

INTERNATIONAL COURTS IN ATYPICAL POLITICAL ENVIRONMENTS:

THE INTERPLAY OF PROSECUTORIAL STRATEGY, EVIDENCE, AND COURT AUTHORITY IN INTERNATIONAL CRIMINAL LAW

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I

INTRODUCTION

The reemergence of a professional field of international criminal law at the end of the twentieth and beginning of the twenty-first century—including prominent institutions such as the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the permanent International Criminal Court (ICC)—has reshaped how atrocities are handled at the international level. For the first time since International Military Tribunals (IMTs) at Nuremberg and in the Far East, a legal and normative logic of individual criminal accountability reemerged to respond to massive human rights violations.¹ This framework revived the legacy of Nuremberg and Tokyo, which established modern legal claims of international judicial and court authority. With legal authority delegated to ad hoc international tribunals by the UN Security Council, and with the ICC acquiring legal or de jure authority through treaty obligations or through the UN Security

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1. See generally JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL (2003); KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011); Ron Levi & John Hagan, *Penser les «crimes de guerre»*, 173 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 6–27 (2008).

Council, over the past three decades we have witnessed the expansion of an institutional and professional field of “normative legalism” that, outside of the European Court of Human Rights, enjoyed no authority—legal or otherwise—during the Cold War.²

Given the coercive nature of international criminal courts, and the challenges they present to state sovereignty and sovereign immunity, we identify the geopolitical context as crucial to delineating the scope of authority that these courts enjoy.³ Indeed, the importance of geopolitical context is evident in the very lead-up to the creation of this field of international criminal law, because even achieving *de jure* authority has been contentious.⁴ And even such courts’ *de facto* authority that resulted in sovereign legal accountability for such crimes was developed in national settings for many years during the Cold War before gaining significant political support on the international stage.⁵

The creation of the International Criminal Tribunals for Rwanda and the former Yugoslavia, along with other specialized *ad hoc* courts and tribunals from the 1990s forward, built on these approaches to emphasize human rights enforcement through personal responsibility and punishment.⁶ By the time the Rome Statute, which created the ICC, was adopted in 1998, the authority of international criminal law had expanded and deepened through the landmark practices of these earlier *ad hoc* tribunals and the political momentum that supported their work. When one examines the narrow legal authority of these post–World War II and post–Cold War Tribunals—the growth in their legal mandate, the number of courts, the doctrinal expansion of the approach to prosecuting war crimes from the 1990s forward, and the creation of a permanent ICC in their wake—it is tempting to develop a teleological account of the expansion in *de jure* (and *de facto*) authority in the field of international criminal law.⁷ Yet a teleological account tends to downplay both fine-grained questions that an analysis of *de facto* authority requires, and also the capacity to gauge the authority of specific courts rather than of the wider field. This article instead analyzes two broad elements: First, the *contextual factors* that shape the authority of international courts, in particular the constituencies they can

2. See generally GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).

3. See Mikael Rask Madsen, *Explaining the Power of International Courts in Their Contexts: From Legitimacy to Legitimization*, in *COURTS, SOCIAL CHANGE, AND JUDICIAL INDEPENDENCE* 23, 23–24 (Adriana Silvia Dreyzin de Klor et al. eds., 2012).

4. See SIKKINK, *supra* note 1, at 5.

5. *Id.*

6. See generally John Hagan & Ron Levi, *International Police*, in *THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE* 207 (Markus D. Dubber & Mariana Valverde eds., 2006); Jane Jenson & Ron Levi, *Narratives and Regimes of Social and Human Rights: The Jack Pines of the Neoliberal Era*, in *SOCIAL RESILIENCE IN THE NEOLIBERAL ERA* 69 (Peter A. Hall & Michèle Lamont eds., 2013); Yves Dezalay & Bryant Garth, *From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights*, 2 *ANN. REV. L. & SOC. SCI.* 231 (2006).

7. See SIKKINK, *supra* note 1, at 14–18; Levi & Hagan, *supra* note 1, at 6–10.

mobilize, the geopolitical context in which they operate, and their relations with national fields of power; and second, connected to these, the *international legal practices* that these courts and their actors develop.⁸ It is this *dual* approach to understanding authority—the articulation between practices and contextual factors, with court practices continuously adapting to external contexts—that we operationalize through the study of international criminal courts.⁹

International criminal courts uniquely draw together these two indicators of authority, with external contextual factors deeply connected to the internal legal practices that these courts go on to develop. This is because international criminal courts operate in what criminal justice scholars identify as “atypical political environments,” or highly contentious environments in which surrounding political conditions lead to a departure from routinized criminal justice, so that courts must develop organizational models to cope with, mobilize, and at times deflect, the political landscape in which they operate.¹⁰

In international criminal courts, such atypical political environments are the norm rather than the exception. For instance, during ongoing conflicts or when dealing with uncooperative states, international criminal courts face unique constraints on their authority—including both the absence of police or arrest authority and limitations on searches and seizure opportunities—requiring prosecutors to develop new evidentiary approaches.¹¹ Similarly, national governments, their leaders, and their allies often contest the very idea of international criminal prosecutions, so that with every move to build authority these courts can find themselves losing, rather than gaining, adherents and potential legal cases.¹² So, in atypical environments, some of the usual strategies courts could develop to gain wider authority are often unavailable.

Precisely because of these contextual features, we turn to prosecutorial strategies as a salient practice for assessing the authority of international criminal courts. Prosecutorial practices are not the only factor relevant to an international criminal court’s authority; but, in these environments, it is the decision to investigate, to prosecute, and to adduce evidence that is the most noticed and dramatic feature of their work, and that is central to their capacity to garner, retain, and expand its audiences and support. This article thus focuses on prosecutorial practices rather than the increases in case volume or the changes in enforcement mechanisms that other international courts use to build

8. See generally Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 17, 32; Jens Meierhenrich, *The Practice Of International Law: A Theoretical Analysis*, 76 LAW & CONTEMP. PROBS., nos. 3 & 4, 2014, at 1.

9. See, e.g., DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 57 (2014); Heather Schoenfeld, Ron Levi & John Hagan, *Crises extrêmes et institutionnalisation du droit pénal international*, 36 CRITIQUE INTERNATIONALE 37 (2007).

10. See generally John Hagan, *Why Is There So Little Criminal Justice Theory? Neglected Macro- and Micro-Level Links Between Organization and Power*, 26 J. RES. CRIME & DELINQ. 116, 117 (1989).

11. See Ron Levi & Heather Schoenfeld, *Médiation et droit pénal international*, 174 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 4, 6–9 (2008).

12. See, e.g., ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).

constituencies. These strategies work to enhance the authority of international criminal courts in the face of built-in challenges by aligning or deflecting geopolitical factors and constituencies. In other words, prosecutorial practices link the internal bureaucratic organization of these courts to their geopolitical contexts, and the authority of international criminal justice is augmented or constrained through choices that prosecutors develop and through the constituencies to which the prosecutors are oriented in employing these practices.¹³

II

INTERNATIONAL COURT AUTHORITY IN ATYPICAL POLITICAL ENVIRONMENTS: PROSECUTORIAL STRATEGY AND EVIDENCE

This article thus emphasizes links between prosecutorial strategy, legal evidence, and methods of case development that are crucial for constructing the authority of international criminal courts. Indeed, once one looks beyond the “high politics”¹⁴ question of jurisdiction—which, in the case of these courts, is what implicates their capacity to operate and gain custody over situations and individuals—one quickly recognizes that the question of evidence, its production, and its use in court represent the sort of *practices* that Alter, Helfer, and Madsen identify as international “legal practices” through which officials build authority.¹⁵

Whereas in many courts international legal practices are linked to how international judges build authority, in the case of international criminal courts the key location for these practices lies upstream in the process, in the office of the prosecutor. Economic and human rights courts are often dependent on the facts and arguments adduced by external litigants; however, in international criminal prosecutions, the in-house indictment and the presentation of evidence produce alliances with external constituencies, and the authority that international criminal justice garners is augmented or constrained by the scope of the network these courts can build. Similarly, indictments and the presentation of evidence are central for building court authority rather than pursuing other international alternatives. Indeed, gaining any toehold is a challenge because salient actors are more likely to snub the prosecutor’s indictment or to comply with evidentiary demands than to rebuff a final judgment (prominently seen in the snubbing of the ICC by Sudanese President Al-Bashir).¹⁶ Finally, given that international criminal prosecutions are time-and-space bound, these environments might risk producing, at least

13. Due to space constraints, this article does not systematically address the constituencies to which international prosecutors speak beyond that which is drawn out through an analysis of prosecutorial practices themselves.

14. NILO KAUPPI, DEMOCRACY, SOCIAL RESOURCES AND POLITICAL POWER IN THE EUROPEAN UNION (2005).

15. See Alter, Helfer & Madsen, *supra* note 8, at 5.

16. See ADAM BRANCH, DISPLACING HUMAN RIGHTS: WAR AND INTERVENTION IN NORTHERN UGANDA 179 (2011).

domestically, one-shotters rather than repeat players.¹⁷ It is thus a challenge to build relationships of trust with civil society organizations, lawyers, diplomats, or other constituencies that would normally allow for growth in narrow and intermediate authority over time.¹⁸

In other words, in these atypical political environments, court authority turns on the capacity of prosecutors, rather than judges, to collect and garner evidence of atrocities to be translated into the criminal process. They must organize their evidence and strategy in “loosely coupled” or “tightly coupled” ways with external actors, such as victims or experts.¹⁹ In contrast to economic cases, establishing this evidence is the concern of institutional insiders—prosecutors—and thus these operational “low politics” of evidence collection and presentation are a salient policy concern. For example, a recent article in *The New York Times* focused on the challenges faced by “an extraordinary witness” of the ICTY.²⁰ Reflecting on her case, an ICTY staff member noted: “Without witnesses, without key insiders, there are basically no trials.”²¹ And just a few months earlier, a piece in *The Guardian*, noted the challenges of working with witnesses for the International Criminal Tribunal for Rwanda experiencing posttraumatic stress disorder, including “huge amounts of testimony and paperwork [that] were generated,” and a prosecutor’s comment that “[l]ots of money got spent feeling our way forward. It costs a lot to fly in witnesses from around the world.”²²

This article thus links these organizational practices of evidence collection with the geopolitical context in which these courts operate.²³ At Nuremberg, a political decision was reached to focus the prosecution on a small number of Nazi figures, with particular attention paid to the documenting of atrocities by the prosecution rather than on developing a doctrinal base of judicial decisions. This aligned the prosecution with a U.S.-based legal constituency and helped deflect the critique of a Tribunal merely furthering victor’s justice—a claim that bedeviled the “united nations” leading the prosecution at Nuremberg.²⁴ The ICTY emerged in a context of political and professional alignments, particularly with the growth of the human rights community, to expand a framework for legal accountability in times of conflict.²⁵ This contributed to the opportunity to

17. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97–114 (1974).

18. See Alter, Helfer & Madsen, *supra* note 8, at 4.

19. See Hagan, *supra* note 10, at 117–20.

20. Marlise Simons, *Witness in War Crimes Court Tallies Cost of a Decade in Hiding: Testifying Against Slobodan Milosevic at Tribunal for Former Yugoslavia*, N.Y. TIMES, Aug. 16, 2014, at A5.

21. *Id.*

22. Owen Bowcott, *Rwanda Genocide: The Fight to Bring the Perpetrators to Justice*, THE GUARDIAN (Apr. 2, 2014), <http://www.theguardian.com/world/2014/apr/02/rwanda-genocide-fight-justice>.

23. See Alter, Helfer & Madsen, *supra* note 8, at 26–27; Hagan, *supra* note 10, at 130.

24. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 27 (1998).

25. See generally HAGAN, *supra* note 1.

produce significant jurisprudence, based largely on the prosecutorial framing of these crimes rather than the reasoning of the final judgments.²⁶ Despite the financial, moral, and political support of Western governments, civil society organizations, domestic political constituencies seeking economic benefits for reconstruction, and the international human rights community rallying behind the extension of human rights into the complexities of war and conflict, ICTY prosecutors still needed to gain narrow and intermediate authority by enrolling compliance partners with which to do their work.²⁷ They thus responded to this authority deficit in strategic fashion over time by leveraging the extensive authority they enjoyed to secure defendants and evidence that would expand the Tribunal's caseload, to ascertain the collaboration of media partners to build constituencies, and to later develop a strategy to coordinate with national court prosecutions in Bosnia and Herzegovina.

Compare the ICTY to the treaty-based ICC, which was negotiated during the momentum that grew around the ICTY and the project of international legalism. But despite this momentum, the ICC became operational in the post-9/11 climate, a disjuncture that affected its capacity to deliver on original hopes.²⁸ Attempts to grow its caseload volume generated resistance to its jurisdiction and the withdrawal of voluntary state parties. Indeed, the authority of the ICC is at stake in the potential withdrawal of African Union states from the ICC, with the African Union expressing concern over the "politicization and the misuse of indictments against African leaders by the ICC,"²⁹ and a continued call to "speak with one voice" regarding these prosecutions.³⁰ It is perhaps not surprising that its first prosecutor has insisted that the measure of the Court's success should not be its judgments, but a combination of deterrence and local legal accountability that could drive the Court's caseload to zero. The ICC's early prosecutions to date have thus targeted a small number of high profile cases.

In these three courts, once one looks beyond the "high politics"³¹ of the field's relationship to peacemaking and diplomacy, court authority relies to a significant degree on, and is reflected in, prosecutors' practices. Prosecutors choose their evidentiary strategies based on the geopolitical context at hand and work to enhance court authority by identifying evidentiary strategies that align

26. See Kelly Askin, *Analysis: Foca's Monumental Jurisprudence*, Tribunal Update 226 (June 18–23, 2001), <https://listserv.buffalo.edu/cgi-bin/wa?A2=JUSTWATCH-L;c4188521.0106>.

27. See, e.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

28. BOSCO, *supra* note 9, at 72–76.

29. *Extraordinary Session of the Assembly of the African Union, Addis Ababa, Ethiopia*, AFRICAN UNION 1 (Oct. 12, 2013), http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf.

30. Press Release, African Union Assembly, 22nd Ordinary Session of the African Union Assembly Concludes: A Summary of Key Decisions (Jan. 31, 2014), <http://summits.au.int/en/22ndsummit/events/22nd-ordinary-session-african-union-assembly-concludes-summary-key-decisions-0>.

31. KAUPPI, *supra* note 14, at *passim*.

the prosecutors with important external constituencies. By analogizing to atypical domestic trials, we identify that the success or failure to build international legal authority in these settings is conditioned by the different political, legal, and organizational arrangements in which international courts operate.³² Turning to three main cases—Nuremberg, the ICTY, and the ICC—this article examines how these prosecutors build authority differently across geopolitical contexts.

III

THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG

In his opening statement to the Nuremberg trials in 1945, the Chief Prosecutor for the United States, Justice Robert Jackson, stressed the importance of documentary proof in the prosecution.³³ “We will give you undeniable proofs of incredible events,” he said, referring among other items to “hundreds of tons of official German documents,” the “captured orders and captured reports” that provide evidence of atrocities, and the violence and criminal enterprise that “we will prove from their own documents.”³⁴ This attention to documents became the leitmotif of the prosecution, and with it a reflection on the machinery of Nazi Germany itself: “There is no count in the Indictment that cannot be proved by books and records,” Jackson indicated, emphasizing that “[t]he Germans were meticulous record keepers.”³⁵ And indeed this was Jackson’s position for months leading up to the prosecution, in which he stressed the record of the IMT and its need to be perceived as authoritative.³⁶ In one of his best-known statements at the International Conference leading to the trials, Jackson insisted, “We must establish incredible events by credible evidence,” stating that the trial would be “a drab case” based on documentary evidence of Nazi crimes, but that the documents would render it unchallengeable.³⁷

32. See generally Hagan, *supra* note 10.

33. See Robert H. Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945), <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/>.

34. *Id.*

35. *Id.* This lies in contrast to the later Tokyo trial that relied substantially on affidavits from prisoners of war. See TIM MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS 57–58 (2001).

36. See DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 60–69 (2001); CHRISTIAN DELAGE, CAUGHT ON CAMERA: FILM IN THE COURTROOM FROM THE NUREMBERG TRIALS TO THE TRIALS OF THE KHMER ROUGE 63–82 (2013); LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 41–53, 114 (2001); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 43–55 (1993); Patricia M. Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 CARDOZO L. REV. 4, 1559–98 (2006).

37. Stephen Breyer, *Crimes Against Humanity: Nuremberg 1946*, 71 N.Y.U. L. REV. 1161, 1162 (1996).

The document-based tone of Nuremberg permeated the courtroom. As observed in *The New Yorker*, the trials were frightfully dull—so much so that the lawyers and staff “want[ed] to leave Nuremberg as urgently as a dental patient enduring the drill wants to get up and leave the chair.”³⁸ Similarly, Joseph Kessel wrote that the Nuremberg trial’s emphasis on documents did not allow for any “breath of life,” with the most animated discussions focusing on the numbering of files and exhibits.³⁹

Legal and historical analysts of the Nuremberg tribunal have understood the decision to rely on documentary evidence as driven by the sheer availability of documents of Nazi crimes and atrocities. Yet the extent of the Nuremberg Court’s authority at that time demonstrates that the documentary reliance was also a prosecutorial practice tied to both the geopolitical context and the specific support that the prosecution enjoyed with external constituencies. The authority the Nuremberg prosecution strove to develop thereby relied on preexisting U.S.-based legal practices, so as to build extensive authority among a U.S.-based community of lawyers, and to help overcome some of the broader skepticism over the trials.

In their analysis of how international courts expand their authority over time, Alter, Helfer, and Madsen emphasize that recently established courts draw upon preexisting international legal practices from other domains, whereas older international courts are often forced to invent new practices in their area.⁴⁰ This article suggests that in the case of the IMT at Nuremberg, building a constituency at home (and a professional constituency that would support the prosecution from within the Tribunal as well) was achieved by drawing on preexisting national legal practices from other domains—in this case prominent antitrust cases in the United States. At an early stage in this field’s development, this strategy positioned the tribunal well with respect to the powerful constituency of legal elites in the United States with whom it was in dialogue, and for many of the institutional insiders at Nuremberg represented the professional community to which they belonged.

To understand the prosecutorial strategy of the IMT one must contend with the overwhelming early suspicion—both in the United States and the United Kingdom, and certainly in the former Soviet Union—surrounding the idea of criminal prosecution of Nazi leaders, regarded by many as risky and viewed by some elites and the public as an overly soft response. This was instantiated in the view of Roosevelt’s Secretary of the Treasury Henry Morgenthau, who derided the strategy as “kindness and Christianity”⁴¹ rather than a strategy to

38. Rebecca West, *A Reporter at Large: Extraordinary Exile*, THE NEW YORKER, Sept. 7, 1946, at 34, 35.

39. JOSEPH KESSEL, JUGEMENTS DERNIERS: LES PROCES PETAIN, NUREMBERG ET EICHMAN (2007).

40. See Alter, Helfer & Madsen, *supra* note 8, at 26.

41. BASS, *supra* note 2, at 162.

deindustrialize Germany and to “attack[] the German mind” itself.⁴² The IMT’s comparative lack of early authority was reflected in the views of elite government lawyers such as Joseph O’Connell, who regarded the Tribunal as a fundamentally “unlegalistic approach” that applies domestic approaches “to a world situation which has nothing in common with it.”⁴³ It was similarly reflected in the early views of President Roosevelt, who sought to emphasize the collective responsibility of the German people, rather than merely that of “a few Nazi leaders.”⁴⁴ Second, among other segments there was criticism over the tribunal’s perceived legitimacy, with the trials often derided as “victor’s justice,” and the criminal counts enumerated in the Charter of the IMT characterized as *ex post facto* charges that undercut legal and political legitimacy.⁴⁵ Even Judith Shklar, who produced the classic defense of the liberalism of Nuremberg, concluded that “little can be said on behalf of the legality of the Trial,”⁴⁶ with some leading legal figures of the time expressing concern over this very point.⁴⁷ And third, the prosecution was internally embattled: each of the Allies were pursuing different goals, and each articulated the rationale for the prosecution differently depending on the degree to which they regarded themselves as victims of the Nazi regime.⁴⁸

A strategy of identifying a small number of Nazi leaders for prosecution at trial won out over competing views that emphasized summary executions of leaders or a broad collective punishment of Germans.⁴⁹ The documentary approach undergirding this newly adopted strategy was based on a U.S. legal strategy developed for domestic purposes in the antitrust litigation of the New Deal. This was combined with the decision to prosecute leading Nazi figures not for the atrocities of the Holocaust, but for the crime of aggressive war—a crime which turned on a reading of international legal obligations deriving from the Kellogg–Briand Pact of the interwar years.⁵⁰ While the prosecution would include war crimes and a newly created “crime against humanity,” even these charges were cabined—by the prosecutors and the Tribunal’s judges—to atrocities that could be tied to aggressive war.⁵¹

42. *Id.* at 152.

43. *Id.* at 179.

44. *Id.* at 154.

45. See MINOW, *supra* note 24, at 27; cf. Susanne Karstedt, *The Nuremberg Tribunal and German Society: International Justice and Local Judgment in Post-Conflict Reconstruction*, in *THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OR INSTITUTIONALISED VENGEANCE?* 13 (David A. Blumenthal & Timothy L.H. McCormack eds., 2008) (discussing the influence of the Nuremberg Trials in Germany).

46. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 168 (1964).

47. See, e.g., Max Radin, *Justice at Nuremberg*, 24 *FOREIGN AFF.* 369 (1946).

48. See BASS, *supra* note 2, at 147.

49. *Id.*

50. See MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL, 1945–46: A DOCUMENTARY HISTORY* 229–30 (1997).

51. See DOUGLAS, *supra* note 36, at 48–53.

Jackson's prosecutorial strategy was deeply rooted and mirrored in the experience of his leadership team. This, in turn, was mirrored in the personnel who were drawn to the Court. Most of the prosecutorial team had no international legal capital, and its members were often young and comparatively inexperienced. Indeed, the *jurisconsultes* of the UN War Crimes Commission, who might have brought international expertise to the case, were reluctant to join the Nuremberg prosecution.⁵² Yet if junior staff filled the prosecutorial ranks, the most senior of the U.S. lawyers at Nuremberg were those who had been instrumental in U.S. antitrust cases. Robert Jackson played a leading role in such cases throughout the 1930s,⁵³ and he was joined at Nuremberg by other prominent New Deal veterans of antitrust litigation: William Donovan of the OSS; John Amen of the U.S. Attorney General's Office, who was New York's "leading 'crime buster'" and son-in-law of President Cleveland;⁵⁴ and Henry Stimson, the Secretary of War and the leading proponent in the Roosevelt Administration for holding war crimes trials. These lawyers had all invested in antitrust litigation strategies for criminal prosecutions domestically, whether dealing with corporations such as the Sugar Trust or with gangsters in New York.⁵⁵ The Sugar Trust prosecution notably built a "joint criminal enterprise" approach that was the foundation for the Nuremberg trials.⁵⁶ The strategy displayed positions in the Nazi leadership regime and an analysis of the Nazi organizational structure—with documentary records providing the material needed to establish the IMT's authority over the case.⁵⁷

Taking this shared domestic legal experience to the international stage—and to a tribunal that was considered to be without precedent—was a prosecutorial strategy designed to resonate with the existing practices of a powerful legal expert constituency within the United States. Indeed, the leading U.S. government designer and champion of the trial-based approach at Nuremberg, Henry Stimson took the view that this prosecutorial practice would resolve the

52. See Guillaume Mouralis, *Lawyers versus Jurisconsults: Sociography of the Main Nuremberg Trial*, in *JUSTICE IN WARTIME AND REVOLUTIONS: EUROPE, 1795–1950*, at 315–326, 317 (Margo de Koster et al. eds., 2012).

53. See Richard Overy, *The Nuremberg Trials: International Law in the Making*, in *FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE* 1, 6 (Philippe Sands ed., 2003); William Kolasky, *Robert H. Jackson: How a "Country Lawyer" Converted Franklin Roosevelt into a Trustbuster*, 27 *ANTITRUST* 85 (2013).

54. See SANDRA QUINN-MUSGROVE & SANFORD KANTER, *AMERICA'S ROYALTY: ALL THE PRESIDENTS' CHILDREN* 134–35 (1995); ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 70 (1986).

55. See BASS, *supra* note 2, at 148, 171; QUINN-MUSGROVE & KANTER, *supra* note 54, at 134–35; KIRSTEN SELLARS, 'CRIMES AGAINST PEACE' AND INTERNATIONAL LAW (2013); Kim Christian Priemel, "A Story of Betrayal": *Conceptualizing Variants of Capitalism in the Nuremberg War Crimes Trials*, 1 *J. MOD. HIST.* 85, 69–108 (2013).

56. See Jens David Ohlin, *Group Think: The Law of Conspiracy and Collective Reason*, 98 *J. CRIM. LAW & CRIMINOLOGY* 147, 169–72 (2007).

57. See BLOXHAM, *supra* note 36, at 60–62; MARRUS, *supra* note 50, at 40–43.

“difficult question” of the Nuremberg trials.⁵⁸ Relying on documents and adopting an antitrust-type format, Stimson followed a prosecution strategy “in a way which is at the same time consistent with our traditional judicial principles and also will be effective in dispensing adequate punishment and also will leave a permanent record in the shape of the evidence collected of the evils against which we have fought this war.”⁵⁹ In other words, Stimson not only agreed with Jackson’s documentary-based prosecutorial strategy, but he identified it as a way to square the circle of ongoing, potential authority challenges the Tribunal was facing.

Veteran New Deal lawyers were convinced that such a format would resonate with a community of adherents in the United States, while also providing an opportunity for the IMT to build an authoritative narrative about the war. The Assistant Secretary of War and Wall Street Lawyer John McCloy went so far as to enthusiastically assure Secretary of Treasury Henry Morgenthau that “[a]fter Justice Jackson puts the Gestapo on the stand and has indicted them like the American Sugar Company or whatever it was, then he says ‘By God, you’re guilty.’”⁶⁰ This emphasis was perhaps seen otherwise by Sidney Kaplan, a member of the prosecutorial team at Nuremberg, who wrote the day before the trial began, “[T]he prosecution is utterly, completely, hopelessly, unprepared. Jackson will deliver a sensational opening statement—and from that point on we’re in the soup.”⁶¹ As historian Gary Bass concludes, Nuremberg was mainly U.S.-created and led, with the allies following suit.⁶² Procedures would reflect the work of keeping agreement across countries, such as the lengthy indictment that would recite details in a manner uncommon for a U.S. prosecution.⁶³ Beyond the national legal constituency from which Jackson and many leaders on the team emerged, the IMT prosecution also sought to build authority for the Nuremberg trials by looking to the future and the anticipated legacy of the trial. Jackson sought to do so by building an external constituency for the Tribunal by emphasizing the historical momentum it could spur. In so doing, Jackson privileged documentary evidence and actively sought to limit testimony as much as possible.⁶⁴ As he wrote to Stimson, Jackson perceived this evidentiary basis as “the sounder foundation for the case, particularly when the record is examined by the historian.”⁶⁵

For this strategy to succeed, Jackson required documentation. Europe was in a ravaged state, and there were an enormous number of documents to

58. BASS, *supra* note 2, at 171–72.

59. *Id.*

60. *Id.* at 171.

61. John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOBAL STUD. L. REV. 511, 512–13 (2007).

62. See BASS, *supra* note 2, at 150, 182, 196; see also Robert H. Jackson, *Some Problems in Developing an International Legal System*, 22 TEMP. L. Q. 147, 154 (1948) [hereinafter *Some Problems*].

63. See *Some Problems*, *supra* note 62, at 151.

64. See DOUGLAS, *supra* note 36, at 16–17.

65. BLOXHAM, *supra* note 36, at 61.

locate.⁶⁶ Jackson reached out to gain the cooperation of the secretive Office of Strategic Services (OSS), the predecessor organization of the Central Intelligence Agency, and its Director General William Joseph Donovan. Donovan and the OSS had been keeping files on potential Nazi war criminals for years and had a collection of intelligence materials from OSS secret agents who operated within the Nazi hierarchy and resistance networks.⁶⁷ The OSS had a long-standing presentation branch that specialized in presenting complex matters by bringing together charts, film, or photography.⁶⁸ The OSS also had personnel fluent in German and with deep knowledge of German society.⁶⁹

Yet the OSS would also critique this document-based strategy. Leading officials in the OSS, including Donovan, maintained that Jackson should rely on witness testimony to draw in the mainstream media and depict atrocities.⁷⁰ This article ventures that this difference in trial strategy was not only tactical, but was also about the very goals of the Tribunal itself, its capacity to attract adherents, and the audience to which Donovan himself was oriented. For Donovan, Nuremberg “was a lawsuit plus something else.”⁷¹ In contrast to building authority with historians or for posterity, Donovan was most sensitive to the short-term political impact of the trial in Germany and its opportunity to set a foundation for de-Nazification policies.⁷² Therefore, while proponents of documentary evidence focused on enhancing the Tribunal’s legal authority, Donovan was interested in the trial’s immediate political effects on post-war Germany.

Jackson’s strategies for achieving authority for the Tribunal led him to reject most of Donovan’s suggestions regarding witness testimony. Jackson was reticent to include testimony from victims or from defendants: victims could be subject to attacks on their credibility, and defendants testifying could give the impression that a plea bargain had taken place.⁷³ Witness testimony was regarded as an “unnecessary cumulation of evidence,” and importantly for the Court’s capacity to build its authority through its prosecutorial practices, witnesses would—in Jackson’s view—run the risk of demonstrating “a strong bias against the Hitler regime.”⁷⁴ He even rejected the views of some on his team who suggested that the case gain “added authority” by having atrocities

66. See generally Telford Taylor, *The Nuremberg War Crimes Trials: An Appraisal*, 23 PROC. ACAD. POL. SCI. 19 (1949).

67. See MICHAEL SALTER, NAZI WAR CRIMES: US INTELLIGENCE AND SELECTIVE PROSECUTION AT NUREMBERG 346–51 (2007).

68. See generally Dan Kiley, *Architect of Palace of Justice Renovations*, in WITNESSES TO NUREMBERG: AN ORAL HISTORY OF AMERICAN PARTICIPANTS AT THE WAR CRIMES TRIALS 15 (Bruce M. Stave, Michele Palmer & Leslie Frank eds., 1998).

69. See Mouralis, *supra* note 52.

70. See BLOXHAM, *supra* note 36, at 60–61; JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 26 (1995).

71. See TAYLOR, *supra* note 36, at 185.

72. See *id.* at 183–85; SALTER, *supra* note 67, at 320.

73. See TAYLOR, *supra* note 36, at 184.

74. BLOXHAM, *supra* note 36, at 61.

presented by “a group of high churchmen” who could speak to Nazi atrocities—in favor of a strategy that would control the evidence in a measured and systematic way.⁷⁵ Although he relented a little with time,⁷⁶ Jackson stated that the prosecution would “put on no witnesses we could reasonably avoid.”⁷⁷

The evidentiary approach of the IMT at Nuremberg demonstrates the close connection between legal practices and geopolitical context that is critical to international court authority. This was a highly atypical political environment: the Allies had occupied Germany, the Nazi regime had extensively documented its crimes, and the leading defendants were captured and in the dock. The Tribunal itself, in this environment, was perceived as exceptional and the object of widespread skepticism among European and American constituencies. The decision to rely nearly exclusively on documentary evidence, and to resist witness testimony—at the expense of not only media attention, but also immediate political outcomes in post-war Germany, the chance to build such media as a platform for victims of Nazi Germany to speak out, and even a potentially reduced emphasis on some atrocities⁷⁸—can partly be explained as an effort to build authority for the Tribunal and the legalistic approach it pursued.

Nuremberg’s prosecutorial practices shed light on an important and potentially generalizable lesson for the study of international court authority. Nuremberg was a new, time-limited court for which narrow and intermediate authority was not an issue, due to the occupation of Germany by the Allies and the availability of incriminating documents. Yet building extensive authority was another matter. With the United States occupying a dominant position among the Allies in the post-war period, the Tribunal’s prosecution sought to produce this extensive authority by relying on a well-known and highly regarded domestic legal strategy, as Stimson noted, to resolve the “difficult question” of the Nuremberg trials.⁷⁹ Antitrust lawyers with close ties to the state came to dominate at the Tribunal with this move. Thus, Jackson’s documentary strategy appears to have bolstered the IMT’s authority within the community of elite U.S. lawyers whose work on antitrust cases defined their practices with a prosecutorial approach that built in this extensive authority and that deflected potential resistance from the start.

IV

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The Cold War soon made it politically unfeasible to develop international legal or political responses to war crimes, a geopolitical conjuncture that led to waning professional momentum for international war crimes prosecutions in

75. *Id.* at 67.

76. SALTER, *supra* note 67, at 409–10.

77. BLOXHAM, *supra* note 36, at 202.

78. BASS, *supra* note 2, at 171–72.

79. *Id.*

both Europe and the United States.⁸⁰ With the end of the Cold War, however, two influential institutions emerged. The South African Truth and Reconciliation Commission was established in 1995 to investigate human rights abuses that occurred under the apartheid regime, and underwritten by an argument that overtly positioned itself in distinction to that of Nuremberg and of trials.⁸¹ Established in 1992 by the UN Security Council, the ICTY was the first international war crimes tribunal in the post–Cold War era. This turn to law was partly fuelled by political expediency, and as Samantha Power notes, it “seemed a low-cost, low-risk way for Western states to signal that despite their opposition to military intervention, they were not indifferent to Bosnia’s suffering.”⁸²

Basic legal authority (or jurisdiction) was explicitly delegated to the ICTY by Security Council Resolution. Indeed, there was significant appetite and support for a legal framework to respond to atrocities committed in war. This included political support from powerful states and in particular the Clinton Administration, which provided the ICTY with resources, expertise, and political support.⁸³ This was further supplemented by the expansion of an internationalized field of human rights⁸⁴ and the growing influence of human rights organizations that had gained in technical proficiency, professional savvy, and political autonomy over the 1980s. This growing influence included extending to the law of armed conflict—as well as the media savvy of human rights and feminist organizations to raise awareness of the atrocities being committed.⁸⁵ Emerging in the early 1990s, the ICTY found itself in a context with a political and professional appetite for articulating the link between human rights and armed conflict.

Yet even with this Security Council delegation, and buoyed by significant political, professional, and social movement support that translated to extensive authority for its work, the ICTY initially found itself in a precarious position respecting its intermediate authority, namely its capacity to attract *compliance partners*.⁸⁶ The Court even felt constraints on its narrow authority; it had no indictees to prosecute or tools to do its work. The ICTY’s position as a “virtual tribunal” defined the strategies that its prosecutors could develop. Though states are formally required to cooperate with its investigations, as a practical matter, the access of Tribunal prosecutors to documentary evidence, their

80. See Levi & Hagan, *supra* note 1, at 6–10.

81. See generally Stéphane Leman-Langlois, *Constructing a Common Language: The Function of Nuremberg in the Problematization of Postapartheid Justice*, 27 LAW & SOC. INQUIRY 79 (2002).

82. SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 484 (2002).

83. See HAGAN, *supra* note 1, at 60–92; John Hagan & Ron Levi, *Crimes of War and the Force of Law*, 83 SOC. FORCES 1499, 1510–14 (2005).

84. See generally Dezalay & Garth, *supra* note 6.

85. See HAGAN, *supra* note 1, at 33–59; Levi & Hagan, *supra* note 1, at 13–15.

86. See Alter, Helfer & Madsen, *supra* note 8, at 10 (quoting KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 8–10 (2014)); Andrei Marmor, *An Institutional Conception of Authority*, 39 PHIL. & PUB. AFF. 238 (2011).

ability to effect arrests, or to interview witnesses remained dependent on states' willingness to extend such cooperation.⁸⁷ As the First President of the ICTY Antonio Cassese emphasized, the Tribunal is “like an armless and legless giant which needs artificial limbs to act and move. These limbs are the State authorities If state authorities fail to carry out their responsibilities, the giant is paralyzed, no matter how determined its efforts.”⁸⁸

In other words, in contrast to the IMT, where prosecutors had the needed intermediate authority thanks to the readily available documentary evidence—and focused on building extensive authority—the prosecutorial strategy at the ICTY needed to build intermediate authority among compliance partners and thereby collect and develop the evidence required for prosecution. The Tribunal was supported in doing so by the broad authority it could draw upon politically and professionally, and from among civil society groups. In what follows, this article demonstrates how the first three Chief Prosecutors of the ICTY were central to developing this authority by turning to political and military partners to obtain detainees, to increase its funding base, to develop new investigatory powers, and to introduce legal practices in the Balkans that allowed the continued development of prosecutable cases. Each Chief Prosecutor did so by building on his or her social and professional background and resources and sought to change the context in which the ICTY's authority was weakest.

The first Chief Prosecutor to enter into this operational context was Justice Richard Goldstone. A South African judge who had just finished as chair of the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation, Goldstone came to the ICTY with a strong understanding of law and diplomacy, seeing his position as a “big-picture diplomatic role” rather than “hands-on prosecution work,”⁸⁹ and endorsing a public role through interviews and travel designed to promote the ICTY's image.⁹⁰ This allowed him to enroll compliance partners by integrating prosecutorial strategy with efforts to induce cooperation by external constituencies.

Aware that without indictments he risked UN budget cuts, and conscious of judicial frustration with the Tribunal's empty prison, Goldstone opportunistically relied on the national German police arrest of Duško Tadić to deliver the Court's first, if relatively low-level, detainee. Despite uncertainty as to whether Tadić had been in a leadership position in planning crimes, Goldstone took the position that building compliance was most important.⁹¹

87. See generally Victor Peskin & Mieczyslaw P. Boduszynski, *International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia*, 55 EUROPE-ASIA STUD. 1117 (2003).

88. Jelena Pejić, *The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 853 (1997).

89. HAGAN, *supra* note 1, at 63.

90. Hagan & Levi, *supra* note 83, at 1510–14.

91. Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 876–77 (1997).

Indeed, when faced the next year with a continued lack of compliance from the United Kingdom, the United States, and NATO in arresting indictees, Goldstone proceeded—despite the legalistic reservations of prosecutorial staff—with in absentia hearings to pressure international authorities to apprehend two high-profile indictees, a process that drove Radovan Karadzic out of elected office.⁹²

Similarly, when Dražen Erdemović was taken into custody in Belgrade, Goldstone made a public demand that he appear before the Tribunal. This demand combined with American political pressure, leading to Erdemović's transfer to the ICTY within several weeks. Goldstone also drew on diplomatic networks to expand the Tribunal's authority to collect evidence of atrocities, obtaining Central Intelligence Agency aerial imagery to identify mass graves sites, and negotiating with Assistant Secretary of State Richard Holbrooke for Slobodan Milošević to allow State Department visits to the area around Srebrenica. These compliance gains opened the door for the Tribunal's exhumation work. Indeed, once some victims' bodies were exhumed, the Tribunal further claimed search and seizure powers under the Dayton Accords to collect evidence about the massacre from Bosnian Serb military headquarters.⁹³

Yet without individuals in custody, it was difficult for the ICTY to enjoy the narrow authority it needed for prosecutions. Goldstone was astute at reconciling this by building the ICTY's intermediate authority through political networks that drew on the Tribunal's existing well of extensive authority. With a limited set of legal tools at his disposal—and despite legal reservations over the legitimacy of some tactics—Goldstone expanded the Tribunal's authority by opportunistically enrolling networks of national and international authorities, with the ICTY gaining influence over politics and diplomacy.⁹⁴ In the process, Goldstone obtained a sustained annual budget along with compliance partners outside of the Tribunal. He indicated that “I think I spent more of my time on diplomacy and pushing and talking and screaming and shouting for the Tribunal than on the simply prosecutorial work.”⁹⁵

The second Chief Prosecutor, Louise Arbour, pursued a similar path in building the Tribunal's intermediate authority through compliance partners—focusing more on the ICTY's coercive criminal law mandate to increase the ICTY's caseload of indictees by working with external enforcement agencies, gaining state cooperation with the Tribunal, and garnering media interest in the Tribunal's work. Arbour brought training in criminal law that opened avenues for drawing in new compliance partners; perhaps presaging this approach, she began her tenure by distancing the Tribunal from the human rights

92. Hagan & Levi, *supra* note 83, at 1513–14.

93. See Schoenfeld, Levi & Hagan, *supra* note 9, at 16.

94. See RICHARD HOLBROOKE, *TO END A WAR* (1999); GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (1999); Hagan & Levi, *supra* note 85.

95. Hagan & Levi, *supra* note 83, at 1514.

organizations that had mobilized to create the Tribunal, to instead building a constituency of criminal lawyers and investigators.⁹⁶ If the Tribunal already enjoyed the sort of extensive authority that civil society would offer, the prosecution needed to instead focus on gaining custody over defendants and cooperation from recalcitrant states. The first President of the ICTY, Antonio Cassese, noted that the main problem of the Court's authority lay in this practical level: indicating that this war crimes tribunal “purports to exercise international criminal jurisdiction,” Cassese stressed that the problem of state sovereignty remains “when it comes to the day-to-day operations of the Tribunal,” and that when states do not cooperate with the ICTY “[it] is like lava burning away the foundations of the institution.”⁹⁷

Given the Tribunal's lack of police powers, Arbour's first prosecutorial innovation was to open new opportunities for partnership and authority with militaries and intelligence agencies by pursuing “sealed” indictments to detach her prosecutorial strategy from political constraints and resistance of local authorities. This allowed high-profile arrests to be executed by U.S. and UN authorities, the British-led Stabilization Force, and later, arrests effected by Dutch, American, and French-led troops that had previously been shamed by their lack of compliance. In this way, the prosecutor was able to overcome the political stonewalling and hesitation that threatened the Tribunal's relevance. Indeed, when Arbour later indicted Milošević at the end of her tenure, she similarly did so with the benefit of secrecy, which allowed her to work with intelligence agencies across five countries and outside public diplomacy, and to obtain the largest handover to an outside agency in the history of British intelligence.⁹⁸ Following this innovation, Arbour's prosecutorial team then defended the approach of third-party arrests by NATO and other forces, an approach that was later backed by the Appeals Chamber in advancing the obligation of third parties to conduct arrests and transfer indictees to the Hague and also in shielding these arrests from claims of illegality. Arbour similarly took the position that despite the conventional internationalist emphasis on state sovereignty, some form of subpoena power must reside in the Tribunal. In response, precisely because it otherwise had no enforcement agents of its own, the Appeals Chamber fashioned a new tool of a “binding order” for the Tribunal.⁹⁹

Arbour's second approach in increasing intermediate authority was to gain greater state cooperation from Balkan states, relying on the extensive political authority of the ICTY with Western nations to induce cooperation as a

96. See John Hagan, Ron Levi & Gabrielle Ferrales, *Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia*, 31 LAW & SOC. INQUIRY 585, 593–94 (2006).

97. Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 11–12 (1998).

98. John Hagan & Ron Levi, *Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice*, 1 EUR. J. CRIMINOLOGY 445, 462 (2004) [hereinafter *Social Skill*].

99. Levi & Schoenfeld, *supra* note 9, at 31–34.

condition of financial assistance. This compelled national leaders to hand over evidence and indictees to the Tribunal: Croatia thus transferred indictees in conjunction with its acceptance into the Council of Europe and its receipt of monetary aid, and Serbia later did so in transferring Milošević and Karadžić to The Hague following the proffer of U.S. financial incentives.

Finally, in addition to her efforts with militaries, intelligence agencies, and NATO forces, Arbour's third prosecutorial innovation was to gain some control over the public messaging and media image of the Court. She did so by cultivating partners and networks with the media to generate public support for the ICTY and its on-site, real-time, and highly emotive investigations. The extensive media coverage of prosecutor-led exhumations was crucial in capturing the attention of the world and the attention of UN budget officials, who had the capacity to increase their monetary support for the ICTY's investigatory work. Indeed, as widespread media coverage of the Milošević indictment and a prosecutorial showdown at the Macedonian border made clear, media coverage of the Tribunal and its developed ability to capture the attention of the world became one of the key successes of the ICTY.¹⁰⁰

As Arbour reflected, "I think about Nuremberg *every* day! The images constantly come to mind."¹⁰¹ In this, Arbour expressed her envy of the Nuremberg prosecutors, where the Court had its defendants in custody, along with every document necessary. It is precisely to fill this gap in authority that the first two ICTY prosecutors engaged with a wider range of compliance partners. This was successful: over the first five years, the ICTY benefited from a consistent rate of arrested individuals transferred to The Hague, a tripling of the annual budget, an increase in voluntary contributions from states that tracked the number of successful arrests, and increased morale among the Tribunal staff sent on missions in the field to conduct investigatory work.¹⁰² In some sense, as the Tribunal achieved greater intermediate authority, it came to enjoy greater extensive authority as well.

The third Chief Prosecutor, Carla del Ponte, inherited an organization with a ninety-million-dollar budget, multiple trials underway, and a high level of staff morale. New state and military cooperation was prompting more arrests, and more indictees arrived at the Tribunal every month. The challenge for del Ponte was to secure convictions while also managing political pressure to end investigations and complete ICTY trials swiftly.

Given this context, del Ponte's efforts to increase the ICTY's authority were no longer as focused on support by militaries and states—other than ensuring the transfer of Milošević to the Hague through a U.S. donor pledge—but on building the Tribunal's legal authority in its prosecutions. To do so, del Ponte focused on the successful prosecution of complex criminal cases, building on her previous work in her capacity as Swiss Attorney General, during which she

100. See *Social Skill*, *supra* note 98, at 459–61.

101. ERNA PARIS, *LONG SHADOWS: TRUTH, LIES AND HISTORY* 415 (2001).

102. See *HAGAN*, *supra* note 1, at 5.

investigated bankers, politicians, and organized crime members. She is known for claiming to have “never served anyone or anything but the law.”¹⁰³ In the ICTY she thus went on to develop “monumental” cases, such as that identifying rape as a crime against humanity¹⁰⁴ and the successful prosecution of genocide charges stemming from the Srebrenica massacre—legal successes that del Ponte echoed by reorganizing the Office of the Prosecutor to give lawyers greater control over investigations and to emphasize courtroom successes over new investigations or arrests.¹⁰⁵ When Milošević was indicted for genocide, del Ponte drew on her experience with Swiss prosecutions of complex financial crimes and asserted that “instead of pulling and pushing to get detainees, our work has moved more fully into the courtrooms, which is where it belongs.”¹⁰⁶

Here, del Ponte’s prosecutorial strategy echoed the new legal and geopolitical context in which the Court found itself: under political pressure from the United States to wrap up the Tribunal’s efforts rather than issue new arrests that would prolong the ICTY’s prosecutions. Yet this too necessitated new compliance partners to build the ICTY’s authority in a changing geopolitical context, a shifting context that was absent for the shorter-lived Nuremberg trials. With powerful states fatigued over these prosecutions, and with concern in the United States over the potential reach of international criminal law, the ICTY’s “completion strategy” resonated with del Ponte’s decision to increase the number of trials and to decrease the number of new investigations. Prosecutions were thus limited to “the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal” and lower-level cases were transferred to “competent national jurisdictions.”¹⁰⁷

The ICTY then began the transfer of a significant number of cases to domestic courts. These courts became the newest compliance partners for the Tribunal, with transfers legally overseen by the ICTY’s Rule 11*bis* to refer indictments to another court.¹⁰⁸ Although political constraints have made this less successful outside of Bosnia and Herzegovina, there have been beneficial effects for extending the ICTY’s authority through the War Crimes Section in the State Court of Bosnia and Herzegovina: the transfer of ICTY personnel, the active influence of ICTY prosecutorial know-how, capacity development, assistance with human rights expertise, the use in the War Crimes Section of

103. CARLA DEL PONTE & CHUCK SUDETIC, *MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY’S WORST CRIMINALS AND THE CULTURE OF IMPUNITY* (2009); Ed Vulliamy, *Avenging Angel*, THE GUARDIAN (Mar. 4, 2001), <http://www.theguardian.com/world/2001/mar/04/warcrimes.comment>.

104. See Askin, *supra* note 26.

105. Hagan, Levi & Ferrales, *supra* note 96, at 604.

106. Marlise Simons, *Court on Crimes in Former Yugoslavia Hits Its Stride*, N.Y. TIMES (May 15, 2005), <http://www.nytimes.com/2005/05/15/international/europe/15hague.html>.

107. S.C. Res. 1503 (Aug. 28, 2003).

108. See Yuval Shany, *How Can International Criminal Courts Have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation*, 46 ISR. L. REV. 431, 438 (2013).

evidence from ICTY proceedings, lessons learned from the ICTY regarding the need for transparency in case selection, and a reliance on ICTY jurisprudence and sentencing practices as persuasive authority.¹⁰⁹ By expanding the community of actors drawing on ICTY precedents reinforcing the field as a whole, the expansion of ICTY authority has had the effect of establishing greater intermediate and extensive authority for the Tribunal.

Compared to the IMT, the ICTY provides a case study of an international court that—though enjoying formal delegation from the UN Security Council and extensive authority politically—required prosecutorial strategies to build its narrow and intermediate authority by mobilizing external compliance partners. Whereas the prosecutorial team at Nuremberg had the evidence it needed, the first three ICTY Chief Prosecutors instead needed to build alliances across potential compliance partners—diplomats, police forces, and militaries—to secure state cooperation and to cope with a changing geopolitical context toward domestic courts in Bosnia and Herzegovina. They could do so precisely by leveraging the extensive authority among powerful states that the Court already enjoyed. The needed compliance partners reflected the political context in which each of the first three Chief Prosecutors found themselves, and the social backgrounds they could bring to the ICTY to influence the context itself. Thus, these prosecutors successfully solidified the ICTY's narrow and intermediate authority while gaining ever greater extensive authority for the Tribunal and the field as a whole.

V

THE INTERNATIONAL CRIMINAL COURT

The latest chapter in international criminal justice is being written at the ICC, which faces a precarious political and legal position. Its creation was negotiated at the height of the international human rights community's commitment to international prosecution, but it began its operations in a post-9/11 environment. It is further embattled by resistance among powerful states as well as African Union countries threatening to withdraw from the Court as a backlash to its investigations against sitting heads of state. ICC prosecutors thus find themselves in a unique position regarding Court authority.¹¹⁰ Perhaps more so than the ICTY, the ICC enjoys extensive authority among the growing professional community in international criminal law. Yet because the ICC deals with ongoing contentious situations—involving states in which multiple actors are engaged with diverse political options to manage conflicts—and because the Prosecutor can investigate all offenses on the territory once a situation is opened, the Court is continually in a weak position. It enjoys *less*

109. See *id.* at 443–44; Yaël Ronen, *The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of Bosnia and Herzegovina*, 3 PENN ST. J. L. & INT'L AFF. 113, 147–56 (2014).

110. See generally Leslie Vinjamuri, *The International Criminal Court and the Paradox of Authority*, 79 LAW & CONTEMP. PROBS., no. 1, 2016 (discussing the extent to which international politics have shaped the extent of the ICC's authority among state actors).

narrow authority and *less* intermediate authority than the ICTY. In addition, whereas it enjoys deep extensive authority among international legal experts, this is uneven given the resistance to the Court by powerful states, growing resistance in states where the Prosecutor is likely to pursue situations, and vociferous academic debate over the basic goals and utility of the Court.

In some ways, the ICC finds itself only obliquely as the inheritor of a past trajectory of international criminal law¹¹¹ and the wider field of global justice. Compared to the IMT at Nuremberg, the ICC enjoys a professionalized base of legal scholarship and practitioners on which to draw, but it is faced with persistent challenges to its narrow and intermediate authority: states threatening withdrawal from the Court, a range of powerful states that have not joined the Court, and Security Council referrals that risk not succeeding in contentious situations.

For most of the past decade the ICC has been known by association with its first Chief Prosecutor, Luis Moreno Ocampo. Ocampo had headed Transparency International for Latin America, directed a law firm focusing on corruption, criminal law, and human rights, and prosecuted the generals in the post-transition Trial of the Juntas in Argentina. Like his predecessors at the ICTY, Ocampo stated he found the ICC challenging because as Chief Prosecutor he had to pursue war criminals without the benefits of police and arrest powers. “I am a stateless prosecutor,” Ocampo lamented. “I have 100 states under my jurisdiction and zero policemen.”¹¹² Indeed, the ICC’s budget, though the same as that of the ICTY, is spread across investigations in different countries and situations rather than focused on one geographic region, partly because the ICC is designed to both defer to and encourage domestic investigations and trials.¹¹³ Yet Ocampo also faced a dilemma in his mandate. With the ICC limited by its statute to cases in which countries were unwilling or unable to conduct their own investigations, and is additionally limited, absent a Security Council referral, to countries that joined as state parties, the ICC’s docket quickly became focused on African conflicts. This led to deep charges of politicization.¹¹⁴

At one level, the resulting crisis of authority lies in the mandate of the Court, because the situations and often real-time crimes that the ICC is seized with are deeply enmeshed within ongoing diplomatic, political, and economic struggles. Its authority is further affected by the fact that the Court must be

111. Cf. Alter, Helfer & Madsen, *supra* note 8 (discussing how courts rely on past cases in their field).

112. Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES (Apr. 2, 2006), <http://www.nytimes.com/2006/04/02/magazine/02darfur.html?pagewanted=print>.

113. See Alex Whiting, *Dynamic Investigative Practice at the International Criminal Court*, 76 LAW & CONTEMP. PROBS., nos. 3 & 4, 2013, at 163, 175–76.

114. See COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA (Nicholas Waddell & Phil Clark eds., 2008); Branch, *supra* note 15, at 179; Mahmood Mamdani, *The Politics of Naming: Genocide, Civil War, Insurgency*, 29 LONDON REV. BOOKS, no. 5, Mar. 8, 2007, at 5, <http://www.lrb.co.uk/v29/n05/mahmood-mamdani/the-politics-of-naming-genocide-civil-war-insurgency>.

sufficiently nimble to work with existing cases as well as those that are referred to it by the Security Council. As Alex Whiting, who earlier served in the ICTY and then as both Investigation and Prosecution Coordinator with the ICC notes, in the ICC “each investigation is largely shaped by the constraints and opportunities peculiar to the situation at hand.”¹¹⁵ Yet this article suggests that despite the differences presented by each situation, ICC prosecutors have also adopted strategies designed to reflect the Court’s possible sources of authority. The focus of the Office of the Prosecutor has thus been on distancing itself from any charges of politicization by changing the way in which evidence is gathered and presented.

For the ICC Prosecutor, the need to deflect charges of politicization—which, by contrast, were less prevalent in the geopolitical context of the ICTY due to the breadth of political support for the Tribunal—has led to a strategy focused on legal analysis and procedure decoupled from investigations. This is partly explained by the budgetary constraints of the Court, including the cost of witness testimony, the risks of testimony being undermined or withdrawn,¹¹⁶ and the bureaucratic structure of the Prosecutor’s office.¹¹⁷ It is also the case that the ongoing context of conflict makes it a challenge for the ICC Prosecutor to gauge the strength of eventual testimony in Court.¹¹⁸ This is further underwritten by security concerns present on the ground during ongoing conflicts,¹¹⁹ so that the capacity for the Prosecutor to investigate depends on support from interested parties.

Echoing Justice Jackson’s strategy at Nuremberg, Ocampo observed that “[o]ur goal is to go even further,” in particular, to prosecute “a case with no witnesses, no victims.”¹²⁰ And indeed the ICC has gone on to invest heavily in the formal legal “in-house” development of its cases, pursuing a strategy relying on social science and documentary methods—even if to-date witnesses remain the core of the prosecutions.¹²¹ And given that the ICC’s strongest base of authority lies in the professional and academic legal community, it is not surprising that the Office of the Prosecutor has sought to play to this strength

115. Whiting, *supra* note 113, at 163.

116. See Thomas Escritt, *War Crimes Court Frustrated by Reliance on Witnesses*, REUTERS (Sept. 20, 2013), <http://www.reuters.com/article/2013/09/20/us-kenya-icc-investigations-idUSBRE98J0HY20130920>.

117. Philipp Ambach & Klaus U. Rackwitz, *A Model of International Judicial Administration? The Evolution of Managerial Practices at the International Criminal Court*, 76 LAW & CONTEMP. PROBS., nos. 3 & 4, 2013, at 119.

118. Whiting, *supra* note 113, at 185.

119. See WAR CRIMES RESEARCH OFFICE, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT’S OFFICE OF THE PROSECUTOR 55–60 (Oct. 2012) [hereinafter INVESTIGATIVE MANAGEMENT], <http://www.wcl.american.edu/warcrimes/icc/documents/ICCRreport16.pdf>.

120. *College’s Center on Law and Globalization Hosts Hague Colloquium Addressing Sexual Violence and Genocide*, UNIV. OF ILL. COLL. OF LAW (June 22, 2009), <http://www.law.illinois.edu/news/article/1061>.

121. See Whiting, *supra* note 113, at 181.

by investing in “pure law”¹²² and by seeking to distance investigatory partners so as to control the collection of witness testimony and avoid charges of politicization. Thus a continued strategy to resonate with and shore up support among the Prosecutor’s most significant professional constituencies is apparent.

In the ICC, this prosecutorial strategy has been implemented in two main ways. First, at a bureaucratic level, the ICC Prosecutor reorganized the Office of the Prosecutor around a more purely legal orientation.¹²³ Likely as an outgrowth of the legal professionalization of the field of international criminal law, the staff of the Office came with a legal and specialized training in international criminal law. By 2009, prosecutions were largely overseen from within the Office of the Prosecutor in The Hague and by a staff with a legal background or experience in human rights organizations, rather than a training in police investigation focused, by contrast, more on chain of custody and avoidance of hearsay in the collection of victim statements. The ICC Prosecutor saw himself as developing a strategy involving cases against top figures and as centering on the narrower legal issue of establishing the responsibility for command authority over crimes rather than proving the occurrence of the crimes themselves. As others have pointed out, this decision to avoid on-the-ground field investigations from within the Office of the Prosecutor has been fundamentally strategic on the part of the Prosecutor, and it “seems to have been a point of pride for the Office.”¹²⁴ The Court’s limited authority is also reflected by pressures on its budget, and its hesitation to request additional budgetary resources from the Assembly of States Parties.¹²⁵ Conducting investigations has, as one journalist suggests, become “but the poor cousin of the international politics of the [ICC].”¹²⁶

The result of this strategy is that the Prosecutor has relied heavily on developing evidence for the prosecutions by relying on external NGOs already working in the politically charged contexts of the ICC’s investigations. In the place of ICC-led investigators, the Court came to rely heavily on NGOs already pre-positioned in Africa when conducting their investigations. This has been harshly criticized by the ICC judges, who in the Court’s first prosecution expressed concern with “the use by the prosecution of local intermediaries in the DRC,” and indicated that the prosecution “should not have delegated its investigative responsibilities to intermediaries.”¹²⁷ In the same vein, the Court in

122. Yves Dezalay, *From Mediation to Pure Law: Practice and Scholarly Representation within the Legal Sphere*, 14 INT’L J. SOC. L. 89, 89 (1986).

123. Whiting, *supra* note 113, at 173–88.

124. INVESTIGATIVE MANAGEMENT, *supra* note 119, at 32.

125. *See id.*

126. Stéphanie Maupas, *CPI: enquêteurs passifs et sans moyens pour procédures bâclées*, LE MONDE (June 8, 2013), http://www.lemonde.fr/europe/article/2013/07/02/cpi-enqueteurs-passifs-et-sans-moyens-pour-procedures-baclees_3440543_3214.html (“L’enquête est le parent pauvre de la politique pénale de la Cour.”).

127. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2843, Summary of the Judgment, ¶ 17 (Mar. 14, 2012).

Lubanga quoted William Pace, the founding convener of the Coalition for the International Criminal Court, stating that “human rights and humanitarian organizations are lousy criminal investigators.”¹²⁸ It therefore focused the greatest bulk of its decision on these questions of investigation and evidence, and it stressed the gap between “the information provided by human rights groups . . . eager to call international attention to crises and “forensic evidence that can be used by a prosecutor.”¹²⁹ This prosecutorial strategy was again criticized in the case against former Côte d’Ivoire President Laurent Gbagbo, with the Court expressing its concern over hearsay received from NGO reports.¹³⁰

The second major approach of the Prosecution to emphasize “pure law” is evident in its case development strategy, which focuses on selecting a small number of cases that can have legal impact quickly, rather than undergoing a lengthy process of pursuing all potential leads. This is partly explained, again, by the lack of investigatory staffing. It was also a response to the Prosecutor’s desire to move swiftly, in the face of political pressure and an empty docket until the arrest of its first indictee in 2006. Bernard Lavigne, who led an early investigatory team in *Lubanga* and was called to testify on the question of evidence, noted what he referred to as the “pressure [of] public opinion internationally,”¹³¹ which would have included, at the time, fierce U.S. resistance to the Court’s operations.

Lawyers representing victims have thus taken the Prosecutor to task for only prosecuting Lubanga for the crime of enrolling children as soldiers, rather than for crimes related to children’s treatment and sexual exploitation. This is tied to the lack of prosecutorial attention that is placed within the Office of the Prosecutor on investigations, including the small teams that are deployed and the comparatively short time frame of which they can avail themselves.¹³² Yet here too the emphasis has been on producing the ICC’s authority by drawing on a limited number of compelling legal cases to launch the Court. As one former investigator said,

We knew that during killings, rapes happened [but] the idea was that the first ICC trial could not fail. To organize a good trial, the prosecutor selected child soldiers as the only charge against Lubanga and [decided] to drop the others . . . against the will of many investigators.¹³³

128. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, Judgment, ¶ 130 (Mar. 14, 2012).

129. *Id.*

130. See Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11-432, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute (June 3, 2013); see also Blake Evans-Pritchard & Simon Jennings, *ICC to Unveil New Investigation Strategy*, REPORTING KENYA (Oct. 22, 2013), <http://reportingkenya.net/reports/icc-to-unveil-new-investigation-strategy/>.

131. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Deposition of Bernard Lavigne, 21 (2010).

132. See INVESTIGATIVE MANAGEMENT, *supra* note 119, at 48.

133. Katy Glassborow, *ICC Investigative Strategy Under Fire*, INST. FOR WAR & PEACE REPORTING (Oct. 27, 2008), <https://iwpr.net/global-voices/icc-investigative-strategy-under-fire>.

Throughout the Court's work, then, the focus of the ICC Prosecutor has been on narrowing the scope of investigations, selecting a small number of incidents, and developing cases likely to draw public attention to leading figures rather than prosecuting atrocities more broadly. As a senior ICC prosecutor stated in an interview:

We have always followed a policy where we do not want to have ICTY type of investigations where we charge basically the history of the Balkans in one case so that is an attempt to write history in criminal proceedings So what we do is we focus our investigations on a very limited number of crimes, we also focus our investigations on those persons whom we believe bear the greatest responsibility We are also very selective in how many witnesses we bring.¹³⁴

The prosecutorial strategy of the ICC is not only different, then, from the ICTY—it is most akin to that of Justice Jackson at Nuremberg. The desire to bring a comparatively small number of cases, to highlight leadership figures rather than to prosecute a full scope of atrocities, and to avoid broad witness testimony echoes the evidentiary and prosecutorial strategy of Nuremberg. Although occurring in fundamentally different geopolitical contexts—the IMT at Nuremberg enjoyed access to all documents and defendants and was supported with narrow and intermediate authority, whereas the ICC is in the reverse situation of enjoying extensive authority among a community of practice but has neither narrow nor intermediate authority at its disposal—the two courts have reacted to their authority constraints in fundamentally similar ways at the level of prosecutorial strategy.

VI CONCLUSION

In many international courts, authority turns on judicial decisions. Yet in the context of international criminal courts, prosecutorial strategy is often at the core of the building or waning of authority. This is partly because of the power of prosecutors to make headlines with indictments, and it is partly because of the highly contentious and atypical political environments in which these courts operate. If these political environments are atypical, this article's survey of the prosecutorial strategy developed by these courts suggests that in building their authority, prosecutors are acutely aware of the authority they enjoy and thus seek to speak to the constituencies they need—while avoiding others—through their prosecutorial practices.

This article provides insight into the varying forms of de facto authority that international criminal courts enjoy, and in light of which prosecutors develop practices that reflect and seek to adapt to the external contexts in which they operate. Further, this article demonstrates that the IMT at Nuremberg, which enjoyed narrow and intermediate authority—with full access to documents and evidence, but also with skepticism in some quarters over its legalistic mandate—sits in stark contrast to the ICTY and the ICC, and their needs for evidence,

134. Anonymous interview conducted by author.

defendants, and state cooperation.

Different prosecutorial practices thus emerge. Justice Jackson at Nuremberg, by having all available evidence at his disposal, spoke mainly to a professional community in the specific domestic context of the United States rather than draw in the media or others through victim testimony. This article suggests that this internal and external contestation, the unevenness of authority of the IMT at Nuremberg, and the geopolitical centrality of the United States in the post–World War II moment, underwrote the prosecutorial motivation to rely on an evidentiary strategy highlighting documents throughout the trial. ICTY prosecutors, by contrast, drew on the extensive authority they enjoyed to build a range of compliance partners for the Tribunal—at first focusing on building investigatory and media networks for the prosecutors, and then seeking out compliance partners in domestic courts as the Tribunal’s extensive authority was in danger of waning. And in the ICC, whose authority is mainly limited to the community of international law practitioners and NGOs directly supporting the ICC and seeking to deflect charges of politicization, the prosecutorial strategy has aimed at distancing itself from investigation and the murky contexts of ongoing conflicts, instead limiting its reach to a narrow set of legal issues and cases.

In the context of international criminal courts, the analysis of authority and prosecutorial practice is tied to the question of how to speak authoritatively about atrocity. In contrast to teleological accounts of international criminal law that presume this authority grows with time, this article suggests that the narrow and intermediate aspects of international criminal court authority have waned over time. In light of this, prosecutors have scrambled to build the authority they need. As a result, the ICTY had sufficient extensive authority from which the Tribunal could draw by tightly coupling its links with compliance partners to overcome weaker narrow and intermediate authority. Yet in the ICC, the risks of being identified as politicized, combined with the mandate constraints in which the Court operates, has led the Office of the Prosecutor to distance itself from compliance partners, a loose coupling that has led to skepticism from judges and victims alike. Perhaps mirroring these courts’ loss of authority externally, the result has been that, though prosecutors have matched their strategies to the available forms of authority they could marshal, the field of international criminal law has—if anything—lost more authority than it has gained.