking emotion to reason in legal cognition, it cannot be assumed that ICL's cause lawyers are alone in allowing their decisions to be influenced by something other than pure reason, nor even that an emotional component is either necessarily avoidable or inevitably adverse. Writing of lawyers in the domestic US context, Kristen Konrad Tiscione argues that by better understanding the impact of emotion on legal reasoning, lawyers can 'better question the premises, assumptions, and biases that fuel their thinking…[and] can think more carefully about what informs their decisions at critical moments of advocacy'.[142] A similar line of enquiry would be extremely beneficial in identifying the impact of (cause) lawyering and its emotional content on ICL practitioners' decisions.

7. Conclusions

[139] Pallas, *supra* note 136, at 244.
[140] Bianchi and Saab, *supra* note 132, at 365.
[141] Liden, *supra* note 136.
[142] Tiscione, *supra* note 134, at 1193.

Through exploring the practice of cause lawyering, this article contributes both to the developing socio-legal perspectives in international justice as well as to the scholarship on Pierre Bourdieu's relational theory of the field as it operates in ICL. It has examined the motivations and professional self-perceptions of international prosecutors, and the relationship between their dispositions, or 'habitus', their symbolic capital and the juridical field of ICL. Cause lawyer prosecutors interviewed for this research articulated a belief that ICL's causes were not merely an essential element of working as a legal professional in the field, they were also constitutive of their congruent personal and professional identities. The altruistic and idealistic dispositions, with which many prosecutors enter and remain within ICL, inevitably informs their work. However, it is cause lawyering that sustains these super-committed professionals, driven both by an unremitting work ethic and a desire for meaning, significance and 'something to believe in' through connection to the cause(s) of international justice. Cause lawyering also builds prosecutors' symbolic capital, the legal, moral and expert authority necessary to secure their dominance within the field. Taking the position that cause lawyering should be a prerequisite of ICL practice, cause lawyer prosecutors look to distinguish themselves from others seen as less dedicated — even less knowledgeable — than themselves, and thereby control the narrative of the discipline itself.

Conversely, the current research has also highlighted the vocal opposition to cause lawyering within ICL. Many defence lawyers (and a small minority of prosecutors) interviewed for this research adamantly maintain that the practice is unprofessional. As a particularly adversarial mode of practice, cause lawyering contributes to the already heavily polarized divisions within the field. Cause lawyering also feeds ICL's tendency to over-promise, where expectation generated by rhetoric and idealism is not matched by outcomes in reality, and where the legitimizing presence of the defence still suggests uncomfortable alternative narratives. However, it is the impact of cause lawyering — and its inherently emotional drivers — on legal decision-making that conventional lawyers find especially problematic. Although there was only one specific (and unproven) allegation of actual bias in the data, the perception that cause lawyering is dangerously irrational was persistent. The influence of emotion on cognitive decision-making remains a virtually unconsidered area within ICL scholarship, and the broader

law and emotion literature would suggest this is ripe for further analysis, particularly given the changes both from within the field and from the forces without.

As it exists for domestic lawyers, cause lawyering is a defensive, minority praxis, typically at odds with the mainstream and in opposition to the state. In contrast, the data from this research suggest that cause lawyering is a majoritarian practice, pursued offensively. As noted earlier, Bourdieu argues that within any juridical field, resistance to state power is what 'sustains the self-identity of a lawyer'.[143] As compensation for the singular lack of support from (or resistance to) any state-like entity within the field, cause lawyering becomes both a key self-sustaining practice and a source of self-identity for ICL's prosecutors. This leaves prosecutors susceptible to changes within and critiques of the field, not least because the dispositions with which practitioners entered ICL practice may no longer be aligned with current realities and power dynamics. The resultant disconnect between dispositions and field — Bourdieu's concept of 'hysteresis' — should be grounds to challenge the belief in the inherent appropriateness of cause lawyering within the discipline's self-constitutive, exceptionalist tendency.[144] Nevertheless, ICL is not a given phenomenon, rather it is constituted by 'repeat performances' of actions by its protagonists.[145] It is through the repeated performance of cause lawyering, by prosecutors in particular, that the institutions and discipline of ICL are what they are today. Cause lawyering for ICL's causes certainly appears easier in international criminal tribunals than in domestic courts. To paraphrase Mégret's point previously discussed,[146] not only is it true that international criminal law is constituted by its lawyers, rather than the other way round, but it is also possible that, without its cause lawyers, the discipline would not exist. Identifying practitioners' motivations and self-perceptions will help to deepen our understanding of the contradictions, uncertainties and imbalances in ICL more broadly. As a simplified aphorism on the walls of the ICC, the unspecified 'causes of humanity' nevertheless speak to the self-professed causes of ICL's everyday practitioners. The extent to which institutional and personal/professional causes are co-constituted is at the heart of developing the ideographic and relational scholarship of ICL's everyday

[143] Bourdieu, *supra* note 71, at 808.
[144] Stahn, *supra* note 7, at 26.
[145] Campbell, *supra* note 7, at 164.
[146] Mégret, *supra* note 7.

actors. As a juridical field untethered to any orienting force of a state, ICL also provides a novel case study for revisiting Bourdieu's theories when the interaction of *habitus*, capital and field create such distinctive relational dynamics.