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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Crafting and Promoting International Crimes: A Controversy among Professionals of Core-Crimes and Anti-Corruption

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Abstract
The emergence of new international criminal courts in the 1990s intensified an existing professional contest to define international crimes. This ongoing competition concerned which crimes should be termed international and consequently become the subject of international institution-building and prosecution. The article draws upon Pierre Bourdieu's analytical tool of the 'field' in order to investigate how legal professionals located in different fields of practice have crafted and promoted specific crimes as international, in successive phases. The focus of the analysis is on two stages of this development. The first is the protracted emergence of a field of 'core crimes' centred on a specific set of crimes: genocide, crimes against humanity, and war crimes. The second is an emergent contestation of this focus on 'core crimes' embedded in the careers of legal professionals engaged in the field of anti-corruption. By adapting the impactful narratives developed around core crimes, this second phase of contestation becomes a new frontline in the wider endeavour to define the role of criminal law in a larger international space of governance and politics.

Keywords
anti-corruption; international crime; international criminal courts; international criminal law; sociology of law

1. INTRODUCTION

The 1990s was a period in which international criminal law (ICL) dedicated to 'core crimes' grew in stature through the creation of a range of *ad hoc* tribunals and the establishment of the permanent International Criminal Court (ICC). Historically, though, emphasis on genocide, crimes against humanity, and war crimes was not a given; rather, it was an orthodoxy that emerged gradually as a result of political, legal, and professional battles in which international jurisdiction over a range of different crimes was debated. This article will analyze the effort to restrict international criminal law to what became known as 'core crimes'. On this foundation, it will explore how the success of this institutionalized narrative has produced new

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forms of contestation. Due to the perceived success of international criminal courts, anti-corruption professionals appropriated the narratives and strategies first tested in the field of core crimes in an attempt to promote corruption as an international crime and thereby gain access to the institutional resources and political attention that drove the development of law around genocide and related crimes.

The article is inspired by Pierre Bourdieu's concept of a 'field' as a social structure whose boundaries are defined internally by competing social forces and externally by its relation to other fields.[1] The broader term of 'space' will be used to denote structurally less well-defined social geographies such as the wider international landscape in which different fields of practice – for our present purposes the fields of core crimes and anti-corruption – coexist and overlap. The basis used for investigating these fields is original empirical material that includes 115 semi-structured interviews. By examining the career trajectories of professionals engaged in the two international fields, the article reconstructs the social dynamics that have structured the contest to define international crimes. The contestation from anti-corruption elites has been chosen as an object of study precisely because it has been formed in reaction to the well-established field of core crimes. Studying the development of new anti-corruption practices illustrates how the success of international criminal courts has altered the nature of professional contests to further develop criminal law as an international governance tool.

First, the theoretical framework and method behind this inquiry will be presented. This will be followed by a brief outline of the efforts to delineate international criminal law during the Cold War and an investigation of the processes that led toward the Rome Statute. This account of how core crimes moved to the centre of ICL provides the basis for the examination of the new contestation driven by anti-corruption professionals. These agents have promoted the status of corruption as an international crime by forming new networks that include symbolically prominent but practically marginalized core crime profiles. Mobilizing around corruption as an international crime, these networks have adapted the narratives and tools generated in and around international criminal courts. The concluding remarks highlight how the social structuration of the two fields has formatted strategies and practices of contestation that have the potential to redefine international criminality through ideas promoted by similar and linked legal professionals active in these fields.

2. A SOCIOLOGICAL PERSPECTIVE ON THE BATTLE TO DEFINE INTERNATIONAL CRIMES

2.1. Previous scholarship

The battle to define international crimes analyzed in this article is situated sociologically at the border of two international fields: core crimes and anti-corruption. The extent of this professional interplay leads to theoretical questions as to the definition of these fields, such as whether they are part of the same field of practice.

[1] P. Bourdieu, *Raisons pratiques: sur la théorie de l'action* (1994) 152–3.

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But as the analysis will demonstrate, the social and political dynamics that frame the strategies and practices of core crime and anti-corruption professionals are very different. Therefore, the present article will treat the two arenas as distinct but closely linked fields of law and law enforcement. This perspective differs from previous scholarship in which these fields have largely been seen as separate legal and professional spaces. With regard to corruption, scholars have pointed out how the 1990s saw a veritable 'corruption eruption'[2] as international attention around this crime intensified. Political scientists have demonstrated how the massive focus on corruption helped build an 'anti-corruption industry'[3] around the international networks of 'integrity warriors'.[4] An important aspect of this industry was the emergence of national anti-corruption agencies created to curb corruption (and, while nationally organized, the formation of these units was partly a response to international anti-corruption norms and conventions).[5] Sociologists have supplemented the perspectives afforded by political science by investigating the social structures that define the relation between corruption, law, and democratic practices around the world.[6] Sociologists have also studied anti-corruption as a professional practice with its own internal rules and dynamics.[7] Despite these important contributions, the controversies surrounding corruption have rarely been analytically situated in a larger global space where the specific ideals of anti-corruption compete with other forms of internationalized legal expertise.

International criminal law has been studied by International Relations (IR) scholars who have analyzed the political power struggles behind the creation and functionality of the new courts,[8] and examined the relation between legal strategies and international politics.[9] By closely scrutinizing the workings of these new institutions, John Hagan offered a trailblazing sociological contribution exploring the social fabric of the International Criminal Tribunal for the Former Yugoslavia (ICTY).[10] This research has inspired other sociological inquiries[11] into the development of the

[2] M. Naim, 'The Corruption Eruption', (1997) 2(4) *Trends in Organized Crime* 60, at 60.

[3] S. Sampson, 'The Anti-Corruption Industry: From Movement to Institution', (2010) 11(2) *Global Crime* 261, at 263.

[4] L. de Sousa, P. Larmour and B. Hindess, *Governments, NGOs and Anti-Corruption: The New Integrity Warriors* (2009); See Sampson, *supra* note 3, at 261.

[5] C. Rose, *International Anti-Corruption Norms. Their Creation and Influence on Domestic Legal Systems* (2015).

[6] M. Nuijten and G. Anders, *Corruption and the Secret of Law: A Legal Anthropological Perspective* (2007); P. Lascoumes, *Une démocratie corruptible: arrangements, favoritisme et conflits d'intérêts* (2011) 100; and P. Lascoumes and C. Nagels, *Sociologie des élites délinquantes - De la criminalité en col blanc à la corruption politique* (2014).

[7] P. Lascoumes, 'Change and Resistance in the Fight Against Corruption in France', (2001) 19(1) *French politics, culture, and society* 49.

[8] P. Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the former Yugoslavia* (2004); S. Roach, *Governance, order, and the International Criminal Court, between realpolitik and a cosmopolitan court* (2009); and D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (2014).

[9] V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (2008) xxi.

[10] J. Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (2003); J. Hagan and R. Levi, 'Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice', (2004) 1(4) *European Journal of Criminology* 445; and J. Hagan, R. Levi, and G. Ferrales, 'Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia', (2006) 31(3) *Law & Social Inquiry* 585.

[11] M.J. Christensen, 'The Emerging Sociology of International Criminal Courts: Between Global Restructurings and Scientific Innovations', (2015) 63(6) *Current Sociology* 825.

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field of international criminal justice,[12] its institutions, and its practices.[13] Additionally, anthropologists have studied the effects of the international criminal courts in local contexts, where their practices clash with deeply-layered social structures that do not necessarily align with the goals of international criminal law as developed and pursued in The Hague.[14] While this scholarship has added important insights about the borders between different sub-fields such as ICL and transitional justice,[15] it has not addressed the foundational contest to define the very crimes around which this field was built.

By taking the boundaries of professional fields as a given, previous scholarship of international criminal law and anti-corruption has missed something essential: namely, the way these international fields of law have developed partly through a contest between professionals who barter distinct forms of criminal law to international stakeholders. In the process, these professionals shape the contours of certain fields of practice whose boundaries may appear fixed but in fact remain in flux. This fluidity is evidenced most clearly in the contest to define the legal orthodoxy of these fields. As part of this promotional activity, aimed at crafting new international crimes and constantly adapting to changing social and political climates, the professionals engaged in this effort mobilize expertise accumulated in national fields and invest it in emergent international fields.

The strategies employed by these agents are structured by their position in both international and national fields of law. In international fields of law, career paths are less certain and the promotional activities of the agents are closely linked to attempts at creating a professional ecology around a certain practice. This uncertainty means that international professionals can invest in the building of new international crimes without endangering their position in the national context. This must interact with national field orthodoxies, as envisaged by Pierre Bourdieu (where predefined sub-fields of law, such as criminal law or tax law,[16] serve to standardize the possible career paths and are a guarantee of the value of the legal capital, i.e., the accumulated and embodied experience that can be translated into specific career paths).[17] A broad consequence of this interaction is that the social and political power dynamics of national fields strongly affect professional investment and

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12 J. Hagan and R. Levi, 'Crimes of War and the Force of Law', (2005) 83 *Social Forces* 1499; and P. Dixon and C. Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', (2013) 7 *International Journal of Transitional Justice* 393.

13 J. Meierhenrich, 'Foreword to Special Edition: The Practices of the International Criminal Court', (2013) 76 *Law and Contemporary Problems* i-x; and J. Meierhenrich, 'The Practice of International Law: A Theoretical Analysis', (2013) 76 *Law and Contemporary Problems* 1.

14 M. Goodale, *The Practice of Human Rights: Tracking Law Between the Global and the Local* (2007); K.M. Clarke, *Fictions of Justice: the International Criminal Court and the Challenges of Legal Pluralism in sub-Saharan Africa* (2009), xxv; A. Hinton, *Transitional Justice, Global Mechanisms and Local Realities after Genocide and Mass Violence* (2010); G. Anders, 'Contesting Expertise: Anthropologists at the Special Court for Sierra Leone', (2014) 20 *Journal of the Royal Anthropological Institute* 426; and N. Eltringham, '"When We Walk Out, What Was it all About?": Views on New Beginnings from within the International Criminal Tribunal for Rwanda', (2014) 45 *Development and Change* 543.

15 K. Campbell, 'Reassembling International Justice: The Making of "the Social" in International Criminal Law and Transitional Justice', (2014) 8 *International Journal of Transitional Justice* 53.

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

17 Bourdieu, *supra* note 1, at 116–31.

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mobilization around new international crimes even in the cases where agents have crafted international careers. In addition, the contesting push and pull effects of national and international fields are not only embedded in practitioners; they also pertain to legal scholars educated in the national system but who engage academically with new forms of international law.[18] As a result, such scholarly output, which is often supplemented with practical expertise when scholars double as experts and/or experts as scholars, becomes an important part of the empirical object of this study.

2.2. The article's method and empirical material

The career trajectories of the 115 individuals interviewed for the present study illuminate the emergence and contesting dynamics of the two international fields outlined above. The interviews form the empirical backbone of the present analysis by providing a relational biography[19] and they complement the use of a database containing more than 500 career trajectories in these fields. These categories of data allow for both a diachronic mapping of the genesis and development of the two fields, and an investigation of the justifications mobilized by individuals as they promote different forms of international crime fighting. The interviews were conducted between 2012 and 2015 in the Netherlands, Canada, the USA, Portugal, Belgium, Norway, and Denmark and they typically took one hour each. Respondents were initially identified through open source material (professionals in leadership positions in international criminal courts, those with publication records, or those active in the media) as well as through official requests for interviews with personnel at the ICC, ICTY and the Special Tribunal for Lebanon (STL). Using the institutions in which participants accrued their main experience as the chief indicator, the interviews included about 25 people who worked at the ICTY, nearly 20 who worked at the ICC, ten who worked at the STL and ICTR, 20 employed in national units, and 15 who worked in European institutions. The additional respondents were journalists, academics, or activists working for NGOs such as the Coalition for the ICC (CICC) and Transparency International (TI). Since their careers also revolved around international crimes and the networks and institutions dedicated to 'fighting impunity', their career paths provided important alternative perspectives on the 'sense for the game'[20] that defines professional life in these fields.

Interviews were also conducted outside international institutions: for instance, at meetings attended by anti-corruption professionals or within national units in charge of international crimes and anti-corruption (but also in coffee shops, railway stations, and private homes). Practitioners often declined formal requests for an interview (referring to the risk of exposure in the national context) but were willing to participate in informal and unrecorded conversations. Interviews were semi-structured and focused on the career trajectories of respondents, as well as on their

[18] P. Bourdieu, 'La force du droit', (1986) 64(1) *Actes de la recherche en sciences sociales* 3.
[19] Y. Dezalay and B.G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002), 9–11.
[20] Bourdieu, *supra* note 1, at 45–6.

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perspectives concerning international criminal law and on which crimes it ought to focus. The term semi-structured interview refers here to the planning and management of each interview: each was organized in a way that ensured respondents could be taken through fixed questions (focusing on his or her background, education, and professional career) but remained open to the respondents' own narratives and the specifics of their experience. This flexibility enabled the project to gather biographies as well as to map different normative perspectives on international crimes and the role of criminal law in the international space. Interviewees came from all levels of seniority (including young professionals without much professional or symbolic power who could nevertheless provide the most unvarnished accounts of professional life in the two fields). All respondents were offered anonymity to allow for frank and open interviews.

3. A SHORT HISTORY OF THE CONTEST TO DEFINE INTERNATIONAL CRIMES

3.1 From interwar to post-Second World War

What defined an international crime was always a central question to the discipline of international criminal law. The contest to define an international crime, however, took different forms and had different stakeholders throughout history. The power balance within the discipline of international criminal law and the relationship of this social space with other fields, particularly international politics, structured that contest. International criminal law emerged as an intellectual endeavour in the interwar period.[21] In that period, the mobilization around this form of law was dominated by academics[22] who sought to maximize the impact of this discipline on the political scene. The result was a broad conception of international crimes that covered, for instance: terrorism, counterfeiting, aggression, and piracy.

While this period saw the entrenchment of a scholarly discipline, international criminal law was less successful in practical terms. The proposed tribunal to adjudicate responsibility for crimes committed during the First World War never materialized.[23] The convention on an international criminal court for terrorism, negotiated in parallel to the convention on the suppression of terrorism,[24] was signed in 1937 by 12 states, but was ratified by none. The statute of the court was penned by

[21] M. Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (2014), at 122–49.

[22] M. Travers, *Le Droit Pénal International et sa Mise en Oeuvre, en Temps de Paix et en Temps de Guerre* (1920); H.D. de Vabres, *Introduction à l'Étude du Droit pénal International;Essai d'Historie et de Critique sur la Compétence Criminelle dans les Rapports avec l'Étranger* (1922); V. Pella, *La Criminalité Collective des États et le Droit Pénal de l'Avenir* (1926); and E.S. Rappaport, *The Problem of the Inter-State Criminal Law, Transactions from the Grotius Society* (1932), 41–64.

[23] Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference', (1920) 14(1/2) *American Journal of International Law* 95, at 95–8.

[24] League of Nations, Convention on the Prevention and Punishment of Terrorism, CE 1937, available at www.wdl.org/en/item/11579/#q=Convention+on+the+Prevention+and+Punishment+of+Terrorism&qla=en (accessed 6 April 2016).

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E.S. Rappaport, a Polish lawyer among the pioneers of the discipline of international criminal law. As General Rapporteur of the conference tasked with establishing a legal framework for the projected court, Rappaport worked alongside other prominent academics such as Professor Jules Basdevant of the Sorbonne in Paris, serving as vice-president of the conference bureau, and Professor J.A. van Hamel of the University of Amsterdam. Despite the efforts of academics and prominent jurisconsults to meet the political concerns of the day, the market for international criminal law proved modest.

After the Second World War, a temporary drive for the prosecution of specific international crimes aligned closely with the political priorities of the Allied powers. In terms of professional mobilization, the legal processes of Nuremberg and Tokyo were controlled mainly by military and legal professionals recruited for this task; Robert Jackson and Telford Taylor being the most prominent examples from the American side. The subject-matter jurisdiction of the trials was closely intertwined with the Allied powers' interest in establishing a narrative from which the Axis powers would clearly emerge as culprits. Article 6 of the Nuremberg Charter specified the crimes which would be prosecuted at Nuremberg: crimes against peace, war crimes and crimes against humanity.[25] The focus on these crimes was carried into Article 2(1) of Control Council Law No. 10 that governed the Nuremberg Military Tribunals (NMT),[26] Article 5 of the Charter of the International Military Tribunal for the Far East (IMTFE),[27] and later written into the so-called Nuremberg Principles formulated by the International Law Commission (ICL) pursuant to UN General Assembly Resolution 177(II).[28] In addition to these crimes, the Genocide Convention was crafted in 1948[29] and this completed the list of crimes that would later be referred to as core crimes.

3.2. The Cold War and its legal diplomacy

Much study has been devoted to the international criminal law which developed in the wake of the Second World War and there has been much scrutiny of the 1948 Genocide Convention[30] and the categories of war crimes, crimes against humanity, and aggression that were the forerunners of what would later become known as core crimes. Yet, developments in this field during the Cold War have received less scholarly attention. In the immediate aftermath of the Second World War, the locus of mobilization around this form of law shifted away from military involvement organized by the Allied Forces. The process of de-militarization

[25] 1945 Charter of the International Military Tribunal, The Charter and Judgment of the Nürnberg Tribunal - History and Analysis: Memorandum Submitted by the Secretary-General (Appendix II), UN Doc. A/CN.4/5 (1949).

[26] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945.

[27] 1946 International Military Tribunal for the Far East Charter, IMTFE (1946).

[28] Documents of the Second Session, YILC 1950, Vol. II, paras. 95–127.

[29] 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

[30] See Art. 6 of the Charter of the International Military Tribunal, *supra* note 25; Art. 2(1) of Control Council Law No. 10, *supra* note 26; Art. 5 of the International Military Tribunal for the Far East Charter, *supra* note 27; and the Convention on the Prevention and Punishment of the Crime of Genocide, UN Doc. A/RES/3/260 (1948).

brought a return to the intersecting influences of scholarship and diplomacy that had been active during the interwar genesis of international criminal law as a broad scholarly discipline that dealt with a range of very different crimes.[31] It was such networks that would be active in the effort to rethink international law after the Second World War. The ILC, set up in 1947 under Article 13(1)(a) of the UN Charter, was staffed by eminent international lawyers, primarily practitioners, and academics, and it served as an incubator for appointments to the bench of the ICJ.[32]

In 1948, the ILC was tasked with considering the potential desirability and organization of international criminal jurisdiction.[33] While the crimes prosecuted at Nuremberg took centre stage in ILC debates about an international criminal court, other 'undefined' crimes were outlined by the special rapporteur who ardently promoted this institution. A professor of civil and international law and a former Panamanian president, Ricardo Alfaro, had also been intimately involved with the legal intricacies around the Panama Canal, serving, for instance, as commissioner on a high-level joint commission between the US and Panama. Alfaro remained a supporter of international adjudication and international criminal jurisdiction which featured a range of different crimes including piracy, slave trading, trade in narcotics, terrorism, and money laundering.[34] To Alfaro, an international criminal court was a way to strengthen the impact of international law and to legally engineer state behaviour. Other members of the ILC were more sceptical.

Disagreement within the ILC was affected by the wider transformation of the field of international politics as it approached the verge of Cold War tensions. This was evident in international diplomacy. The USSR used its veto 79 times in the first decade of UN activity and did not accept the jurisdiction of the ICJ with regard to six human rights instruments, including Article IX of the Genocide Convention. Similar currents influenced the atmosphere in which the proposed international criminal court was discussed. In the 1950 meeting of the ILC, USSR commission member Koretsky walked out after failing to have a proposal passed to exclude the Chinese participant, whom he deemed to be a member of the 'reactionary clique' holding power in the Chinese People's Republic.[35] In this atmosphere, the support for international criminal jurisdiction voiced by Alfaro was tempered by a more realist perspective.

The other rapporteur, Swedish international lawyer and activist Emil Sandström, was deeply engaged in the cautious diplomacy of the International Committee of the Red Cross (ICRC) and became the spokesman for the influential Swedish Red Cross after the murder of Count Bernadotte in Jerusalem in 1948. Through

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31 Lewis, *supra* note 21.

32 This was the case for Ricardo Alfaro (Panama) serving in the ICJ from 1959–64 and Sir Hersch Lauterpacht (UK) who served in the ICJ from 1955–60. Other examples include Roberto Cordoba (Mexico), the ICJ judge from 1955–64; Feodor I. Kozhevnikov (USSR), the ICJ judge from 1953–61 – with Sergei Krylov moving the other way from the ICJ to the ILC; Benegal Narsing Rau (India), the ICJ judge from 1952–53; Sir Gerald Fitzmaurice (UK), the ICJ judge from 1960–73; and Jean Spiropoulus (Greece), the ICJ judge from 1958–67.

33 UN Doc. A/RES/260 B (III) A-C, (1948).

34 R.J. Alfaro, Report on Question of International Criminal Jurisdiction, UN Doc. A/CN.4/15 (1950).

35 Summary Records of the Second Session, YILC 1950, Vol. I, at 1–2.

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this work, Sandström was accustomed to treading carefully with regard to state sovereignty, and the ICRC held unofficial meetings with the ILC to discuss concerns related to the 1949 Geneva Conventions and the draft Code of Offences against the Peace and Security of Mankind negotiated parallel to the international criminal jurisdiction.[36] While Alfaro predicted that the court would function as a deterrent and tried tactically to separate questions of desirability from questions about the court's plausibility,[37] Sandström argued that the main question was whether such a court would be able to function effectively. Recalling burgeoning tensions between the world systems, specifically the unfolding crisis in Suez and the war in Korea,[38] he did not see potential for a well-functioning court. Despite discord in the ILC, the UN General Assembly established a special Committee on International Criminal Jurisdiction to produce the potential framework of an international criminal court.[39] Closely linked to the politically sensitive process of drafting the Code of Offences that built on the Nuremberg Principles, the work of this committee was halted in 1954.[40]

When an international criminal court was pushed off the political agenda during the Cold War, the idea of an international criminal jurisdiction was reproduced mainly by academics. As an academic discipline, the international criminal law of this era sought to appropriate new crimes, expanding its subject-matter and potential market in the quest to affirm its relevance. German professor Albin Eser and US scholar M. Cherif Bassiouni exemplified the attempt to adapt international criminal law to political realities by publishing treatises on what was envisaged as a very broad field of law.[41] In their pre-1990s scholarship, they championed a broad subject-matter as the basis for international criminal law, encompassing a range of different crimes such as those outlined in the Nuremberg Principles, as well as apartheid, aircraft hijacking, piracy, drug offences, certain environmental crimes, and theft of nuclear material. In the second edition of Bassiouni's book, corruption was counted as part of international criminal law alongside a long list of other crimes.[42] The work of these academics not only focused on a broad spectrum of crimes, but it also evinced openness to political preferences. This allowed them to recalibrate their engagement to include crimes seen as important in a wider international space. Both Bassiouni and Eser used their scholarly expertise to play key roles in the field of core crimes as new international criminal courts emerged.

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36 Ibid., at 157.
37 Documents of the Second Session, YILC 1950, Vol. II, at 379.
38 E. Sandström, 'FN's Lagkommission Och Folkerättskodifikationen', (1963) 33 *Nordic Journal of International Law* 1, note 33, at 21.
39 International Criminal Jurisdiction, UN Doc. A/RES/489 (V), 12 December 1950.
40 International Criminal Jurisdiction, UN Doc. A/RES/898 (IX) 14 December 1954. For an overview, see W. Schabas, 'International Criminal Courts', in C. Romano, K.J. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014), 205.
41 M.C. Bassiouni and V.P. Nanda, *A Treatise on International Criminal Law* (1973); and T.A. Eser, *Principles and Procedures for a New Transnational Criminal Law* (1992).
42 M. Bassiouni and E. Vetere, 'Towards Understanding Organized Crime and its Transnational Manifestations', in M.C. Bassiouni (ed.) *International Criminal Law* (1998), 883.

4. The growing dominance of core crimes

4.1. New international criminal courts and a new concept of international crime

This section will show how core crimes moved to the centre of international criminal law and how a new professional field was formed around the international criminal courts which further naturalized the importance of those crimes. This development was closely related to wider transformations of international law that followed the end of the Cold War.[43] The field of core crimes was created in two main waves: one, related to the establishment of the UN *ad hoc* tribunals; and the other, related to the setting up of the ICC. In these separate but interrelated drives of legal innovation, the emergent institutions and the field around them became populated by a new category of professionals holding a mix of academic, legal, and diplomatic capital.[44] These professionals became highly influential in the process of creating the *ad hoc* tribunals and the ICC, as well as in the process of determining their subject-matter jurisdiction. The UN had no in-house expertise in international criminal law and this enabled the academics and early entrants in the *ad hoc* courts to take leading positions.[45]

The late Cold War era and the period immediately afterwards was used by scholars and politicians to test the different proposals for international criminal courts that targeted various non-core crimes. This was evident in Trinidad and Tobago's 1989 proposal to create an institution to prosecute drug traffickers that revived the debate about an international criminal court.[46] The drug trafficking court was put on the UN agenda by the then prime-minister A.N.R. Robinson, an Oxford graduate closely connected to co-drafters of the proposal. These included long-time supporter of an international criminal court Robert Woetzel, activist scholar M. Cherif Bassiouni, as well as the former Nuremberg prosecutor Ben Ferencz. The proposal provided stimulus for the UN General Assembly's request to the ILC to recommence the work they had abandoned in 1954.[47]

The activities of this elite network resonated with, and were amplified by, transformations in the space of global power politics. In 1987, Mikhail Gorbachev proposed the establishment of an international criminal court for terrorism.[48] This court was presented as part of the wider USSR programme *perestroika*, orchestrated by professionals recruited into the Soviet administration by Gorbachev.[49] From their perspective, *perestroika* extended into the international sphere in which new institutions were meant to contribute to creating a more secure world, a policy also related to the consequences of the USSR falling behind in the arms race. In addition, the

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43 K.J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014), xxvi, 142–60.

44 J. Hagan, *Justice in the Balkans*, *supra* note 10; and M.J. Christensen, 'From Symbolic Surge to Closing Courts: The Transformation of International Criminal Justice and its Professional Practices', (2015) 34 *International Journal of Law, Crime and Justice* 609.

45 Interview with UN civil servant, 12 November 2014.

46 M. Glasius, *The International Criminal Court: A Global Civil Society Achievement* (2006), at 9–11.

47 UN Doc. A/RES/44/39 (1989).

48 M. Gorbachev, *Realities and Guarantees for a Secure World* (1987), 10. The proposal was repeated in Gorbachev's speech at the UN General Assembly Meeting on 7 December 1988.

49 Interview with academic C, 24 November 2014.

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1989 events at Tiananmen Square, in which the Chinese army disbanded protesters and faced widespread international criticism, led China to become more open to international law experiments and international agreements. The protests themselves had been timed to coincide with a visit from Gorbachev and were partly a response to the death of prominent reformist and former leader of the Communist Party, Hu Yaobang.

In this context (and amid its Most Favoured Nation negotiations with the US through the WTO[50]) China voted in favour of the UN Security Council resolution establishing the ICTY, while maintaining that this would be without prejudice to its future stance on international criminal courts.[51] China later abstained from voting on the ICTR and would not sign the Rome Statute. Yet, in the early 1990s, the converging interests of the USSR, China, and Western states in the Security Council provided the political impetus for the resurgence of international criminal justice and helped pave the way for the project of an international criminal court that was initially envisaged as a body for dealing with terrorism or drug trafficking. However, international criticism of the failure to stop human rights abuses in the Balkans and Rwanda was crucial to the experience of the *ad hoc* tribunals formed in response, and the subject-matter jurisdiction of the ICC subsequently moved in the direction of the core crimes defined in the aftermath of the Second World War.

4.2. The battle for international crimes in ICC negotiations

The work of the ILC has been characterized by an attempt to balance competing ideas of what constitutes an international crime in politically viable draft statutes for a permanent international criminal court. Unlike the elite network promoting international criminal law on the international scene, the members of the ILC were legal academics and practitioners, not invested directly in this form of law but closely tied to the interests of national states (despite formally acting as independent professionals). Unfolding in close proximity to political stakeholders, the ILC debate essentially concerned the core of the future discipline of international criminal law. The 1993 ILC report made a particular effort to embed drug trafficking in the framework of the proposed court under, then, Article 26.[52] But what became paragraph 20 in the final 1994 proposal was more directly inspired by the Nuremberg Principles and the newly-opened ICTY. It established a more clear-cut division between crimes under general international law, genocide, aggression, war crimes, and crimes against humanity (Article 20, sub-paragraphs a–d respectively) and different treaty crimes (Article 20, sub-paragraph e).[53] Although some members of the ILC protested against the logic of including crimes against humanity but not apartheid or drug trafficking, which were both the subject of international conventions,[54] core crimes took centre

[50] Hazan, *supra* note 8, at 37.
[51] UNSC Meeting Records, S/PV.3217, 25 May 1993, at 6.
[52] Report of the International Law Commission on the work of its forty-fifth session (3 May – 23 July 1993), 1993 YILC, Vol. II (Part Two), at 110–11.
[53] ILC Draft Statute for an International Criminal Court (with Commentaries), 1994 YILC, Vol. II (Part Two), at 38–41.
[54] Ibid., para. 15, at 40.

stage. Other treaty crimes were recommended for inclusion in the jurisdiction of the court only if they constituted an exceptionally serious crime of international concern.[55]

Controversy over the subject-matter jurisdiction of the court remained a diplomatic issue as negotiations were continued by the preparatory committee set up by the UN General Assembly.[56] This committee eventually recommended a court with jurisdiction over core crimes while jurisdiction over the treaty crimes of terrorism, crimes against UN personnel, and drug trafficking would depend on further accession by states parties to conventions regarding these crimes and the acceptance of the jurisdiction of the court.[57] This did not mean that the idea of including other crimes was off the table. At Rome, a number of smaller countries, mainly from the Caribbean community (CARICOM), backed the initial proposal of Trinidad and Tobago for the inclusion of drug trafficking.[58] But the majority of states expressed concern that jurisdiction over treaty crimes was premature and they supported Norway's proposal for a revision clause. This proposal allowed for an amendment at a later stage when review of the Statute was planned[59] and was included in Resolution E passed at the Rome Conference.[60]

As the proposal for an international criminal court moved into multilateral political negotiations organized according to UN rules and procedures,[61] new legal, political, and professional forces gathered around what would eventually become the Rome Statute. This second wave of professional investments supplemented the mobilization around the *ad hoc* tribunals and opened a field in which a mix of new and established profiles battled for supremacy. Three types of career trajectories led to the emerging field of core crimes. One was through experience with complex forms of crime – organized crime, corruption, and international crimes – from national jurisdictions. The second was tied more intimately to professionals with academic or diplomatic credentials who used the national missions or UN Secretariat at the Rome Conference as a stepping stone for new professional opportunities.[62] The third was tied to NGO advocacy. From a sociological perspective, the focus on core crimes was closely related to the emergence of this social and professional field of stakeholders who promoted a court attuned to their trajectory and their vision of international priorities.

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55 Ibid., para. 20, at 41.

56 UN Doc. A/RES/50/46 (1995).

57 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1 (1998), at 27.

58 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998, UN Doc. A/CONF.183/13, Vol. II (1998), at 66 (Trinidad and Tobago), at 77 (Costa Rica), at 107 (Thailand), at 116 (Haiti), at 123 (Sri Lanka). See also Summary Records of the Meetings of the Committee of the Whole, at 171–9. Note also that there was a certain discord between CARICOM members, Jamaica remaining unconvinced but open to later inclusion of treaty crimes, ibid., at 284.

59 Ibid., Summary Records of the Meetings of the Committee of the Whole, at 172.

60 UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June – 17 July 1998, UN Doc. A/CONF.183/13 Vol. I (1998), at 71–2.

61 J. Washburn, 'The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century', (1999) 11(2) *Pace International Law Review* 361.

62 Interview with academic B, 4 June 2015.

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4.3. A new field of interests around the ICC

The professional mobilization around Rome and the ICC meant an expansion of human rights advocacy and scholarship which co-created the normative and legal terminology around the crimes that these fora addressed. Amid the broader growth of parties and networks around ICL, agents involved in the creation of the *ad hoc* tribunals remained key players. Bassiouni, for instance, served as chairman of the drafting committee in Rome while Ferencz presented on the legacy of Nuremberg before the committee. As new and old stakeholders converged, the growing dominance of core crimes became visible in debates around the ICC. It was also evident in the collective biography as a range of professionals oriented their activities towards international criminal law and ending impunity for these crimes. The conjunction of political support and professional mobilization entrenched the focus on core crimes while never completely edging treaty crimes out of the picture.

Academics were crucial in the drafting of the Rome Statute; they were also active in establishing the social and professional rules within the core-crime field through publications and their teaching of young entrants. One practical, overt, contribution was the development of an alternative to the 1994 ILC Draft Statute for an International Criminal Court, since the ILC text was found lacking in some aspects of substantive law.[63] The Siracusa/Chicago/Freiburg Draft was produced jointly by Cherif Bassiouni, who was based at DePaul University in Chicago and was also head of *L'Istituto Superiore Internazionale di Scienze Criminali* (ISISC), and Albin Eser, who was professor of criminal law at the Max Planck Institute in Freiburg. Since Bassiouni served as the president of the International Association of Penal Law and was also a chairman at Rome, he was perfectly placed to promote the competing draft and secure its impact.[64] More crucially, the engagement of these scholars triggered a broader reorientation among academics, who turned their attention to an emerging field of law that promised plenty of opportunities for original studies of the many legal, political, and institutional problems related to the functioning of the courts. Implicitly, international criminal law scholarship came to signify core crimes while the term 'transnational criminal law'[65] was developed to cover residual treaty crimes. Although academia has also served as a venue for contesting the subject matter of the discipline,[66] most publications focus on international criminal law as a narrowly conceived discipline organized around genocide, crimes against humanity, and war crimes.

In a parallel development, human rights advocacy reoriented towards core crimes and NGOs began to employ expert staff, often with work experience from the *ad hoc* tribunals, and later from the ICC. These NGO professionals were tasked with

63 Interview with academic A, 3 May 2016.
64 Ibid.
65 N. Boister, *An Introduction to Transnational Criminal Law* (2012).
66 M.A. Drumbl, 'Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes', (1998) 22(1) *Fordham International Law Journal* 122; F. Mégret, 'The Problem of an International Criminal Law of the Environment', (2011) 36(2) *Columbia Journal of Environmental Law* 195; and S. Freeland, *Addressing the Intentional Destruction of the Environment during Warfare under the Rome Statute of the International Criminal Court* (2015).

monitoring the practices of the international criminal courts.[67] As Marlies Glasius has highlighted,[68] the language of fighting impunity was sponsored by NGOs such as Human Rights Watch (HRW) and Amnesty International (AI) in connection with human rights abuses, mainly in Latin America and in Africa.[69] On the basis of this expertise, and in an attempt to push the human rights agenda forward, the anti-impunity norm was championed by the Coalition for the International Criminal Court (CICC) which was an umbrella organization for more than 2,500 NGOs (about 800 NGOs participated during the Rome Conference). The CICC was organized around a core of influential human rights organizations such as AI, HRW, the *Féderation internationale des droits de l'Homme* (FIDH), Parliamentarians for Global Justice (PGA), and the World Federalist Movement (WFM). This latter body exerted significant influence because of its function at the secretariat for the CICC, and also through William Pace who became convener of the Coalition in 1995. Within this coalition, human rights discourses intersected with principles of global governance represented by bodies such as the WFM and an agenda devoted to ending impunity globally was formulated. Human rights advocates were drawn to the ICC's prospective adjudication of grave human rights abuses and were encouraged by the prospect of direct NGO influence on that process. For federalists, the global court was seen as a significant step towards a world community built on the rule of law. The prescribed involvement of a well-established network of human rights and peace-oriented NGOs (the CICC compiled the list of organizations to be accredited at Rome)[70] was an important factor in orienting the debate around the ICC towards core crimes. Only a handful of NGOs at Rome, such as EarthAction and International Court for the Environment, had other crimes on their agenda.

The reconceptualization of human rights converged with academic investments and political support for a permanent court which grew out of post-Cold War transformations of international governance. At an institutional and professional level, both inside and outside the international criminal courts, Rome initiated a structural specialization of legal practice that was built partly on the innovations of the *ad hoc* tribunals. The professional market formed around the new court was predicated on the emergent *doxa* of the field, namely, that it dealt with core crimes. This orthodoxy was inscribed in the social division of labour among different professional areas including scholarship, the practice of the courts, and NGOs. It also had the effect of socializing new entrants: in informal conversations younger

[67] Interview with professional A in international NGO, 10 December 2013; interview with professional in international NGO B, 12 December 2013; and interview with professional in international NGO C, 4 September 2014.

[68] Glasius, *supra* note 46.

[69] Human Rights Watch and the Arms Project, *Colombia's Killer Networks: The Military-Paramilitary Partnership and the United States* (1996), at 69; Amnesty International, 'Burundi: Struggle for Survival. Immediate Action Vital to Stop Killings' (1995), available at www.refworld.org/docid/3ae6a9e1c.html (accessed 13 April 2016).

[70] Preparatory Committee on the Establishment of an International Criminal Court, List of Non-Governmental Organisations having expressed an interest in attending the Rome Conference, UN Doc. A/AC.249/1998/CRP.22.

professionals working in this field went so far as stating that international criminal law did not exist prior to 1993.[71]

5. The field of anti-corruption and its legal practitioners

5.1. The social structure of the field of anti-corruption

The strategies of criminal law professionals organized around corruption as an international crime were shaped by the wider anti-corruption field that is dominated by professional practices not necessarily aimed at adjudication. Historically, early anti-corruption initiatives included the US legislation in the aftermath of the Watergate scandal[72] but it was not until the 1990s that a proliferation of international conventions, NGOs, and government anti-corruption units occurred. Structurally, the international field of anti-corruption emerged at the juncture of national politics and international financial institutions. In this context, Transparency International (TI) became one of the major players in the effort to place anti-corruption on the international agenda. Established in 1993 by Peter Eigen, a former regional director for the World Bank, together with a group of legal activists, academics, and journalists, TI was closely related to international organizations in the field of finance and economics, and to a wider vogue for transparent governance in processes of state building and rebuilding.[73] The main TI tool, the Corruption Perception Index, aims to benchmark corruption and stimulate compliance with international anti-corruption norms. As the main objective was to support good practice through co-operation with states and companies, most TI chapters refrained from supporting criminal prosecutions.[74]

The anti-corruption agenda achieved greater prominence during the 1990s. Compliance experts in governments and international NGOs moved into permanent positions that cumulatively created a field of practice around anti-corruption. Professionals in this new field often had educational and professional backgrounds comparable to those which shaped the elite practitioners in leadership positions within the institutions of core crimes. The anti-corruption group was characterized by its practical criminal law expertise which stood out from typical trajectories tied to compliance and economic diplomacy. In their national jurisdictions, the members of this new group had built professional capital by working on complex and organized crime, and by prosecuting or adjudicating large corruption cases that often had an international dimension.[75] It was this expertise that enabled them to move into senior positions in their national settings and to become involved in international networks of anti-corruption. However, the international engagement of legal professionals, many of whom were prosecutors involved in anti-corruption, was distinct

[71] Interview with academic D, 7 June 2013; and interview with academic E, 10 November 2014.
[72] Rose, *supra* note 5, at 1.
[73] E. Gutterman, 'The Legitimacy of Transnational NGOs: Lessons from the Experience of Transparency International in Germany and France', (2014) 40(2) *Review of International Studies* 391.
[74] Interview with professional in international NGO D, 9 December 2013.
[75] Interview with professional in international criminal court A, 28 October 2013; and interview with professional in international criminal court B, 10 June 2014.

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from the dynamic at play around core crimes. The structure of the international anti-corruption field was characterized by very different legal configurations that also impacted the social organization and power dynamics of this field.

These structurations have been evident in the legal frameworks and instruments implemented since the 1990s. Unlike the innovations in the field of core crimes, these instruments were built on national supremacy rather than international jurisdiction and institutions, although international offices such as the UN Office on Drugs and Crime (UNODC) also emerged as an organizational contestant in this field. Major legal innovations in international anti-corruption were tied to soft law norms,[76] such as the non-binding initiatives organized under the Organization for Economic Co-operation and Development (OECD), the Extractive Industries Transparency Initiative (EITI), and the Financial Action Task Force (FATF). A different level of obligation was created via the UN Convention against Corruption (UNCAC) which is a binding international treaty.[77] However, the UNCAC Articles on international co-operation are cautiously worded[78] and the Convention leaves the enforcement of its provisions on criminalization up to states (although it does stipulate that they should create a specialized anti-corruption law enforcement unit, 'in accordance with the fundamental principles of its legal system').[79] Similarly, two Council of Europe conventions, on civil law and criminal law, aimed to harmonize criminalization of certain activities but they provide for weak regional enforcement mechanisms.[80] This list is far from exhaustive but it highlights the central feature of the international anti-corruption field: the legal frameworks in this field mirror its power dynamics. While the internationalization of the anti-corruption agenda led to specialized agencies being formed around the globe,[81] prosecution of corruption remains a national prerogative.

The international strategies of criminal law professionals involved in re-casting corruption as an international crime have been developed very much in opposition to what they see as a *laissez-faire* attitude implicit in such national legal frameworks.[82] These agents contend that the low success rate of nationally-based initiatives – for instance, the fact that governments only manage to recover a fraction of stolen assets[83] – is proof of a malfunction in the system in which a focus on compliance has served to legitimize prosecutorial inaction. For them, corruption is a crime with massive international ramifications that is deeply embedded in the workings of capitalism. Due to the enormous impact of corruption, individual states are seen as being helpless and often unwilling to pursue prosecutions.

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76 C. Brummer, *Soft Law and the Global Financial System, Rule Making in the 21st Century* (2011); and Rose, *supra* note 5, at 13–58.

77 UN Doc. A/RES/58/4 (2003).

78 Art. 43(1) UNCAC: 'Where appropriate and consistent with their domestic legal system, State Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.'

79 Art. 36 UNCAC.

80 1999 Civil Law Convention on Corruption, CETS 174; and 1999 Criminal Law Convention on Corruption, CETS 173.

81 See Sousa, Larmour and Hindess, *supra* note 4, at 209–14.

82 Interview with anti-corruption professional A, 13 June 2014.

83 L. Gray et al., *Few and Far: The Hard Facts on Stolen Asset Recovery* (2014), 15–16.

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The professional campaign for a more rigorous prosecutorial policy on corruption has taken two forms. Both have appropriated narratives and techniques from the field of core crimes and have built upon the close social contact among practitioners of criminal law. One form has been the call for the inclusion of corruption in the mandate of the ICC or the creation of an alternative, international anti-corruption court. The other, strategic, form has been to adopt a more discreet mode in an attempt to elevate corruption to the international agenda without prematurely disturbing the delicate power balances in a field which is still dominated by nation states and the international anti-corruption mechanisms drawn in their image.

5.2. Linked professionals and new legal mobilizations

In an attempt to appropriate some of the legal authority and perceived political success of core crimes, professionals who endorse corruption as an international crime have adopted the concepts and discourses first tested in the context of international criminal courts. While the campaign to craft a new international crime has faced some pushback from core crime and anti-corruption professionals alike, the social and professional linkages between elite agents in these two fields have been instrumental in developing a new agenda. This section will examine these linkages and their professional consequences.

The professionals driving this new agenda were no longer involved in the adjudication of corruption and were thus free from official roles in national or international institutions, which was crucial to their ability to float new ideas without suffering professional consequences. They did, however, deploy symbolic capital gained from their practical experience with anti-corruption or core crimes. Often, these were also professionals who had struggled to find appropriate venues that allowed them to capitalize on this knowledge. This combination of symbolic capital and closing sites of investment is evident in the Spanish judge Baltasar Garzón, who pioneered universal jurisdiction in the *Pinochet* case of 1998 and also co-wrote the 1996 *Appel de Genève*, calling for new tools in the fight against corruption.[84] In 2012, Garzón was barred from practicing law in Spain for 11 years after being convicted by the Supreme Court for having ordered illegal wire taps.[85] Having lost his domestic platform for the promotion of universal jurisdiction, Garzón created his own NGO, Fundación Internacional Baltasar Garzón (FIBGAR), and redeployed his charismatic authority in an attempt to transpose the legal discourse developed around core crimes to suit other forms of crime. Adopting the universalizing language of core crimes, including the idea of corruption as a 'crime against humanity' and of 'ending impunity',[86] this effort exemplifies the endeavour to establish corruption as an international crime and as the world's most endemic legal challenge.

The efforts of FIBGAR have been supplemented by the work of other legal professionals who have reinvested their nationally accumulated expertise in the idea of

[84] B. Bertossa, et al., '*Appel de Genève*' (1996).
[85] 'Spain's judge Baltasar Garzón convicted for wiretapping', *BBC News*, available at www.bbc.com/news/world-16965790 (accessed 16 May 2016).
[86] 'Purposes and Objectives', *FIBGAR*, available at en.fibgar.org/fundacion (accessed 23 January 2017).

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creating a new international court or extending the mandate of the ICC.[87] The most recent plan for such an institution has been endorsed by US Judge Mark L. Wolf's 2014 proposal for an international anti-corruption court (IACC). Judge Wolf, a Yale and Harvard trained lawyer, has significant anti-corruption experience. In particular, he was drafted into the administration in the aftermath of the Watergate Scandal and worked on high-profile cases as a judge in the District of Massachusetts. His proposal was noticeably modeled on the language of the core-crime field as it called for an end to the 'culture of impunity for corruption'.[88] To accomplish this goal, Wolf has used his legal and symbolic capital as a well-respected judge to set up his own NGO, Integrity Initiatives International (III), launched on 2 May 2016.[89] In order to raise funds for this project, President Obama's former crowd-funding assistant has been recruited, evoking a degree of continuity given the Obama administration's previous condemnation of corruption as 'a scourge on civil society'.[90] In addition to soliciting support from key players in the US context, the initiative draws upon the symbolic authority in the field of core crimes through the recruitment of the former ICTY and ICTR prosecutor and anti-apartheid judge, Richard Goldstone.

In terms of the international adjudication of corruption, the link between the core crime and anti-corruption fields is personified by Justice Goldstone, as well as by the former ICC prosecutor, Luis Moreno Ocampo, who moved back into anti-corruption after ending his term at the Court. Besides serving on the advisory board of TI and partaking in the debates around a global anti-corruption court, Ocampo was assigned to a 2012 inquiry into FIFA corruption. However, tainted by a bad reputation in ICL circles, he has struggled to draw dividends from his substantial experience. He currently works as an associate of Getnick & Getnick and as a consultant for Phillip Morris International. Free from institutional pressures and often searching for ways to relaunch a faltering career trajectory, advocating the recognition of a new international crime can potentially pay high dividends. It might also remain a losing strategy relegated to the periphery of both core crimes and anti-corruption.

5.3. Corruption hunters and the discreet promotion of prosecution efforts

In contrast to the explicit strategy of placing corruption on the international agenda by labeling it an international crime or by calling for the creation of new courts, a competing strategy is rooted in the professional careers of prosecutors and anti-corruption practitioners who remain active. The members of this group regard

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87 I. Bantekas, 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies', (2006) 4 *Journal of International Criminal Justice* 466; S. Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations', (2007) 101 *Northwestern University Law Review* 1257; C. Rose, 'Boersma M., Corruption: A Violation of Human Rights and a Crime under International Law?', (2014) 61(3) *Netherlands International Law Review* 455; and E. Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (2015).

88 M.L. Wolf, 'The Case for an International Anti-Corruption Court', *Governance Studies at Brookings* (2014), available at www.brookings.edu/wp-content/uploads/2016/06/AntiCorruptionCourtWolfFinal.pdf (accessed 23 January 2017).

89 Interview with anti-corruption professional B, 10 February 2016.

90 J. Wouters et al., 'International Legal Framework against Corruption: Achievements and Challenges', (2013) 14(1) *Melbourne Journal of International Law* 205.

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the 'transparency game'[91] based on conferencing, advocacy, and diplomacy as a politicized endeavour that has little to do with anti-corruption as a legal practice.[92] In line with this scepticism, they are also generally dismissive of an IACC and adamant about killing the idea quickly before it diverts attention from other, more serious anti-corruption initiatives. To build support for a more hands-on approach to anti-corruption, these professionals (many of whom are nationally based and operate under bureaucratic rules that discourage explicit policy work) have helped develop international network strategies attuned to the state-centred climate but designed to transcend the confines and unwillingness of individual states.

One such group is the Corruption Hunters Network. To gain entry into this network, individuals must have been personally involved in high-profile corruption cases and must be seen as trustworthy and non-corruptible.[93] These tacit criteria make the network an esoteric group in which established members hand-pick new corruption hunters on the basis of their perceived merits and evaluate their trustworthiness before sharing information. In this group, prominent work in the field is afforded a high social value which offsets the professional and personal costs associated with bringing large corruption cases in national jurisdictions where they are often unwanted and disturb the established power balances. The founder of the network, Eva Joly, has expertise as a frontline prosecutor in France and conducted the case against the French oil giant Elf Aquitaine. She was the first prosecutor to live under 24/7 police protection,[94] thus embodying the ethos of the network. Joly is currently a Member of the European Parliament and has actively supported anti-corruption initiatives such as the creation of the European Public Prosecutor's Office.[95] With her mix of legal and political expertise, Joly has also been at the forefront of international attention. She played a central role in drafting and promoting the Déclaration de Paris,[96] which was signed not only by several Nobel Prize laureates and TI founder Peter Eigen, but also by prominent core crime professionals, including Cherif Bassiouni and Baltazar Garzón. This underlines, again, the close proximity between criminal law professionals across different fields of practice.

The network has global aspirations to create and maintain expertise that can transcend what is perceived as the vegetative state of national anti-corruption industries driven by politics rather than law. However, because of the legal and professional structuration of the field of anti-corruption, the network vacillates between full engagement with politics, as with Joly, and more cautious collective strategies devised to secure the safety and position of prosecutors still employed in national jurisdictions[97] which often remain reluctant to prosecute large corruption cases.[98]

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91 J. Peterson, 'Playing the Transparency Game: Consultation and Policy-Making in the European Commission', (1995) 73(3) *Public Administration* 473.
92 Interview with anti-corruption professional A, 29 November 2013.
93 Interview with anti-corruption professional D, 13 June 2014.
94 E. Joly, *Justice Under Siege: One Woman's Battle against a European Oil Company* (2006), 178.
95 K. Ligeti and M. Simonato, 'The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?', (2013) 4 *New Journal of European Criminal Law* 7.
96 E. Joly et al., 'Déclaration de Paris' presented at La Sorbonne, 19 June 2003.
97 Interview with anti-corruption professional G, 3 June 2015.
98 Interview with anti-corruption professional E, 12 June 2014.

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In this climate, the network is used to shine an international light on domestic power structures in which individual prosecutors are often under intense pressure, especially but not exclusively those working in developing countries.[99] This strategy is used to support national prosecutions of corruption (viewed by the network as an unacknowledged international crime that has deep effects not only on national economies but also on global governance).[100]

Via these two different strategies, anti-corruption criminal law professionals are working to elevate corruption's standing on the international agenda using the concepts first developed in core crimes. Formatted by their very different positions in the field's social space, one strategy explicitly calls for international criminal enforcement and the other works more discreetly for more co-operation and resources. The first strategy is tied to groups who have moved beyond state hierarchies, or have little to lose from their overt promotion of a new crime. The other is driven by professionals who are subject to the formal and informal pressures of national bureaucracies. Collectively, however, through their conceptual and practical appropriation of ideals consolidated around core crimes since the 1990s, these legal professionals have been promoting new ideals of anti-corruption based on criminal law prosecutions rather than compliance and transparency. Although they have been trying to construct a new international crime, the aggregation of legal and political expertise around the core notion of anti-corruption as criminal law has, so far, been unsuccessful in challenging the orthodoxy of international crimes or in substantially reforming the workings of the anti-corruption field.

6. Concluding remarks

In contrast to other studies of international criminal law and anti-corruption, the present analysis demonstrates that the evolution of the core crime and anti-corruption fields was not simply driven by parallel developments; rather, the fields are closely linked, owing to professionals active within and across both fields. As the proximity of core crime and anti-corruption agents demonstrates, what is usually referred to as 'the international' is in fact a fairly small social space, at least when it comes to internationalized criminal law. Besides being structured by distinct social fields, international spaces of law are crisscrossed by transversal or linked ecologies of professions.[101] As these ecologies transcend different fields of practice – often treated as distinct in academic literature – they can only be made intelligible by analytical tools capable of capturing how the structure of such fields shape the crafting of legal innovations.

Representing perhaps the most prominent recent challenge to state-driven law, the core crimes agenda was a successful platform for international

[99] Interview with anti-corruption professional E, 12 June 2014; and interview with anti-corruption professional F, 13 May 2015.

[100] Interview with anti-corruption professional A, 29 November 2013; and interview with anti-corruption professional B, 10 February 2016.

[101] A. Abbott, 'Linked Ecologies: States and Universities as Environments for Professions', (2005) 23 *Sociological Theory* 245.

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institution-building in the 1990s and early 2000s; but the surge of the industry formed around these crimes seems to have ceased with the completion strategies of the *ad hoc* tribunals – the ICTY and ICTR.[102] As the ICC assumed subject-matter jurisdiction over core crimes, a narrow understanding of international criminal law became dominant. This process also inspired new forms of contestation. The contest between core-crime and anti-corruption professionals demonstrates the fundamental contingency of internationalized criminal law. The promotion of corruption as an international crime builds on social networks established across the fields of core crimes and anti-corruption and the process is modelled directly on innovations in the field of core crimes.

Whether or not new crimes will become recognized as truly international depends, of course, on securing the political will to codify them as such. But prior to such politics (and functioning beneath its processes) much more tacit professional drives are at work championing specific forms of criminality. These forms of contestation are produced in networks ready to sell their perspective on criminal law on political markets if and when they become open for business. The promotion of new forms of international crime is closely linked to the contest to define the political and professional economies that determine the costs of operating on such markets. By supplying a new form of service and underlining its potentialities for international security and welfare, criminal law professionals are trying to stimulate a new form of governance, in which the tools and perspectives they have helped develop are in high demand.

[102] Christensen, *supra* note 44, at 609.

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