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Politics and Prosecutions: From Katherine Fite to Fatou Bensouda

Diane Marie Amann*

"Certainly mankind has been befouled with a stain that won’t be removed in a week or a month."¹ So wrote

* Emily and Ernest Woodruff Chair in International Law, University of Georgia School of Law; Vice President of the American Society of International Law, 2009-2011; founder, IntLawGrrls: Voices on International Law, Policy, Practice. This essay, which reflects developments through July 2012, revises and updates the First Annual Katherine B. Fite Lecture that I presented on August 29, 2011, at the Fifth Annual International Humanitarian Law Dialogs in Chautauqua, New York. My thanks to David Crane and the folks at the Robert H. Jackson Center, without whom these Dialogs and this lecture would not be possible, to Georgia Law student Sarah Hassan for research assistance, and to Georgia Law librarian Thomas J. Striepe for archival assistance. Special thanks to my colleague, John Q. Barrett, who set the stage for this lecture series with his own 2009 lecture, which introduced Chautauquans to the woman here honored and which has been published as John Q. Barrett, Katherine B. Fite: The Leading Female Lawyer at London & Nuremberg, 1945 [hereinafter Barrett, Fite], in PROCEEDINGS OF THE THIRD INTERNATIONAL HUMANITARIAN LAW DIALOGS 9-30 (Elizabeth Andersen & David M. Crane eds., 2010) [hereinafter 3D IHL PROCEEDINGS]. This essay has benefited from John’s comments. Nevertheless, by way of caveat, it must be stressed that this essay—part of a larger and ongoing project that examines the roles women played at Nuremberg—is based largely on archival sources, many of which admit of multiple meanings, and some of which are contradictory. Every effort has been made to present facts accurately and to draw inferences fairly.

¹ Letter from Katherine Fite to Mr. and Mrs. Emerson Fite (Oct. 28, 1945), available in the Truman Library digital archives list at 7
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Nuremberg lawyer Katherine Fite while preparing for the post-World War II trial of nearly two dozen Nazi leaders. In that single sentence, Fite not only remarked that the memory of atrocity may shred human ties for generations, but also admitted that prosecution alone cannot bind war-torn societies. Essential, her letters made clear, is politics—robust political support for social recovery as well as criminal accountability. Fite’s insights resonate more than six decades later as lawyer Fatou Bensouda begins her term as Chief Prosecutor of the International Criminal Court (ICC) on July 1, 2012. Like the Nuremberg Tribunal before it, the ICC must work within a political context in order to achieve a modicum of criminal justice.

http://www.trumanlibrary.org/sitesearch.htm?cx=008710743933556765127%3Ag3_3qxxfjqg&cof=FORID%3A10&ie=UTF-8&q=letter+from+katherine+fite&sa.x=0&sa.y=0&siteurl=www.trumanlibrary.org%2Fwhistlestop%2Fstudy_collections%2Fnuremberg%2Fdocuments%2Findex.php%3Fdocumentdate%3D1945-07-25%26documentid%3D20-31%26pagenumber%3D1 [hereinafter Fite letters list]. This essay hereinafter will denote Fite’s correspondence to her parents solely by the letter’s date; for example, the above will appear as “10/28/45 letter.” All quotes repeat spelling and punctuation as in the original.

It is my great honor to explore the interrelation of politics and prosecutions by means of this First Annual Katherine B. Fite Lecture. To establish a frame for future speakers, this lecture first introduces IntLawGrrls, which is responsible for this session at the International Humanitarian Law Dialogs. It then outlines the career that Fite, the lecture’s namesake, built for herself. Drawing from Fite’s experiences, the lecture concludes by examining how international politics affect Nuremberg’s contemporary counterpart, the International Criminal Court.

IntLawGrrls

The blog, \textit{IntLawGrrls: Voices on International Law, Policy, Practice}, has welcomed more than 1.1 million page viewers since its founding in 2007. By the kind invitation of Professor David Crane, IntLawGrrls joined the Dialogs as a co-sponsor of the 2009 Dialogs, “Honoring Women in International Criminal Law, From Nuremberg to the International Criminal Court.” Among the speakers was then-Deputy Prosecutor Fatou

\footnote{3 See Diane Marie Amann, \textit{Go On! IntLawGrrls Cosponsors 3d IHL Dialogs, on ‘Women in International Criminal Law,’ IntLawGrrls} (July 16, 2009), http://www.intlawgrrls.com/2009/07/go-on-intlawgrrls-cosponsors-3d-ihl.html. Presentations at this fall 2009 meeting were published at \textit{3D IHL PROCEEDINGS, supra note *}. All IntLawGrrls’ posts about the Dialogs may be found at http://www.intlawgrrls.com/search/label/IHL%20Dialogs.}
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Bensouda,\(^4\) who would contribute to IntLawGrrls two years later.\(^5\) Many IntLawGrrls contributors have taken part in the Dialogs: Kelly Askin, Laurie Blank, Rebecca Richman Cohen, Neha Jain, Marilyn J. Kaman, Valerie Oosterveld, Lucy Reed, Susana Sá Couto, Leila Nadya Sadat, Jennifer Trahan, Beth Van Schaack, and Pamela Yates.\(^6\)


Another IntLawGrrls contributor is past Dialogs speaker Patricia M. Wald, who served as a judge on the International Criminal Tribunal for the former Yugoslavia.\(^7\) Wald’s move to The Hague in 1999 capped a long career stateside, where she was the first woman Chief Judge of a U.S. Court of Appeals, in the District of Columbia Circuit. After returning to Washington in 2001, Wald continued to promote international criminal justice; for example, she co-chaired the American Society of International Law Task Force on U.S. Policy toward the International Criminal Court.\(^8\) In 2010, IntLawGrrls and ASIL held a roundtable which


\(^{8}\) See *U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT: REPORT OF AN INDEPENDENT TASK FORCE* (Am. Soc’y Int’l L., 2009), available at
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produced “Women and International Criminal Law,” a special issue of the *International Criminal Law Review* dedicated to Judge Wald.⁹

A theme of that special issue was women as creators of international criminal law. The women featured included many of the female prosecutors at the Nuremberg trials, as well as Cecilia Goetz and Hannah Arendt, a philosopher who influenced the development of international criminal law.¹⁰ This lecture is named after yet another international criminal law creator, Katherine Fite.


Katherine Fite, Woman at Nuremberg

Boston-born Katherine Fite was a Vassar woman who earned her law degree from Yale University in 1930.\textsuperscript{11} After graduation, she served as an attorney on the U.S.-Mexico Claims Commission for a couple of years. In 1937, Fite began practicing at what would be her work home for the next twenty-five years—the Office of the Legal Adviser of the U.S. Department of State, known simply as “L.” Her boss throughout the war years was Legal Adviser Green Hackworth, the editor of a major international law digest who would later become the first American judge and President of the International Court of Justice.\textsuperscript{12}


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In July 1945, the State Department assigned Fite to work with Justice Robert H. Jackson, who was on leave from the Supreme Court and serving as the Chief U.S. Prosecutor at Nuremberg.13

This photograph, taken eleven weeks after Germany surrendered, is emblematic of Fite’s significance to the Nuremberg era. It depicts the arrival of the first Allied lawyers at Nuremberg to tour the Palace of Justice and its surroundings. Fite is easy to spot in the photo: hers is the only skirt.14

13 See Woman Joins Staff of War Crimes Group, N.Y. TIMES, July 11, 1945, at 4. On Jackson’s work at Nuremberg, see, e.g., Barrett, Fite, supra note *, at 11-13; for a recent account discussing that work in relation to Jackson’s work on the Supreme Court, see generally NOAH FELDMAN, SCorpIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES (2010).

14 See Barrett, Fite, supra note *, at 18 (reproducing photograph and observing that it “shows nineteen people wearing pants and one wearing a skirt—Katherine B. Fite”); see also 7/23/45 letter (describing trip).
Days later, Fite accompanied Jackson to the Potsdam Conference and then into central Berlin. In one of her many chatty letters home, Fite wrote of rummaging in what had been, not so long before, the office of the Nazi Fuhrer, Adolf Hitler. They found a swastika-embossed cross hanging from a grosgrain ribbon, and in a mock ceremony, Jackson presented this “Cross of Honor of the German Mother” to Fite.15 Back in England, Jackson and Fite met with Cambridge jurist Hersch Lauterpacht.16 After another of their pre-trial trips—this one to the Dachau concentration camp where more than 40,000 persons perished—Fite commented, “It is really impossible to believe that the neighborhood didn’t know about it.”17


17 9/17/45 letter. See Introduction, KZ-GEDENKSTÄTTE DACHAU, http://www.kz-gedenkstaette-dachau.de/index-e.html (stating, at Dachau Memorial website, that “[i]n the twelve years of its existence over 200,000 persons from all over Europe were imprisoned here and in the numerous subsid[i]ary camps, 41,500 were murdered”).
Fite spent six months as an assimilated officer. She had the rank of Major. But on receipt of a letter calling her "Major Fite," she wrote her parents "to warn you never to address me as Major," as "the army despises assimilated rank."  

She enjoyed ration privileges, and a card in the Truman Library archives indicates that she made full use of the opportunity to purchase cigarettes, toothpaste, and other essentials. Luxuries, however, were hard to come by. Fite worried that her clothes were "shabby," and asked her parents for stockings and curlers. "Altogether hair is a problem," she reported. One letter began in an urgent tone: "Please send me immediately via APO 403, four bath towels and four hand towels. Not necessarily in good tip-top condition, but at least absorbent." Hot water was a hot commodity.

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18 11/20/45 letter.


20 8/19/45 letter; see 8/12/45, 11/11/45, 11/19/45, and 12/9/45 letters.


22 9/10/45 letter.
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Havoc lay all about her. In London there was “still devastation on a large scale.” 23 Nuremberg was “a shambles” and Frankfurt “a mass of destruction”; destruction in Berlin was “staggering and unreal,” while Potsdam stank “like a charnel house.” 24 Within weeks Fite wrote, “I’m sick to death of ruins.” 25

Fite expressed little sympathy for vanquished enemies. “Somehow I hated to look at the Germans—some looked at you boldly and curiously,—others looked very stupid and sullen,” she wrote after her first visit to Nuremberg. 26 Of the news from Hiroshima and Nagasaki, she mused: “The atomic bomb is something awful to contemplate. I’m torn between wishing we hadn’t been the ones to launch it and being so

23 8/19/45 letter.


25 8/5/45 letter.

26 7/23/45 letter. In the same letter, Fite reported no qualms about displacing Germans who owned what became her billet: “After all we are military occupants.” See also 8/5/45 letter (“The German countryside is lovely, and they should have stuck to it.”); 9/17/45 letter (stating, after visit to Dachau, that “all” Germans had “a pinched, unpleasant look”); 10/8/45 letter (Germans in Bayreuth were “a hard, evil looking lot”). In contrast, Londoners she encountered were “invariably friendly and courteous.” 8/19/45 letter.
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profoundly thankful it has ended the war. I suppose it’s no worse to kill civilians one way than another.”

Katherine Fite was a hard-working, well-educated, upper-crust woman who cared very much about the opinion of her father, a Vassar professor of political science. She was forty years old and single. Her letters suggest that she was lonely. In an apparent reference to lower-ranking staffers, she wrote: “The girls have a sort of dormitory in an apartment house which I have a horror of—and anyway I find only one or two of them companionable.” Fite relished talks with the few women like her, such as Aline Chalufour of France, who would help prosecute a war crimes case in the British

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27 8/12/45 letter.

28 8/12/45 letter (asking in postscript what her father thought of the Nuremberg Charter); see also 7/23/45 letter.


30 9/23/45 letter; see 10/21/45 letter (writing that “the circle of socially, how shall I say, mixable women” was “very restricted”). Cf. Barrett, Fite, supra note *, at 21 (writing that Fite initially stayed at the Grand Hotel, and so “was at least spared staying in the adjacent building, known informally as ‘Girls’ Town,’ where secretaries, stenographers and other women lived in quarters where men were at least theoretically not permitted”).

http://digitalcommons.law.uga.edu/facsch/6
sector. Other women did practice law at Nuremberg, but Fite had left by the time they arrived. Thus, Fite probably never met Cecelia Goetz, who would become the only woman to deliver an opening statement at the trials, nor other Nuremberg Prosecutors, like Sadie Arbuthnot, Mary Kaufman, Belle Mayer, and Dorothea Minskoff. Nor would Fite likely have met Elisabeth Gombel, the only female lead defense counsel, or other defense attorneys, such as Erna Kroen and Agnes Nath-Schrieber.

Artifacts suggest that Fite struggled to maintain her status as a professional, as an attorney. Her Soviet-

31 See 10/14/45 letter (writing that Chalufour was “really very intelligent and congenial—and I lack congenial feminine companionship”). See also Diane Marie Amann, Portraits of Women at Nuremberg, in 3D IHL PROCEEDINGS, supra note *, at 31, 40 & n.26 (describing Chalufour).


33 Cf. Barrett, Fite, supra note *, at 26-28 (quoting archival materials other than those discussed in this essay to make observations about how Fite’s sex might have played into her experience at Nuremberg).
issued pass to the Potsdam Conference read: “Miss Katherine Fite, Secretary.”

In one photo, a balding U.S. Army officer held the hand that a younger, taffeta-clad woman, seated to his right, had slipped into the crook of his elbow; to the officer’s left sat an evening-gowned Fite, looking as if she wished to be somewhere other than on that couch.

Fite’s letters indicate that she was far more comfortable in the thick of the work.

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34 See Pass into Potsdam Issued to Katherine Fite, July 25, 1945, available at http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-07-25&documentid=20-31&studycollectionid=&pagenumber=1. In fact, she had her own secretary. See Letter from Katherine Fite to Kitty Gilligan (June 16, 1945), Fite letters list, supra note 1 (indicating at bottom, in stenographic style of the period, that Fite had dictated the letter to “fje”).

35 See photo captioned “General Betts, Katherine Fite Lincoln, and others in Nuremberg, Germany,” http://www.trumanlibrary.org/photographs/displayimage.php?pointer=11296&rr=&people=Lincoln%2C+Katherine+Fite%2C+1905-1989&listid=1. The Truman Library thus has identified the balding officer as General Edward C. Betts, the Army’s Judge Advocate in Europe—a man with whom Fite told her parents she had a prickly planning session early on. See 7/23/45 letter (“We went over a bit of business and I felt as tho I were in very high quarters, but spoke up
Though assigned to the Office of the U.S. Chief of Counsel for the Prosecution, Fite was not herself a line prosecutor. Earlier that year, she had been at the Allies’ summit at Yalta. At Nuremberg, she helped interrogate defendants von Ribbentrop, Keitel, and Frick. Often she was “too busy” to attend the courtroom proceedings, which she found “dull.”

Fite complained that the Nuremberg Charter contained an error, that the indictment was rushed. The start of the trial was rushed too, in her view, for political

nevertheless.”). In correspondence with this author, however, John Q. Barrett, who as Jackson’s biographer is quite familiar with the personnel at Nuremberg, has identified the officer as Colonel Robert J. Gill, Executive Officer at the Office of Chief of Counsel (and the woman at left as secretary Mary Burns). The precise identity of the officer does not alter a viewer’s reading of the photograph—a reading that likely will differ among viewers.

36 See Personalities Who are Mentioned in Record of the Big Three Conference, N.Y. TIMES, Mar. 17, 1955, at 49.


38 11/19/45, 11/20/45, 11/27/45, & 12/9/45 letters. See also Barrett, Fite, supra note *, at 17-18 (including in Fite’s contributions work at London drafting the Nuremberg Charter and framing “arguments, based on the Kellogg-Briand Treaty, which answered the objection that it would be retroactive criminalization to prosecute German defendants for waging aggressive war”).
reasons. Such reasons would have registered with her: she was, by her own description, a "political observer." What she observed did not always please her. “I think the Justice has most unnecessarily given offense to the other countries,” she wrote after Jackson, at a press conference, had led “the papers to understand that only the U.S. means business. I get the impression that the other 3 have now ganged up to put the heat on us & maybe rush us through.” On occasion, she took issue with what she saw as Jackson’s penchant for acting as “his own Sec’y. of State.”

39 11/19/45 letter (writing that Claude Pepper, a Florida Democrat, wanted to see the opening day, and adding, “I suppose when you have Senators here you hurry the trial”).

40 12/9/45 letter. Cf. SCHABAS, supra note 16, at 75 (writing of personnel at Nuremberg with missions more political than legal, such as William J. Donovan, U.S. Deputy Prosecutor and “head of the major United States intelligence agency,” there “to ensure that indictments were not issued against senior Nazis with whom the Americans had made deals in the final months of the war,” and Andrey Vyshinsky, who led a Soviet commission that “gave instructions to their Prosecutor on matters such as the handling of the Katyn forest massacre issue”).

41 10/8/45 letter. See Barrett, Fite, supra note *, at 22 (reprinting excerpt of same letter, and noting that criticism occurred during a period when “Fite worked more independently of Jackson”).

42 12/9/45 letter. Notwithstanding these criticisms, Fite kept in close contact with Jackson after her year in Nuremberg. See Barrett, Fite, supra note *, at 28-29.
Ending her tour in December, Fite wrote from France: “Paris sad—no food—no sidewalk cafes. Goods in the stores are lousy and frightfully high.”43 This last letter concluded:

Europe is a sad worn out continent. I’m glad to leave. The U.S. is sitting atop the world. . . . We have to run the world—but the vast majority have no idea what the rest of the world is like. And how can equilibrium be maintained between wealth and energy on the one hand and poverty and exhaustion on the other?44

Like the sentence quoted at the beginning, this passage bears resonance with today’s world. Fite foresaw that World War II had thrust the United States into the position of a rich and powerful global leader. She understood, as well, that the new role carried a new responsibility to rebuild, to extend good fortune to others less fortunate. The United States had already joined the United Nations, assumed a permanent seat on its Security Council, and helped to forge a global financial structure; soon it would launch an unprecedented plan for economic recovery. The United States retained the isolationist elements that had held sway after the first

43 12/28/45 letter. Fite’s letters indicate that she had secured permission to stay longer; they do not make clear when or why she decided to go. See 10/28/45, 11/3/45, & 12/9/45 letters.

44 12/28/45 letter.
global conflict—a “vast majority” of Americans, to quote Fite, had “no idea” of “the rest of the world”—yet the United States helped to establish a complex of international institutions. Judicial bodies figured in the project. After World War II, the International Military Tribunal at Nuremberg, where Fite worked, was established, followed by its counterpart in Tokyo, and the World Court to which Fite’s State Department superior was elected weeks after she returned home.\textsuperscript{45} Once the Cold War concluded, a new spate of international criminal tribunals was established.\textsuperscript{46} They were, of course, bounded by law; nevertheless, the success of each often hinged on how its participants operated within a larger political context. Politics mattered at Nuremberg, as Fite’s letters underscored. Politics likewise matter at Nuremberg’s progeny, the International Criminal Court.

\textsuperscript{45} See Sydney Gruson, 15 Judges Elected for World Court: Three of the Judges Named by UNO Yesterday, N.Y. TIMES, Feb. 7, 1946, at 8 (noting, with reference to the Permanent Court of International Justice set up after World War I, that “[a]lthough the Americans had sat on the old court at The Hague from its inception, the United States was never a member”).

\textsuperscript{46} For an insider’s account of the United States’ role in the establishment of late twentieth-century international criminal justice mechanisms, see DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS (2012).
Politics and Prosecutions

Speaking at the 2011 Annual Meeting of the American Society of International Law, Fatou Bensouda said of the Court for which she then served as Deputy Prosecutor, "I think the relevance of the ICC over the years, especially now, has been established." She situated the Court within its global context:

I would quickly quote the unanimous decision by the United Nations Security Council referring Libya to the ICC. I think this has shown the ICC to be a player, not only for the international criminal justice, but also one of the solutions to bring peace and security to the conflict-torn societies. It has become a relevant player.

Bensouda's metaphor prompts many questions: What is the game that is being played? Is the ICC winning? If not, what is to be done by persons who care about international criminal justice, persons who are as sick now of seeing charnel houses as Katherine Fite was then, who look to adjudication as one means of effecting


justice? Potential answers fill the academic literature and popular commentary. This lecture explores just one avenue: that of improved interrelation between the ICC and other political entities that bear responsibility, as Bensouda put it, “to bring peace and security to conflict-torn societies.”

Politics has long been seen as a source of the ICC’s troubles. In 1998, after 120 state delegations had voted in favor of the Rome Statute of the International Criminal Court, officials of a prominent naysayer, the United States, asserted that the Court would become too politicized. Pointing to the Statute’s grant of “power to initiate prosecutions without a referral from the Security Council or state parties,” a Republican Senator fretted, “There will be no effective screen against politically motivated prosecutions from being brought forward.”


50 Is a U.N. International Criminal Court in the National Interest?: Hearing Before the Subcomm. on Int’l Operations of the Senate Comm. on Foreign Rel., 105th Cong. 3 (1998) [hereinafter Hearing] (remarks of Senator Rod Grams (R-Minn.), Chairman of the Subcomm. on Int’l Operations). At issue was Article 15 of the ICC Statute, supra note 49, which set forth conditions under which ICC prosecutors “may initiate investigations proprio motu”—on their own motion—“on the basis of information on crimes within the jurisdiction of the Court.”
The Democratic administration’s envoy expressed similar concern that *proprio motu* prosecution would “embroil the Court in controversy, political decision making, and confusion.” In 2010, amendments that would empower the Prosecutor to pursue individuals for the crime of aggression provoked all sides to conjure up the loathed specter of politicization.


52 Compare Press Release, Amnesty Int’l, Proposals Threaten International Criminal Court’s Independence (June 8, 2010) (objecting to proposal to require Security Council authorization, and so “calling on states to reject proposals which could seriously undermine the integrity of the Rome Statute and deeply politicize the International Criminal Court”), http://www.amnesty.org/en/for-media/press-releases/proposals-threaten-international-criminal-court’s-independence-2010-06-08, with Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, *U.S. Engagement With The ICC and the Outcome of the Recently Concluded Review Conference*, Special Briefing at U.S. Dep’t of State (June 15, 2010) (warning that if the ICC “were to get into the political area and to deal with crimes not against individual civilians, as in war crimes or crimes against humanity or genocide, but crimes against states and the crime of aggression, it would find it even more difficult to obtain cooperation”), *transcript available at* http://www.state.gov/g/gcj/us_releases/remarks/143178.htm. The amendments may be found in The Crime of Aggression, Assembly of States Parties Res., RC/Res. 6, *adopted by consensus* June 11, 2010 (June 28, 2010, advance version), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.
The politicization critique has always surprised me, not only on account of my own experience, but also on account of the experience of the international criminal tribunals on whose foundation the ICC was built.

Having been trained as a lawyer and having practiced federal criminal defense in the United States, I always regarded the prosecutor as part of the political system. A leader of the U.S. Department of Justice carries out the policies—the results of the politics—of the system within which she operates no less than does a deputy in one of the country’s myriad District Attorney’s offices. Certainly, she must act with impartiality and independence; in so doing, she is embedded even more deeply into the political framework. The Supreme Court recognized as much in its oft-cited description of the federal prosecutor:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.⁵³

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It is because she enforces widely shared decisions of the American polity that the American prosecutor is seen to do justice. The few occasions when prosecutions are called into question typically expose division within society. For example, the crack-versus-cocaine controversy and the Starr investigation of President Bill Clinton were salient issues at the time of the Rome Conference. In both instances, complaints about prosecutorial acts derived in part from the fact that the prosecution’s mandate lacked sufficiently widespread public support.

The experience of the post-Cold War ad hoc tribunals ought to have reinforced understanding of the essential interaction between political context and the criminal justice mission. The International Criminal Tribunals for Rwanda and for the former Yugoslavia, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon—each has been charged with

prosecuting the authors of violence that political actors in the international community refused to tolerate. The mandate of each demanded action. Prosecutors often deemed most successful adhered to an active-prosecutor model. The courtroom was but one of their venues. No less important was the court of public opinion, before which they not only presented the case against a person suspected of international offenses, but also endeavored to build public support, called for broader accountability, and urged deterrence and prevention. In so doing, these prosecutors enforced, even pushed, the policy decisions of their time.

A recent example is that of Serge Brammertz, who has served as the Chief Prosecutor of the ICTY since 2008. At the 2010 International Humanitarian Law Dialogs, he insisted that Serbia not be permitted to join the European Union unless and until it secured custody over the last ICTY fugitives in Serbia: Ratko Mladić and Goran Hadžić. Both men now reside in the same Dutch jail as the former Bosnian Serb President, Radovan Karadžić. Brammertz’s adoption of an active prosecutorial role no doubt contributed to this result.


The question is not whether an international prosecutor should participate at some level in the process by which the international community determines and implements policies. The question that emerges, rather, is this: Whose politics will the prosecutor serve? The answer is elusive, in no small part because politics are part and parcel of the political compromise called the Rome Statute.57


57 Despite the contrary protestations set forth infra in the text, this statement ought not to surprise; rather, as others also have observed, it seems evident in the general nature of treaty drafting and the specific nature of international criminal justice. See, e.g., SCHABAS, supra note 16, at 3 (stating that “[a]t the international level, policy and politics seem to sit much closer to the centre of the justice agenda”); id. at 90 (observing that “[t]he provisions in the Rome Statute concerning the relationship between the Prosecutor and the Security Council were probably the most contentious of the entire negotiations”). A powerful statement respecting the significance of politics appeared in the memoir of the United States’ first ambassador at large for war crimes issues:

I learned through extraordinary journeys that international justice has as much to do with the vagaries of global politics and our own moral strength as it does with treaties, courtrooms, prosecutors, judges, and defendants. The modern pursuit of international justice is the discovery of our values, our weaknesses, our strengths, and our will to persevere and to render punishment.

SCHEEFER, supra note 46, at 8.
By the terms of that Statute, the ICC Prosecutor does have the power to bring cases on her own—but only in limited circumstances, and only if she wins approval from the ICC Pre-Trial Chamber.\(^{58}\) Only one matter on the Court’s docket to date derives purely from the exercise of *proprio motu* power; the rest arrived via state consent or Security Council referral.\(^{59}\) These are quintessentially political entities, of course. Perhaps the only thing more political than a country’s request for investigation is concurrence by the five permanent members of the Council in making a similar request.

As might be expected of an instrument reached through political compromise, the Rome Statute leaves open to interpretation how the Office of the Prosecutor is to operate when its actions stir political debate. The first Prosecutor, Luis Moreno-Ocampo, stressed that “I was given a clear judicial mandate. My duty is to apply the

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\(^{58}\) ICC Statute, *supra* note 49, arts. 13(c), 15(3), 15(4). Although intended as a check against prosecutorial abuse, the requirement of Pre-Trial Chamber approval carries the risk of drawing the Court’s judicial organ uncomfortably close to contemporary geopolitics. Full exploration of this judicial risk is beyond the scope of this prosecution-focused lecture.

\(^{59}\) See *Situations and Cases*, INT’L CRIM. CT., http://icc-cpi.int/Menus/ICC/Situations+and+Cases/ [hereinafter ICC, *Situations*]; see ICC Statute, *supra* note 49, arts. 13(a), 13(b) & 14 (describing state and Council referral process); see also *id.*, art. 16 (requiring year-long deferral of prosecution upon resolution by the Council).
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law without political considerations." 60 Contending that the Statute deprived his office of discretion over cases once the ICC had exercised jurisdiction, he insisted that "there can be no political compromise on legality and accountability." 61 The Prosecutor issued a policy paper in September 2007 likewise construing Article 53 of the Rome Statute as only allowing him to decline a case in a few narrow circumstances, related to security, prevention of crime, and protection of victims and witnesses. 62 The paper then stated that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions." 63

Experts have advanced cogent arguments that the Prosecutor labored under a misinterpretation of a statutory provision for ending prosecutions "in the


61 Id. at 4.


63 Id. at 9.
Be that as it may, one thing is certain. In declaring its Statute inflexible and its mandate apolitical, the Office of the Prosecutor did not extract itself from the political context. To the contrary, it exposed itself to the critique that it was playing a covert game of politics, not only when it exercised jurisdiction, but also when it chose not to do so.\textsuperscript{65}

Such criticism is by no means unique to the ICC. The tribunals for Rwanda and for the former Yugoslavia, to name two, have endured charges of selectivity throughout their existence.\textsuperscript{66} Political turmoil marked the


\textsuperscript{66} See Diane Marie Amann, Group Mentality, Expressivism, and Genocide, 2 INT’L CRIM. L. REV. 93, 116-17 (2002) (discussing selectivity and randomness); see also HELLER, supra note 32, at 370 (citing statistics on selectivity respecting defendants in Nuremberg trials, and quoting Mark A. Drumbl, Atrocity, Punishment, and International Law 151 (2007), on how selectivity hinders
years of negotiations that led to the Cambodia Tribunal, and owing to political turmoil since its establishment, that Tribunal has often seemed on the brink of collapse. 67 Indeed, Katherine Fite's letters remind us today that politics dogged the first international criminal tribunal at Nuremberg. 68 That said, political vagaries pose a far greater challenge to the ICC. Every other charter limited its tribunal's competence by both time and place. Jurisdiction was limited to a distinct conflict, occurring on a defined territory, and within a particular cultural context. Early tribunals, moreover, were given free rein to pursue scores of suspects. None of this obtains in the ICC. The Rome Statute extends the Court's competence to a world of atrocities—involving not only the 121 ICC States Parties, but also—Security Council willing—any non-Party State. No tie to armed

the retributive function of international criminal justice); Schabas, supra note 16, at 82 (stating that international criminal "tribunals, and their budgets, were never conceived to deal with all crimes" within their jurisdiction, a fact compelling the conclusion that "[b]y nature, they are selective") (emphasis in original).


68 See supra text accompanying notes 35-43. For a biting analysis of politics in the Nuremberg era, see generally Peter Maguire, Law and War (rev. ed. 2010).
conflict is required, so that incidents that the law not long ago deemed internal, such as post-election violence, are now attended to by the ICC. It is expected to target only those persons most responsible for atrocity, a numerical limitation that already has led to the pursuit of three heads of state—prosecutions that inevitably stir political controversy.

Having opened its first investigation fewer than eight years ago, today the Office of the Prosecutor is responsible for 15 cases in seven situations, and is

69 They are: Sudanese President Omar al-Bashir, the subject of an ICC arrest warrant since 2009; the now-deceased leader of Libya, Muammar Gaddafi; and Laurent Gbagbo, formerly the President of Côte d’Ivoire, in ICC custody since December 2011. See ICC, Situations, supra note 59. At this writing, some sought to add to the list another head of state, Syrian President Bashar Assad, whose security forces had been engaged for many months in a lethal crackdown on protesters and insurgents. See Dana Khraiche, Lebanese Lawyer Says His Case Against Assad at ICC Strictly Legal, DAILY STAR (Apr. 19, 2012), http://www.dailystar.com.lb/News/Local-News/2012/Apr-19/170741-lebanese-lawyer-says-his-case-against-assad-at-icc-strictly-legal.ashx#axzzlt6XFINKX; United Press Int’l, Pillay Backs Referring Syria to the ICC (Feb. 28, 2012) (referring to repeat by U.N. High Commission for Human Rights of her call for Security Council referral of situation in Syria), http://www.upi.com/Top_News/Special/2012/02/28/Pillay-backs-referring-Syria-to-the-ICC/UPI-47241330459214/.

70 Uganda, INT’L CRIM. CT. (noting the decision to open the investigation issued on July 29, 2004), http://icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/.
conducting preliminary examinations in eight additional countries, located on four continents.\textsuperscript{71} It is asked to do everything for everyone all the time, everywhere. Some recent examples include Colombia, Greece, Iran, Maldives, Mexico, Nigeria, Syria, Thailand, Turkey, Yemen, and the Vatican.\textsuperscript{72} Despite this stream of pleas

\textsuperscript{71} ICC, \textit{Situations}, supra note 59.

for help, the Court has operated for years without any significant budget increase.\textsuperscript{73}

Compounding matters is the fact that the ICC is not, if you will, your grandmother’s criminal court. As one would expect, it investigates allegations of crime, prosecutes suspects, and imprisons convicted persons. Less recognized are the considerable duties of public outreach and transitional justice that the Rome Statute imposes on the Court. Its organs must give support to victims and witnesses, meet with members of affected communities, prod States Parties to hold their own accountable, give technical assistance when states choose to do so, and exhort all states to cooperate with its work. These tasks, while alien to most attorneys who practice in domestic criminal justice systems, are


essential to the mission of the ICC. In the words of Prosecutor Bensouda, the Rome Statute founded “a sui generis model for global justice,” “a system of its own kind.”

The states that established a new system of justice at Rome in 1998, and those that now belong to its Assembly of States Parties, ought to pay for, and otherwise bolster, the Court. They have not always done so. As a result, ICC resources have been spread so thin as to raise doubts about traditional casework. Conduct of the ICC’s first trial—that of a former militia leader charged with recruiting child soldiers in the Democratic Republic of the Congo—proved to be a lightning rod for criticism from judges and commentators alike. The judgment of conviction did little to allay such concerns, given that the ICC Trial Chamber devoted the first third of its nearly 600-page Lubanga verdict to recounting failures of proof, misconduct by persons working with the Prosecution, and its own outright rejection of many


witnesses' testimony. Adding to the investigative and evidentiary challenges inherent in any criminal justice forum are the Court's many novel duties with respect to witnesses and others. Political compromise created this *sui generis* system in 1998, but the political context since that date has not afforded it adequate support.

This is true even with respect to the Security Council's two referrals to the ICC. The Council's referrals of the situations in Darfur in 2005 and in Libya in 2011 explicitly excluded payment for any of the costs of ICC investigation or prosecution. When the ICC moves into a region for the first time, it needs personnel with new areas of expertise and often new linguistic abilities. In short, it requires new expenditures of money; the Council disregarded that patent need.

Politics ill-served the Prosecutor in other ways as well.

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77 See S.C. Res. 1593, ¶ 7, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (stating "none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily"); S.C. Res. 1970, *supra* note 48, ¶ 8 (reiterating above proviso).
The Prosecutor duly undertook investigations following both Security Council referrals, and the Pre-
Trial Chamber confirmed requests to issue arrest warrants. In the case of Libya, the Court’s organs acted 
within months—lightning speed in international criminal justice. Rather than being praised, however, the ICC incurred wrath. Critics cited these situations—along with 
those in the Central African Republic, the Democratic Republic of Congo, Côte d’Ivoire, Kenya, and Uganda—as proof that the ICC has paid undue, even “neo-
colonialist,” attention to Africa. Prosecutors noted that all but one case had come by referral and that victims in Africa welcomed the Court’s aid, but their response tended to gain less traction than the charge that provoked it.

Having issued arrest warrants, moreover, the Court encountered less than full assistance in the execution of those warrants. Years after being charged with responsibility for genocide, crimes against humanity, and war crimes in Darfur, Omar al-Bashir remains the President of Sudan. Nor is he confined to his own, non-
cooperative state. He has traveled not only to non-Party


States but also to a few ICC States Parties. The Court complained to the Security Council, but the Security Council failed to act.\footnote{See, e.g., Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05/01/09 (Pre-Trial Ch. I Dec. 13, 2011), http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptci/140?lan=en-GB. On ratifying the Rome Statute, states parties obligate themselves to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” ICC Statute, supra note 49, art. 86; see id., arts. 87-93.} Bashir made an official state visit without incident to China, a permanent member of the Security Council that, by withholding its veto, had effectively acquiesced in the 2005 Darfur referral to the ICC.\footnote{See Malcolm Moore, Sudan’s Al-Bashir Given Red Carpet Treatment by China, TELEGRAPH (June 29, 2011), http://www.telegraph.co.uk/news/worldnews/asia/china/8605319/Sudan-s-Al-Bashir-given-red-carpet-treatment-by-China.html.}

China affirmatively supported UNSC Resolution 1970, which referred the situation in Libya; As Bensouda stressed in her talk at the American Society of International Law, the Security Council vote was unanimous.\footnote{See supra text accompanying note 48.} Yet as events unfolded, Council members seemed less than eager for the now-deployed justice
mechanism to discharge its duty to dispense justice. Three weeks after the referral, states in the North Atlantic Treaty Organization launched a Security Council-sanctioned military intervention. Any NATO member that did not belong to the ICC—in effect, the United States—could take part in the attack with the expectation that a provision in the referral resolution immunized its actions from ICC scrutiny. The leaders of Britain, France, and the United States then wrote in a joint op-ed that the ICC "is rightly investigating the crimes committed against civilians and the grievous violations of international law," and insisted that Gaddafi "must go and go for good." Notably, they did not say that Gaddafi must go to The Hague. The implication that these permanent members of the Security Council would


84 See S.C. Res. 1970, supra note 48, ¶ 6 (stating that the Council "[d]ecides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State"). A similar provision appeared the Darfur referral. S.C. Res. 1593, supra note 77, ¶ 6.

be happy for him to go anywhere was confirmed in July 2011 when officials of the three governments showed interest in allowing Gaddafi to remain in Libya but removed from power, if Libya’s new government were to agree. By this point in time, the ICC Pre-Trial Chamber had issued a warrant for Gaddafi’s arrest upon request of the Office of the Prosecutor. The French-British-American signal of “never mind” must have left ICC officials feeling as if their legs had been cut out from under them.

In the case of Libya as in other instances, states’ behavior toward the International Criminal Court has shifted with political winds. Born of political compromise, the ICC—itself governed by the state officials who comprise the Assembly of States Parties—has struggled to proceed with proper juridical independence and impartiality. In the Court’s first decade, ICC officials’ categorical protestations that it is apolitical did not shield it from claims that it played

political favorites. A more nuanced approach seems in order; indeed, it may be on the horizon.\textsuperscript{87}

Although the new Prosecutor, Fatou Bensouda, invoked the term “judicial mandate” in her talk before the American Society of International Law, she contrasted it with “a humanitarian mandate”—a different tone than that of the first Chief Prosecutor.\textsuperscript{88} At another time, Bensouda stated that officials at the Court “have nothing to do with politics,” yet recognized, “We operate in a political atmosphere.”\textsuperscript{89} She has made clear that hers is a mandate to be exercised in cooperation with those of others. The ICC “recognizes itself as a player with the other stakeholders who have different mandates,” said

\textsuperscript{87} Cf. \textsc{Schabas}, \emph{supra} note 16, at 87 (observing, after critique of Moreno-Ocampo’s policy respecting selection of situations, that “the Prosecutor’s career at the Court is confined to a single nine-year term,” and adding that “[f]uture prosecutors may view this differently”).

\textsuperscript{88} \textit{Bensouda Conversation, supra} note 47, at 00:31:42.

Bensouda. Specifically, the ICC is “bringing to the table that justice is part of the components that can be used to bring peace and security to these conflict-torn situations.”90 This metaphor of cooperation played out in an achievement Katherine Fite would have approved of—the November 2011 arrival at The Hague of a former head of state pursuant to a sealed ICC warrant.91

Conclusion

Persons who care about international criminal justice should welcome new prosecutorial willingness to grapple with the challenges of the political context. They should, in fact, do more. When it does well, the ICC deserves support, through execution of the warrants it issues, the provision of adequate funding, and other means. When it falters, the Court also deserves support, from civil society as well as from states. What the Court needs is not uncritical defense of its failings, but rather deep thought about advisable structural, procedural, and other changes. Through such collaboration we may take up the task that Katherine Fite and her Nuremberg peers left to us—the work of freeing humanity from atrocity’s stain.

90 Bensouda Conversation, supra note 47, at 00:31:42.