Prosecutorial strategies and opening statements

Justifying international prosecutions from the International Military Tribunal at Nuremberg through to the International Criminal Court*

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I. Introduction

The expansion of a professional field of international criminal law since the 1990s is commonly identified with a trajectory of international justice that gained traction over the course of the twentieth century. This is said to begin at the International Military Tribunal at Nuremberg (IMT) – and to extend to the current International Criminal Court (ICC). This trajectory, thought of by political scientists as a 'justice cascade',[1] is said to have reshaped how atrocities are handled at the international level, by emphasizing individual criminal responsibility as the mode of accountability for war crimes and massive human rights violations.[2] This surge is said to recover the 'legalism' underlying the Nuremberg trials,[3] extending what Sikkink[4] identifies as the 'hard law streambed' of individual criminal accountability globally.

When one contrasts the narrow legal authority of the IMT at Nuremberg with the growth of international criminal law from the 1990s onward, the growth of this field appears, indeed, teleological. Yet as the field of international criminal justice has expanded and solidified, struggles

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1 *K. Sikkink,* The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics, Norto 2011.

2 *R. Levi and J. Hagan,* Penser les "Crimes de Guerre", 173 Actes de la recherche en sciences sociales (2008), p. 6–21; *D. Scheffer*, All The Missing Souls. A Personal History of the War Crimes Tribunals, Princeton 2012.

3 *G. Bass,* Stay the Hand of Vengeance: The Politics of War Crimes Tribunals, Princeton 2000.

4 *Sikkink,* fn.1 above.

over the *authority* of these courts have continued to rage. Despite growing attention to international criminal justice as a broad framework, it is not the case that each of these courts has simply gained greater authority over time. This is partly because these courts have been unable to develop routinized legal strategies that can persist over time.[5] Given the atypical political environments in which these courts operate, and the contentious nature of their operations, their authority is instead derived from the relationship between geopolitical contexts and the capacities of their prosecutors to adapt to these demands. The result is that, despite their formal legal authority, gaining authority in fact – that is, the capacity to generate alliances among wider constituencies and thus being able to effectively launch international legal prosecutions – has rested on the ability of prosecutors to detect these demands, to adapt their strategies for collecting evidence, and to calibrate their bureaucratic processes for indictment and prosecution to varying political circumstances.[6]

As a result, it is prosecutors, rather than judges, who have been at the strategic core of how international criminal courts negotiate external geopolitics. Their attempts to build authority for these courts explain, for example, the documentary strategy at Nuremberg, the media relations strategy of the International Criminal Tribunal for the former Yugoslavia, and the hesitation to engage in on the ground investigations by the Office of the Prosecutor at the International Criminal Court.[7] Yet prosecutors do more than engage in investigation and the collection of evidence. They ground their interventions by framing their prosecutions in a language aimed at justifying the decision to pursue individual criminal accountability. Thus, there is a *moral grammar* to these prosecutions, through which international prosecutors work to assure other institutional players and external audiences that these prosecutions are 'worth the candle'.[8] We argue that these legal justifications should form part of a broader sociology of practice and of fields. Our claim is that these justifications are particularly relevant to international legal fields *both* because of the centrality of language as a form of symbolic power for law, *and* because the field

5 *S. Dezalay,* Weakness as Routine in the Operations of the International Criminal Court, International Criminal Law Review (2016), p. 1–21.

6 *R. Levi, J. Hagan and S. Dezalay*, International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority, in International Criminal Law, Law and Contemporary Problems 78, 4 (2016), p. 289–314.

7 *Levi, Hagan and Dezalay,* fn.6 above.

8 *P. Bourdieu*, Practical Reason: On the Theory of Action, Stanford 1998, p. 77.

of international criminal law in particular is a weak and heteronomous field.[9] These justifications are themselves part of the strategic work that prosecutors engage in, with each institution recreating itself and justifying its weak authority rather than relying on a slow accretion of authoritative practice.[10]

In this chapter, we contrast the strategic work of prosecutors at two significant moments of the development of the field of international criminal law: at the stage of the genesis, at the International Military Tribunal at Nuremberg (IMT), and at the International Criminal Court (ICC), the first *permanent* court of international criminal justice. By studying the opening statements in these two instances, our emphasis is on how prosecutors at these two tribunals *justify* these proceedings and the prosecutorial strategies they have elected to pursue. To be sure, the opening statements at Nuremberg reflected the national interests of each of the four states involved.[11] Yet, looking at these statements together is also a way to infer from these justifications the status of the Tribunal more broadly, in its wider context – and we then compare these with the opening statements of the first prosecutions at the ICC. This does not mean that we divorce the study of prosecutors' language from that of context or power. Instead, through an analysis of these justifications we gain insight into the repertoires available to prosecutors and the position-takings of prosecutors in relation to their audiences at both Nuremberg and the ICC. This provides us with a comparative sociology of law in two different eras and geopolitical contexts – the immediate period following World War II on the one hand, and the post-Cold War and post-9/11 context of the creation of the ICC on the other hand – to explain the 'conditions under which different types of evaluation prevail'[12] in international criminal justice, and how legal power is justified in each instance.

In what follows, we expand briefly on our approach to the study of justifications, before turning to our two case studies: the full text of the opening statements of the four different Chief Prosecutors at the IMT at Nuremberg (respectively from the US, France, the UK, and the Soviet Union), and the opening statements for the prosecution in the first three cases of the ICC. In assessing these texts against a range of possible justifi-

9 *Levi, Hagan and Dezalay*, fn.6 above.

10 *Dezalay*, fn.5 above.

11 *M. Marrus,* The Nuremberg War Crimes Trial, 1945–46: A Documentary History, Boston 1997.

12 *M. Lamont and L. Thévenot* (eds), Rethinking Comparative Cultural Sociology. Repertoires of Evaluation in France and the United States, Cambridge 2000, p. 7.

cations, we find narrower appeals over time and less diversity in the orders of worth to which prosecutors appeal to launch cases. We trace this as a shift from a justificatory model of 'organizational hedging'[13] to a model of unhedged bets, in which we see significant investment in a narrower set of justifications and a move away from broad appeals to justify legal intervention. Combining these findings with interviews and archival data, we conclude that this is part of a broader move toward an investment in 'pure law' at the ICC, embedded in a geopolitical context of comparatively weak – if not waning – political support for its operations and prosecutions, and an ongoing competition between law and diplomacy that threatens the supply of cases and situations to the Court.

II. Prosecutorial discourse as practice: studying repertoires, stability, innovation, and change in international legal fields

Perhaps in an effort to distinguish itself from internal and legalistic approaches to studying law, the sociology of international law often defines legal practices as nearly everything *but* the discourse of law itself. Though often decried as an outmoded distinction, this continues to inform polarizing debates in the field. This is illustrated by Bourdieu's view that Latourian research on science (or, presumably, now on law) amounts to mere *textism* because it ignores positions and position-takings, or Latour's opposite response that, for Bourdieu, 'legal form does not add anything, other than the impossibility of criticizing the resources that it hides between its pseudo-rationalizations'.[14] Seeking to go beyond these debates, we combine a focus on prosecutorial opening statements, which we construe, thereby, as themselves a form of *practice*, with parallel attention to the resources and positions available to prosecutors as they develop their strategic statements. In other words, our research strategy relies on an empirical approach to strategic statements that regards international legal practices as themselves embedded within the geopolitical context in which courts operate.[15]

Contrasting how repertoires change over time, and in these two institutional forums, enables us to empirically trace processes of change over time

13 D. *Stark*, The Sense of Dissonance: Accounts of Worth in Economic Life, Princeton 2011.

14 *B. Latour*, The Making of Law: An Ethnography of the Conseil d'Etat, Cambridge 2010.

15 *K.J. Alter, M.R. Madsen and L. Helfer*, How Context Shapes the Authority of International Courts, 79 Law and Contemporary Problems (2016), p. 1–36.

in international legal fields. Focusing on how innovative international legal institutions and processes are justified over time is indeed a way to emphasize processes of stability, innovation, and change in the field of international criminal law.[16] Examining how legal innovation is justified builds on work in comparative sociology and the sociology of culture that examines how, for example, different social groups evaluate 'worth' and 'morality'.[17] The focus is thereby shifted from a sociology exclusively focused on *values* to a sociology of *value* and of *valuation*.[18] To build this approach, we bring together two related conceptual tools. The first, drawn from the literature on practices in international relations and international law, regards discourse as a form of practice itself (with practices themselves understood as a form of speech act[19]). Yet we also suggest that legal discourse does more than this: statements by prosecutors are not only epistemic in the sense of building on a community of practice, they are also fundamentally strategic and justificatory. This echoes Bourdieu's elaboration on law and the state in *Sur l'État*, in which he identified the central importance of the 'capital of words' available to lawyers in the parallel development of legal fields and fields of state power.[20] This capital is what allows lawyers to innovate over time. Thereby, the unique power of jurists to justify is also a power that draws together the political *with* language in order to justify and explain innovative political and social practices.

We rely on these insights to trace change, innovation, and stability over time in international criminal legal institutions, with an emphasis on processes of legitimation and justification. This is particularly critical in the context of international criminal law, given the logic of the 'constant coup' that seems to dominate this field,[21] and the need, therefore, for continued justification and legitimacy. In other words, while the field of international criminal law may appear to have a teleological trajectory from the post-World War II moment through to the present, there is also

16 See generally *J. Brunnée and S. Toope,* Interactional International Law: An Introduction, International Theory 3, 2 (2011), p. 307–318.

17 *Lamont and Thévenot,* fn.12 above.

18 *M. Lamont,* Toward a Comparative Sociology of Valuation and Evaluation, Annual Review of Sociology 38, 1 (2012), p. 201–221.

19 *E. Adler and V. Pouliot, Adler,* International Practices 3(1) International Theory (2011), p. 1–36; *J. Meierhenrich,* The Practice of International Law: A Theoretical Analysis 76(3–4), in: Law & Contemporary Problems (2013), p. 1–83; and see *J. Searle,* Speech Acts: An Essay in the Philosophy of Language, New York 1969.

20 *P. Bourdieu,* Sur l'État. Cours au Collège de France (1989–1992), Paris 2012.

21 *Dezalay,* fn.5 above.

a sense of constant crises in which lawyers must legitimate and justify their intervention at each turn. In the field of international criminal law, this is illustrated by the protracted tension between international criminal justice and its political alternatives, most prominently manifested in the 'peace-justice tradeoff' that pits lawyers against diplomats for the resolution of violent conflict. This is a classic problem for actors in a weak field, making it a struggle to gain and maintain authority.

III. Prosecutorial opening statements: legal innovation in unsettled times

To study how legal innovation is justified, we rely on the regimes of justification distilled by Boltanski and Thévenot in *On Justification*, in which they classify the chief conventions, or 'orders of worth', that individuals rely on to justify their positions in light of disagreements or contention.[22] As they demonstrate, there is a pluralism to how people justify actions: rather than being limited to justifications from a particular social field, individuals may move from one form of justification to another, and rely on moral principles from an array of ethical spheres. These are 'market performance', 'industrial efficiency', 'civic equality', 'domestic relations', 'inspiration', 'renown', and in more recent literature, 'sustainability'.[23]

Table 5.1 Orders of worth[1]

	Inspired	*Domestic*	*Civic*	*Opinion*	*Market*	*Industrial*
Mode of evaluation (worth)	Grace, non-conformity, creativeness	Esteem, reputation	Collective interest	Renown	Price	Productivity
Elementary relation	Passion	Trust	Solidarity	Recognition	Exchange	Functional link

[1] This table is a condensed version of the table in L. Boltanski and L.Thévenot,'The Sociology of Critical Capacity', 2 *European Journal of Social Theory* (1999) 359–377, 368.

Each of these categories provides a moral grammar for justifying action, as summarized in Table 5.1.

This moral grammar can be illustrated with a common situation of justification. In his work applying this sociology of justifications to how

22 *L. Boltanski and L. Thévenot,* On Justification: Economies of Worth, Princeton 2006.

23 *Lamont and Thévenot,* fn.12 above.

changes in the economy were articulated and produced in Eastern Europe, David Stark elegantly relies on the example of a faculty reference letter for an academic job candidate.[24] Such a letter would often rely on multiple justifications for why the candidate deserves the position: it may indicate that the candidate is very creative (thus drawing on the world and language of creativity and 'inspiration'), that they are loyal to students (thus drawing on the language of the 'domestic' order and its elementary relation of trust), that they are a good citizen in engaging with their colleagues (thus drawing on the language of the civic and the collective interest), that they are frequently cited (and thus renowned), that they have a strong record of attracting grant funding (or a market justification), and that they are also highly productive and efficient.

Stark's example not only demonstrates these orders of worth in practice: it also underlines that justifications need not be exclusive of each other. Indeed, this becomes part of Stark's analysis of how justifications can reflect and allow for 'organizational hedging'. If an institution is uncertain about the metrics that will be used to evaluate its success, and/or if an institution is looking for opportunities to gain degrees of freedom by *producing* that very uncertainty so as to allow it to act along different paths and meet a variety of requirements, it will develop justifications for contentious action across multiple registers: as he suggests, '[i]n managing one's portfolio of justifications, one starts from the dictum: diversify your accounts'.[25]

In the context of international criminal law, this is a particularly attractive avenue to examine how courts are positioned over time. It is also especially relevant as a method to study prosecutorial practices, since these reflect both the range of the possible (what can be said) and the appeals that can be made (in Stark's terms, prosecutors must be attendant to their environment to both react to and at times produce uncertainty through their statements), and on the social skill of prosecutors in developing these frames and aligning their institutions around them in order to induce cooperation as needed.[26]

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24 *Stark*, fn.13 above.

25 *D. Stark*, Recombinant Property in East European Capitalism, American Journal of Sociology 101, 4 (1996), p. 993–1027.

26 *J. Barbot and N. Dodier*, Rethinking the Role of Victims in Criminal Prosecution, Revue Française de Science Politique 64, 3 (2014), p. 23–49; *J. Hagan and R. Levi*, Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice, European Journal of Criminology 1 (2004), p. 445–475; *N. Fligstein*, Social Skill and the Theory of Fields, Sociological Theory 19, 2 (2001), p. 105–125.

In this chapter, we focus on the four prosecutorial opening statements at the IMT,[27] and contrast these with the prosecutorial opening statements in the first three cases of the ICC (*Lubanga*,[28] *Katanga*[29] and *Bemba*[30]). We selected these as significant case studies: the ICC's prosecutorial statements in its first three cases provide a current empirical moment for considering the 'Nuremberg legacy', comparing the field's genesis at the IMT with the ICC as the first *permanent* international criminal court.

We coded the prosecutorial statements to identify language, in these prosecutorial statements, that reflected an appeal to the orders of worth distilled by Boltanski and Thévenot: 'industrial', as an appeal to efficiency; 'domestic', as an appeal to domestic practices and national loyalty; 'inspired', as an appeal to humanity; 'opinion', as an appeal to recognition; 'market', as an appeal to economic efficiency; 'civic', as an appeal to collective welfare and society. As we develop below, these empirics across both courts underline clear patterns of position-taking and change in prosecutorial statements between these two institutional settings and over time.

IV. The International Military Tribunal at Nuremberg: hedging across topics and across time

In his opening statement to the Nuremberg trial in 1945, the Chief Prosecutor for the United States, Justice Robert Jackson, emphasized documentary proof in the prosecution. '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

27 These are available through Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, The Avalon Project at the Yale Law School. For discussion see *Marrus*, fn.11 above.

28 *Mr Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court*, The Case of the Prosecutor v. Thomas Lubanga Dyilo. ICC-01/04-01/06. Opening Statement, The Hague (26 January 2009).

29 *Mr Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, Mr Eric MacDonald, Senior Trial Lawyer of the International Criminal Court,* The Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui. ICC-01/04-01/07. Opening Statement, The Hague (24 November 2009).

30 *Mr Luis Moreno-Ocampo, Prosecutor of the International Criminal Court,* The Case of the Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08. Opening Statement, The Hague (22 November 2010).

reports' that provide evidence of atrocities, and the violence and criminal enterprise that 'we will prove from their own documents'.[31] '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'. Justice Jackson held this position for months leading up to the prosecution: at the International Conference leading to the trials, he insisted that '[w]e must establish incredible events by credible evidence', underlining that the trial would be 'a drab case' based on documentary evidence of Nazi crimes, but that the documents would render it unchallengeable.[32]

In addition to Justice Jackson's documentary-based strategy, each prosecutor of course also sought to represent their country's own national positions in their opening statements. It is thus not surprising that General Rudenko mainly sought to justify the prosecution in light of the Nazis' crimes regarding the Soviet Union (a 'domestic' justification that represents nearly 60 per cent of all justifications he used in his statement). The prosecutors from France and the United Kingdom each relied on domestic justifications in nearly a quarter of all their justificatory statements: and the US prosecutor, hailing from the most distant of the four countries, only relied on domestic justifications in under 7 per cent of his statements. The opposite occurred with respect to industrial justifications speaking, for instance, to a system of international justice. The US prosecutor relied heavily on this industrial logic (nearly 75 per cent of all his justifications reflected the 'industrial' order of worth); the prosecutors from France and the UK each relied on this for just over half of their justificatory statements; and the Soviet prosecutor relied on industrial justifications for just over one quarter of his justificatory claims at Nuremberg. And in contrast, the US prosecutor was the only one of the four to even briefly invoke a 'market'-based justification for the prosecution, in the name of 'the American dream of a peace-and-plenty economy'. Clearly, national positions made a difference in these prosecutors' justifications.

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31 *R. Jackson*, Opening Statement Before the International Military Tribunal (22 November 1945), available at www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international - military-tribunal/ (last accessed 6 June 2017).

32 *S. Breyer*, Crimes Against Humanity: Nuremberg, 1946, New York University Law Review 71, 5 (1996), p. 1161–1164.

Table 5.2 Justifications for the IMT Nuremberg prosecution

IMT Prosecutor	*Inspired*	*Domestic*	*Civic*	*Opinion*	*Market*	*Industrial*
Jackson (US)	4.1 %	6.8 %	10.2 %	3.7 %	1.35 %	73.9 %
Shawcross (UK)	6.5 %	24.1 %	4.3 %	8.6 %	—	56.5 %
de Menthon (France)	7.4 %	22.4 %	9.8 %	5.4 %	—	55 %
Rudenko (USSR)	1.7 %	59.3 %	8.7 %	2.9 %	—	27.3 %

Yet what is most notable is that, throughout the opening statements, all four prosecutors also invoked nearly all of the justifications identified by Boltanski and Thévenot. All prosecutors spoke across a wide array of orders of worth to justify the Nuremberg Trial: in other words, *each and every prosecutor justified the Nuremberg trial by invoking the worlds of inspiration, the domestic, the civic, opinion, and the industrial* (with a market justification, as noted above, also invoked by the US prosecutor). So while each national prosecutor placed different *emphasis* on some orders of worth, each of the prosecutors also relied on a *wide array* of these orders of worth in justifying the Nuremberg prosecution. We demonstrate this in Table 5.2.

These findings are illustrated by the following quotes, which demonstrate appeals to each order of worth by different prosecutors.

The Nuremberg prosecution as an appeal to the world of *inspiration*:

> 'We believe that there can be no lasting peace and no certain progress for humanity, which still today is torn asunder, suffering, and anguished, except through the co-operation of all peoples and through the progressive establishment of a real international society' (de Menthon, France, representing 7.4 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of the *domestic*:

> 'Now, when as a result of the heroic struggle of the Red Arms and of the Allied forces, Hitlerite Germany is broken and overwhelmed, we have no right to forget the victims who have suffered. We have no right to leave unpunished those who organized and were guilty of monstrous crimes' (Rudenko, USSR, representing 59.3 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of the *civic*:

> 'The day has come when the peoples of the world demand a just retribution and … when they demand severe punishment of the criminals' (de Menthon, France, representing 9.8 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of *opinion*:

> 'When Belgium and the Low Countries were occupied and France collapsed in June of 1940, England – although with the inestimably valuable moral and economic support of the United States of America – was left alone in the field as the sole representative of democracy in the face of the forces of aggression' (Shawcross, UK, representing 8.6 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of the *market*:

> 'The American dream of a peace-and-plenty economy, as well as the hopes of other nations, can never be fulfilled if those nations are involved in a war every generation so vast and devastating as to crush the generation that fights and burden the generation that follows' (Jackson, US, representing 1.4 per cent of his justifications).

The Nuremberg prosecution as an appeal to the world of *industry, efficiency, and practicality*:

> 'This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more, to utilize international law to meet the greatest menace of our times – aggressive war' (Jackson, US, making up 73.9 per cent of his justifications).

How can we understand the wide array of justifications that were deployed by each of the Nuremberg prosecutors? By drawing together the study of justifications with field sociology, we suggest that this wide breadth of justifications can be understood as a strategy of 'organizational hedging' (to use Stark's concept) by Nuremberg prosecutors. This 'hedging' strategy, we suggest, allowed these four prosecutors to shore up the tribunal's authority and legitimacy through the language and moral grammar they deployed. This was particularly important given the skepticism the IMT faced, and the political fields within which the IMT and its prosecutors were embedded.

This was particularly important in the IMT context. First, this was a time- and place-bound tribunal that, while purporting to develop legal rules for possible application to future cases, was more proximately a response to how to deal with Nazi criminality. Yet there was suspicion – both in the US and the UK, and certainly in the USSR – over the very idea of criminal prosecution for Nazi leaders, regarded by many as risky and as an overly soft response by elites and public opinion alike. This was

instantiated in the view of Roosevelt's Secretary of the Treasury Henry Morgenthau, who derided the strategy as 'kindness and Christianity' rather than a strategy to deindustrialize Germany and to 'attack [] the German mind' itself.[33] 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';[34] or even the view of Henry Stimson, the leading US government designer and champion of the trial-based approach at Nuremberg, who referred to the 'difficult question' of the Nuremberg trials.[35] 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'.[36] Second, among other segments there was criticism over the tribunal's perceived legitimacy,[37] 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.[38] 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.[39]

This wider context of contestation over the very standing of the Tribunal helps explain the broad appeals being made at various levels of justification, precisely because the IMT at Nuremberg was *both* understood to be operating within a context of high ambiguity over its degree of authority, *and* because its prosecutors – in the US but also in the UK and France – would be invested in keeping a broad rhetorical framework so as to position themselves broadly in their national jurisdictions (Jackson,

33 *Bass*, fn.3 above, p. 152.
34 *Bass*, fn.3 above, p. 179.
35 *Bass*, fn.3 above, p. 171–172.
36 *Bass*, fn.3 above, p. 154
37 *N. Frei,* Before and After Nuremberg, Journal of Contemporary History 38, 2 (2003) p. 333-343.
38 *M. Minow,* Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence, Boston 1998; but see *S. Karstedt,* The Nuremberg Tribunal and German Society: International Justice and Local Judgment in Post-Conflict Reconstruction, in *D.A.B.* and *T.L.H. McCormack* (eds.), The Legacy of Nuremberg. Civilising Influence or Institutionalised Vengeance?, Leiden 2008, p. 13–35
39 *Marrus,* fn.11 above.

for instance, had been identified before his departure as a possible Chief Justice of the US Supreme Court).[40]

This perhaps also explains the degree to which the prosecutors, in particular Hartley Shawcross from the UK, but others as well, sought to downplay the degree to which Nuremberg represented a legal innovation. Shawcross, for instance, explicitly positioned the IMT as 'no more than the logical development of the law' rather than an 'innovation', despite 'some small town lawyers who deny the very existence of any international law'. For his part, while underscoring that the IMT prosecutions were 'novel and experimental', Jackson still emphasized that the Tribunal was not 'created to vindicate legalistic theories' or to advance law and legal developments, but was instead a merely technical, practical way to solve problems. Indeed, this emphasis on continuity was central in Jackson's statements, who thereby underlined a strategy that had already been legitimated among the US legal elite who were enrolled into the prosecution. If junior staff filled the prosecutorial ranks, the most senior of the US lawyers at Nuremberg were those who had been instrumental in US antitrust cases in the 1930s. Robert Jackson himself had played a leading role in these cases, and he was joined at Nuremberg by other prominent New Deal veterans of antitrust litigation: William Donovan of the OSS; John Amen of the US Attorney General's Office, who was New York's 'leading "crime buster"' and son-in-law of President Cleveland; 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 gangsters in New York. 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 constituency of legal experts in the United States.

Finally, this organizational hedging is also mirrored in how all prosecutors deployed *time* in their justifications. As others working on the sociology of conventions and justifications have noted, strategic actors often deploy time in ways to gain adherents and to build their claims, often with

40 For a discussion see *J. Barrett*, Bringing Nuremberg Home: Justice Jackson's Path Back to Buffalo, October 4, 1946, Buffalo Law Review 60 (2012) p. 295–321.

an orientation to the future in their justifications.[41] We demonstrate this in Table 5.3.

Table 5.3 Temporality at IMT Nuremberg

Prosecutor	*Future*	*Past*	*Neutral/Present*
Jackson (US)	18.5 %	11.3 %	70.2 %
Shawcross (UK)	10.4 %	46.6 %	42.9 %
de Menthon (France)	13.3 %	34.0 %	52.7 %
Rudenko (USSR)	0	69.8 %	30.2 %

Indeed, while the Soviet prosecutor, Rudenko, was least strategic in this regard (since of course he did not regard the case as building a set of future-oriented principles), the other prosecutors invoked the future relatively consistently, if not overwhelmingly so. Indeed, the IMT prosecution sought to build authority for the Nuremberg trials – in light of these legal concerns and the wider geopolitical context – by looking to the future and the anticipated legacy of the trial. Notably, Jackson sought to do so by building an external constituency for the Tribunal by emphasizing the momentum it could spur historically. As Jackson wrote to Henry Stimson, his evidentiary strategy was to produce a case that would be perceived as sound, 'particularly when the record is examined by the historian'. This aimed at bolstering the authority of the IMTs toward the community of elite US lawyers and deflect potential resistance from the start – but this future orientation also appealed to a wider spectrum of constituencies among audiences in the US, and Europe.

As we will see below, on both of these dimensions – organizational hedging and future orientation – the IMT prosecutors stand in stark contrast to the justifications of the first three prosecutions at the ICC.

V. *The International Criminal Court: investing in technicality and law as an unhedged bet*

The most notable institution in international criminal justice currently is the International Criminal Court. With the ICC being restricted by its own statute to cases where countries are unwilling or unable to conduct their own investigations, and limited to those countries which have joined the Court as States Parties (absent a Security Council referral) – and with

41 *N Dodier*, Les appuis conventionnels de l'action: Eléments de pragmatique sociologique, Réseaux 11, 62 (1993) p. 63–85.

atrocities occurring in some African states – the ICC's docket quickly became focused on African conflicts.[42] In light of this, the authority of the ICC has become deeply at stake with the potential withdrawal of African Union states from the Rome Statute, with the African Union expressing concern over the 'politicization and the misuse of indictments against African leaders by the ICC'.[43] As a result, though the ICC enjoys a professionalized base of legal scholarship and practitioners on which to draw – compared to the IMT at Nuremberg – it is also faced with persistent challenges to authority along with charges of politicization.

At one level, the resulting crisis of authority lies in the very mandate of the Court, since the situations and often real-time crimes that the ICC is seized with are deeply enmeshed within ongoing diplomatic, political, and economic struggles. As Alex Whiting, who earlier served in the International Criminal Tribunal for the former Yugoslavia (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'.[44] Commentators also increasingly wonder whether the 1990s which built the momentum for the creation of the ICC represented a high-water mark that was unlikely to be sustained, in the post-9/11 era, pointing to perceived bias in prosecutions, and to the failure to deal with the protracted conflict in Syria.[45] The ICC thus finds itself in a paradoxical position in which there is a seemingly strong 'common sense'[46] over international criminal justice as a legitimate response to mass violence – indeed reinforced by the professionalization of the field – but a protracted fragility of the ICC as the institutional forum for this response.[47]

In this context it is perhaps not surprising that the prosecutorial strategy, as illustrated in the first three cases of the ICC, appears to turn more

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42 See *A. Branch*, Neither Liberal nor Peaceful? Practices of "Global Justice" by the ICC, in *S. Campbell, D. Chandler* and *M. Sabaratnam* (eds.), A Liberal Peace? The Problems and Practice of Peacebuilding, London 2011, p. 121-137.

43 Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia, Ext/Assembly/AU/Dev.1-2 (Oct. 2013).

44 *A. Whiting*, Dynamic investigative practice at the International Criminal Court, Law and Contemporary Problems 76, 3–4 (2013) p. 163.

45 *D. Bosco*, Rough Justice: The International Criminal Court in a World of Power Politics, New York 2014.

46 *C. Topalov* (ed.), Laboratoires du nouveau siècle. La nébuleuse réformatrice et ses réseaux en France (1880–1914), Paris 1999.

47 *Dezalay*, fn.5 above.

adamantly on a legal framework, with an appeal to 'pure law'[48] that draws on the now more elaborate doctrine of international criminal legal and increasing legal profession- alization within the field. This interview with a senior ICC prosecution lawyer adeptly caps this turn to a 'pure law' strategy:

> 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* [49]

This focus on pure law was stressed by the first Prosecutor himself: 'International criminal law is so primitive that for us, it's law, but for others, it is just one political option among others.'[50]

This turn to a legal framing can partly be seen as a strategy to deflect criticisms of the politicization of the ICC.[51] It is also likely an outgrowth of the increasing legal professionalization of the field of international criminal law, with new young legal personnel coming through the ICC with academic training and detailed knowledge of international criminal law. This growing expertise is seen – as just one example – in Figure 5.1, which provides a count of the number of faculty members listed as specializing in international criminal law in law schools across the US.

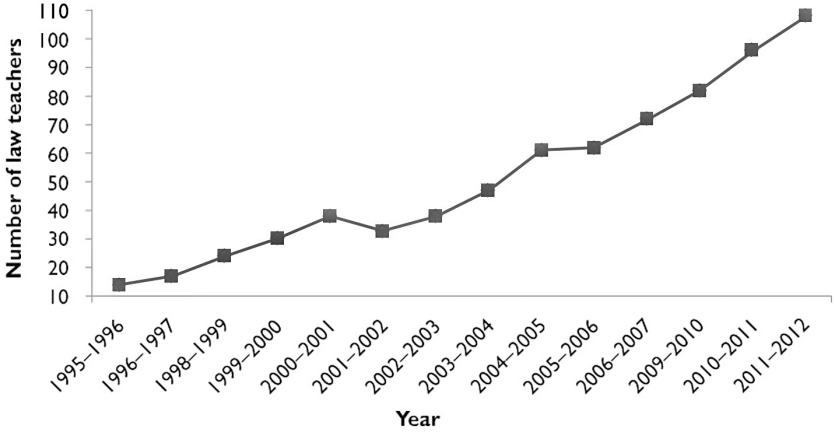
48 *Y. Dezalay*, From Mediation to Pure Law: Practice and Scholarly Representation in the Legal Sphere, International Journal of the Sociology of Law 14 (1986), p. 89–107.

49 Authors' interview with legal officer at the OTP, The Hague, 22 August 2012. Emphasis added.

50 Authors' interview with Luis Moreno Ocampo, Toronto, 8 November 2012.

51 *J. Meierhenrich*, The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory, in: *M. Minow, C. True-Frost and A. Whiting* (eds.), The First Global Prosecutor: Promise and Constraints, Ann Arbor 2015, p. 97–127.

Figure 5.1: Number of law teachers in US law schools specializing in international criminal law.[52]



Note: data unavailable for 1997–1998, 2007–2008, 2008–2009.

This legalization turn has also been reflected in an explicit strategy of the ICC prosecutor, both for the conduct of investigations, and in the professional profiles among the staff at Office of the prosecutor.[53] By 2009, prosecutions were largely overseen from the ICC Office of the Prosecutor in The Hague, with few if any on-the-ground investigations, and by professionals with backgrounds in law more than in police investigation (in contrast to previous tribunals, such as the ICTY). This offshore investigation strategy was driven in part by the difficulty of conducting on-site investigations, compounded by the lack of US support in the first years of operation of the ICC. But it also responded to the prosecutor's strategy of developing cases against top political and military figures, with the stake of establishing the responsibility for command authority over crimes, rather than proving the occurrence of the crimes themselves.

This approach has led to direct criticism of the ICC Prosecutor's Office, thought to unduly rely on investigatory materials and evidence provided by secondary actors, such as pre-positioned NGOs on the ground such

52 These data come from the American Association of Law Schools' directory of law teachers for each of the relevant years: AALS. The AALS Directory of Law Teachers, Washington, D.C.: AALS.

53 *Dezalay*, fn.5 above.

as Avocats Sans Frontières.[54] But it has also, indirectly, narrowed the spectrum of possible justifications once evidence is marshaled, downstream, into the Court, notably regarding the position of victims in prosecutorial justifications. As one interviewee indicated, at the ICC 'they don't see any problem in defending, in given trials, one group and another in another trial, even though they massacred each other. In any case they are victims … it is a depoliticization of the court …'[55]

This context of constraint and constant external pressure to not be identified as 'political', along with this prosecutorial strategy of offshore investigations, is directly reflected in the prosecutorial opening statements in the first three cases of the ICC. Indeed, in stark contrast to the organizational hedging model of the IMT prosecutors at Nuremberg, these underline a turn to an unhedged bet of law and legal expertise. There is thus a concentration of justifications across three orders of worth: the 'civic', the 'inspired', and the 'industrial' – and no invocation at all of the 'domestic', 'opinion', or the 'market'. Further, not only is there a substantial growth of appeals to the 'industrial' – but the 'industrial' is also the primary justification – making up over 70 per cent of justifications in all three cases, reaching 84 per cent in the *Bemba* case. While hinging on an appeal to professionalism and efficiency, this further reflects what Bourdieu described as an 'organizational capital with a legal basis',[56] whereby prosecutions are justified on the basis of a legal form of expertise. This is particularly well illustrated in the opening statement in *Bemba*:

> The Rome Statute consolidated customary international law on the topic and specified its dimensions. It does not introduce a new and separate liability of the superior into international law […] In accordance with this principle and the Pre-Trial Chamber III's decision confirming the charges for trial, the Prosecution will prove the elements required by the law in this specific case.[57]

54 Notably in the Lubanga case, in which, among the 624 pages of the decision, more than 200 focus on evidence-related issues – not only the investigation strategy, but also a central issue pertaining to this case – and others: that of the selection and roles played by 'intermediaries' on the ground to gather evidence or identify (and vet) witnesses and victims.

55 Authors' interview with victims' lawyer, Brussels, 13 December 2012.

56 Bourdieu, Sur l'État, fn.20 above, p. 524-525.

57 Bemba, fn.30 above.

This turn to 'pure law' is further reflected by the relative change of other orders of worth invoked by prosecutors over the ICC's first three cases. We demonstrate this shift in Table 5.4.

Table 5.4 Orders of worth in ICC prosecutions

	Inspired	*Domestic*	*Civic*	*Opinion*	*Market*	*Industrial*
ICC Lubanga	21.2 %	—	5.8 %	—	—	73 %
ICC Katanga	13 %	—	9.8 %	—	—	77.2 %
ICC Bemba	4 %	—	12 %	—	—	84 %
IMT at Nuremberg (all four prosecutors)	5.2 %	29.0 %	8.4 %	5.2 %	<1 %	52.3 %

As prosecutors relied ever more heavily on 'industrial' justifications that reflect legal professionalism, expertise, and efficiency, they relied ever less on appeals to the order of 'inspiration'. In the *Lubanga* case, the very first prosecution of the ICC, prosecutors placed significant weight on inspiration in the opening statements. For example: 'The children still suffer the consequences of Lubanga's crimes. They cannot forget what they suffered, what they saw, what they did […] They will tell the Court what happened to them. They will speak or themselves and for all the other, for those who could not overcome the past or face the present.'[58] Yet over the course of the next two cases, prosecutorial appeals to inspiration fell dramatically, from 21 per cent of all justifications in *Lubanga*, to 13 per cent in the following case of *Katanga*, and down to merely 4 per cent of all prosecutorial justifications in the *Bemba* opening statements. And on the flip side, justifications based on a 'civic' order of worth were deployed by ICC prosecutors to emphasize solidarity with victims and a global community that is built, in the main, through law and legal tools – and these doubled in prominence, from 6 per cent of justifications in *Lubanga*, to 10 per cent in *Katanga*, and 12 per cent of all justifications in the ICC's third case in *Bemba*. Take for example the prosecutorial opening statement in *Katanga*:

> The people from such places as Bogoro, Bunia, Aveba and Zumbe must know that they are not alone, they do not need to resort to violence again … the people from Ituri, have to feel they are part of a global community, that we are their brothers and sisters. The

58 Lubanga, fn.28 above, 2.

> Rome Statute is building one global community to protect the right of victims all over the world.[59]

In parallel to this narrowing in orders of worth, prosecutorial statements in the ICC have also used ever less of the future tense in their justifications. While more prevalent in the ICC's first case in *Lubanga*, by the ICC's third case in *Bemba*, only the 'industrial' order of worth relies on some future-orientation in its language (at just 5 per cent of these justifications), and the use of future-statements in the context of inspiration and civic orders of worth falls to zero in the prosecutorial statements. This is also in contrast with the opening statements at Nuremberg, where some use of the future appeared across all orders of worth. ICC prosecutors are thus relying both on a narrower set of justifications over time, and on an increasingly presentist (rather than a future-oriented) language. This shift in the use of time is demonstrated in Table 5.5.

Taken together, this evidence suggests that in the ICC there is a growing segmentation of law from diplomacy and from the national context of state politics. This is in favor of an unhedged bet on legalization and professionalism, aimed at insulating the ICC from criticism and wider contextual constraints – be it a result of being shunned by states, or the difficulties of conducting investigations on the ground.

Table 5.5 Future-orientation of orders of worth

	Inspired	*Domestic*	*Civic*	*Opinion*	*Market*	*Industrial*
ICC: Lubanga	37.90 %	—	12.50 %	—	—	5 %
ICC: Katanga	50 %	—	0 %	—	—	1.40 %
ICC: Bemba	0 %	—	0 %	—	—	4.80 %
IMT at Nuremberg (all four prosecutors)	64.70 %	3.10 %	15.80 %	11.10 %	50 %	8.20 %

VI. Conclusion

The moral grammar of international criminal prosecution is, we argue, deeply connected to the position-takings of prosecutors and the geopolitical contexts in which courts are embedded. At any given time, prosecutors are engaging in a strategic approach that engages with the opportunities and constraints of the field: both to deflect concerns over the cases they are prosecuting, and to afford themselves opportunities to recast the debate.

59 Katanga, fn.29 above, 3.

Comparing the IMT at Nuremberg and the ICC along these lines, we find markedly different approaches. For a Tribunal in the post World War II context in which there was skepticism over even its *de jure* authority and over the capacity of law to respond adequately to Nazi crimes, IMT prosecutors responded to that uncertainty through organizational hedging that drew on the widest array of justifications available. In contrast, the ICC finds itself on the other end of the continuum: faced with persistent charges of politicization and now beyond the peak of international social movement support, ICC prosecutors have instead invested in an unhedged bet that increasingly privileges a single justificatory language – a technical, legal, and institutional approach – while also refraining from a future-orientation to its prosecutorial claims.

It is here that the focus on prosecutorial statements is brought together with a field theory of international law. Paralleling the professionalization of international criminal law over time, interview evidence suggests that the decision to invest more heavily in a legalization that seeks to deflect politics is as much a reaction to the political context in which the ICC finds itself as it reflects the availability of a professionally and increasingly specialized staff. As Bourdieu's work on the state and the role of jurists indicates, juridical capital here relies on the capacity to rely on words and meaning to both advance the legal cause – both in the IMT and in the ICC – and to legitimate the role of legal institutions as a response to atrocity. This further serves to legitimate the professional expertise and domain of lawyers operating within the ICC. In this way, prosecutors in both eras are seeking to position the courts vis-à-vis its critics, real or anticipated. The entrepreneurial work of prosecutors in these statements is thus to mediate and to present the innovations of these courts – and their own positions within the field as a result – in ways that respond to and shift the terrain to accommodate the dominant values of the field at a given moment in time. This combination of language and rhetorical appeals as both responsive to constraints and an attempt to recast the terrain is, we suggest, core to understanding the juridical capital of prosecutors in international legal fields.

My iCourts experience

My earliest recollection of iCourts is of Mikael Madsen, during an event at the American Bar Foundation in Chicago, pulling me aside to the library. We sat at two chairs, in between bookcases housing some of the classic work at the intersection of law and social science, with a focus on access to justice, on the legal profession, and on legal decision-making. Swearing me to secrecy (at least this is how I remember it!), he shows me a proposal to the Danish National Research Foundation.

Mikael's idea? A scholarly centre to draw together researchers from *across disciplines* on international courts. *All* international courts, over time and in the present. And they'd be studied *empirically*, without geographic constraint. In the process, the Centre would build a *basic social science* of how to study legal institutions and international legal elites. I remember being stunned! I also don't remember being of much help. I think my only question, which Mikael wisely ignored, was about the name. Mikael soon launched iCourts, in the University of Copenhagen's Faculty of Law, to global scholarly success.

But in a homologous way to how Bourdieu thinks of the State, I quickly learned that iCourts is not just where you look for it! Rather, iCourts provided me with a community of new connections, scholarly and more importantly personal, across the globe. And iCourts offered many of us the belief, and with it the relief, that what we were studying was part of a common project. And iCourts would, of course, bring us back to recharge those connections and to build new projects: at one stage my own visits to Copenhagen occurred so often that the Danish National Police seemed to take notice too, and I'd vanish for some hours at a time! And while I never did figure out where to find the coffee pods, it has struck me that the fact that iCourts could feel like home in such different physical spaces – from Studiegården to the modern design of Karen Blixens Plads – is further proof that iCourts is an ethos and a way of working together, which has also been sure to refresh its own driving questions over time.

For me, iCourts also served as inspiration, where I could launch the wildest ideas for articles and meet students and colleagues from across the globe. In my case, it allowed me to produce new work on international criminal courts and on legal fields, to host workshops, and to experiment with new empirics and new concepts (to give a sense, I think I once presented it to the Summer Institute on studying international courts as akin

to how physicists search for neutrinos. *This* is the kind of open intellectual space Mikael fostered).

I add that this iCourts of the mind also had personal effects. Northern European television gained global reach over this time, and on Netflix I'd notice myself, late night in Toronto, watching The Bridge, or then Borgen, while ignoring the subtitles. I don't know if I thought I could understand Danish, or if I was just willing myself to believe I could! But iCourts was in my head, even if I couldn't understand a word. And I don't think Mikael knows this, but my son also wore, for at least a couple of years, an F.C. Copenhagen shirt here in Toronto, I'd bring home grounds from Coffee Collective, and above our dining room table is a small version of the round pendants from one of the dining halls. So yes, Mikael may have given me an identity crisis.

I have many friends that came through iCourts and the workshops that we held. But in the same spirit, iCourts was also on the road. This included an all too merry band of sociologists of law searching for late night crabcakes in Baltimore, and somewhere there is a guest registry with a lengthy inscription by Mikael about distinction in crabcakes. These excursions included what remain my most special memories of the Law & Society meetings when, in the early years of iCourts, panels on international courts were new and drew ever more people into conversations. And then there were the trips I meant to join but could not, which Mikael would send me by WhatsApp: his teaching in Jerusalem would also bring his academic advice to others in the late-night jazz venues in the city! His text messages from then include three important data points: a first notes that he is "just done with the conference"; the second is "Have you looked into where we are going to retire?"; and the third is, in quick succession, a legal document he found from the British Foreign Office. Look at these three texts as data: Mikael's first act on landing was to engage in rigorous scholarly engagement by delivering a paper; he remained throughout dedicated to friendships and planning with close colleagues and friends; and he always remained on the lookout for new empirics, for new ways to learn about international law; and he was always sure to share any new scholarly insights with a team. The iCourts ethos is, in my experience, embedded in these three little texts.

And if the story of iCourts, for me, is that it isn't just where you look for it, then it is because the iCourts that Mikael built cut across generations. I remember when, as junior academics, several of us sat around a large table, noting Bryant and Yves heading off to their own table! We were taken with the fun they were having, and I know that I wanted the same. Mikael and the group he assembled at iCourts harnessed that sort of scholarly

engagement, and fun, into building an entire scholarly field. And just today, a Zoom call to launch a new collaboration on global crimes and courts with a friend, met through iCourts, and students working with me at Toronto. We did it across continents, across courts, across generations, and across law and social science, in classic iCourts style. We worked on some of the most challenging courts and trials of our time. We thought about our own roles as researchers. And we had loads of fun on the call today too. iCourts isn't where you might think to look for it!

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