Crimes of War and the Force of Law*

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Abstract

The origin and enforcement of criminal law are central to the sociological study of crime, yet we know relatively little about how the coercive apparatus of criminalization is actualized through prosecutorial and court practices. We use Bourdieu's extension of Weber's analysis of law to develop a perspective on fields of practice, the juridical field and the force of law at The Hague Tribunal for the former Yugoslavia. Our research is based on four years of prosecutor interviews, courtroom observations and analyses of trials covering four prosecutorial regimes. Successive and competitive practices have created an interlocking and cumulative force that is a prerequisite to promoting international humanitarian law.

I. Introduction

Prime Minister David Ben-Gurion defended Adolf Eichmann's controversial Israeli trial for crimes against the Jewish people by insisting that "Israel does not need the protection of an International Court" (Arendt [1964] 1977:272). Hannah Arendt argued in response that in addition to the Jewish people, all of humanity required an international criminal court for their protection, reasoning that "insofar as the victims were Jews, it was right and proper that a Jewish court should sit in judgment; but insofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it" (1977:269). Since at that time there was neither an international criminal tribunal nor sufficient support to create one, as a political matter the issue was momentarily moot.

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We argue below that Arendt's case for international criminal law remains persuasive, and that when combined with Bourdieu's sociology of the juridical field can inform us about the now renewed force of international criminal law. The renewal of this field of law — as well as its abeyance for the last half of the 20th century — is a reminder that the creation and enforcement of the criminal sanction is central to the sociological understanding of crime (see also, e.g., Deflem 1998; Jenness and Grattet 2001; Silbey 2002).

II. Foundational Moments in International Criminal Law

International criminal law flourished briefly at the Nuremberg and Tokyo Tribunals and then languished before reemerging in the last decade in the International Criminal Tribunals for the former Yugoslavia and Rwanda, Special Courts in Sierra Leone, East Timor and Cambodia, and the still largely nascent International Criminal Court. The most visible of these is the International Criminal Tribunal for the Former Yugoslavia (ICTY), which was established by the United Nations in 1993.

The ICTY began with neither a building nor employees, little funding and no one in custody. After a troubled start, this tribunal grew in less than a decade to more than 1,000 employees, $100 million in annual UN funding, more than 50 detainees, and the first sitting head of state, Slobodan Miloevic, on trial for crimes against humanity and genocide. The ICTY is the leading edge of a reconstituted transnational juridical field (see Meron 1998; Neier 1998; Robertson 1999).

There is significant agreement about the necessary links between law, power and politics that allowed this resurgence of international criminal law. Testifying before Congress in support of the Nuremberg Tribunal, the criminologist Sheldon Glueck emphasized the role of politics and power in any new field of law, saying that "in the early stages of any system of law the executive and the judicial are not sharply differentiated; and international law is not a highly developed system" (1944:2; see also Hagan and Greer 2002). Max Weber and Hannah Arendt concurred.

Weber's writings on legal and economic order emphasized that resort to coercion by military and police power is essential to the distinction between custom and law (1978:313–14), going so far as to characterize war as a "normal" form of international law enforcement (1978:319). For Weber, the hallmark of state law — and the basis on which it retains its effectiveness — is that its formal rationality is further backed by the power of the state to coerce enforcement. In this way, Weber anticipated the problem of international criminal law in the 20th century, namely the absence of a coercive police power to enforce these emerging norms.

Arendt made related points in her *Origins of Totalitarianism* (1973) and *Eichmann in Jerusalem* ([1964] 1977). Her essay on the "Rights of Man"

(1973:290–302) further considered the extent to which legal mechanisms can secure human rights. She exposed the disparity "between the efforts of well-meaning idealists," who promote a concept of inalienable human rights, and "the situation of the rightless themselves," who lack institutions to guarantee their rights (279). Arendt noted that the 18th century Declaration of the Rights of Man asserted *inalienable* rights — and, therefore, provided no protections for them. Protection in time was tied to national sovereignty and to a nation's people rather than to humanity more generally. But after World War I, it became fully apparent that those stateless peoples who most needed human rights protection lacked it.

Arendt identified a resulting human rights debate between "cynics" and "idealists": while cynics (including totalitarian leaders) point to stateless people as evidence that inalienable human rights do not exist, well-intentioned idealists speak for rights without the political power to defend them. The challenge is to find protective space between these polarities. The question is thus posed: if the rhetoric of human rights is often dominated by cynics or idealists, if the conflation of human and civic rights has led to their unenforceability for the stateless, and if legal guarantees are insufficient to ground their enforcement — how can human rights gain a relative autonomy and force in Arendt's framework? (See Arendt 1973:269, 292–93)

In *Eichmann in Jerusalem* ([1963] 1977), Arendt considered the role of an international criminal tribunal and finds the possibility of a more forceful human rights agenda. While Arendt agreed that it was "right and proper" for Israel to try Eichmann, she also endorsed her mentor Karl Jaspers' proposal of an international legal forum (Arendt 1977:269–277). It was Arendt's (275–76) fear of genocide's recurrence that grounded her position:

> If genocide is an actual possibility of the future, then no people on earth — least of all, of course, the Jewish people, in Israel or elsewhere — can feel reasonably sure of its continued existence without the help and the protection of international law. Success or failure in dealing with the hitherto unprecedented can lie only in the extent to which this dealing may serve as a valid precedent on the road to international penal law. (273)

Arendt reveals in this passage her appreciation of social and legal precedents and practices — more specifically, of both the creative and the repetitive features of law — which constitute crucial links to the concepts of habitus, doxa and fields of practice in Bourdieu's work that we introduce below.

Meanwhile, Austin Turk anticipated the shifting power relationships that with the end of the Cold War would revive a more universal jurisdiction briefly anticipated at Nuremberg:

> Specifically, the needs to secure capital investments, open up new investment and trade opportunities, protect or improve military positions, and respond to the pressures of internal and external politics have led not

> only to international cooperation and conflict but also to "interference" by some authorities in the "internal affairs" of others. As such pressures increase, so will interference… [P]olitical policing will be organized more and more on a multinational if not international basis. (1982:207)

What Turk termed "political policing" is exactly the business of international criminal tribunals, such as the ICTY, and their "interference in internal affairs," which reached a near term peak with the transfer of Slobodan Milosevic to the ICTY in The Hague. The transfer of Milosevic to an international court is the move Arendt argued must confront future crimes against humanity.

The establishment of the ICTY and the arrest and transfer of Milosevic are thus explained broadly by existing accounts. Yet this leaves us knowing more about the origin than about the operation and institutionalization of this body of law. The concept of 'relative autonomy' provides little help, because while it acknowledges that law sometimes can operate apart from class and power, it tells us little or nothing about how, in doing so, law gains its own distinctive force (Hunt 1993). Pierre Bourdieu (1987) offers an empirically grounded approach to this problem with his reassertion of an influential "force of law" that is more than simply relatively autonomous. Bourdieu explains this legal force with his "sociology of the juridical field." (See also Dezalay and Garth 1996.)

III. Bourdieu and the Force Field of Juridical Practice

Bourdieu's concept of the field locates actors within a structured set of relations and practices. The relations orient "the strategies which the occupants of the different positions implement in their struggles to defend or improve their positions" (Bourdieu 1993:30). Thus Bourdieu describes the literary or artistic field as based on objective relations, "a field of positions and a field of position-takings" (Bourdieu 1993:34). The juridical field is similarly a social space in which conflicts are translated into recognized forms, and in which agents accept (and thereby produce) the authority of legal expertise in resolving disputes (Bourdieu 1987:830–32). The focus is on the objective relations among the positions and actions of those who produce legal texts and outcomes (Bourdieu 1993:33).

In this way, Bourdieu agrees that legal texts (or other symbolic objects) bring specific possibilities to a field — but he does not privilege these texts as carrying their own autonomy, apart from the formal positions of actors in the field (Bourdieu 1993:32–34). The force of law, instead, derives from its enactment and practice. It is the struggle over the interpretation and direction of these texts, combined with law's authority to name orthodox principles and its rhetorical claim to universality, that constitutes law as a field with internally driven practices.

These internal practices that ground the force of law are rooted in the habitus of the juridical field: the generally repetitive and sanctioned — and sometimes

innovative — ways about knowing and doing law that form a force field for the production of decisions and other effects. This force field involves struggle and competition within and between groups of actors who mostly work within a legal sphere that at least partially insulates their operations. The habitus, then, functions as "a matrix of perceptions, appreciations, and actions" (Bourdieu 1977:83) — the "systems of dispositions" — (Bourdieu 1993:71; Bourdieu and Wacquant 1992:105) through which individual agents act. When combined with a tacit public grant of legitimacy to the legal order (Bourdieu 1987:844), the juridical field can then act back upon and thus influence the world beyond its boundaries.

For Bourdieu, the habitus of the juridical field involves practices which include elements of *orthodoxy* and *doxa*. The orthodoxy consists of substantive and procedural norms — in the case of the ICTY framed for the Tribunal by a mixture of common and civil law custom, along with treaties, conventions and resolutions of the UN Security Council and General Assembly. The doxa — most often deriving at the ICTY from Anglo-American common law but increasingly from European civil law — are practices that are taken as so self-evident that they elicit immediate and tacit consent. (See also Bourdieu 1977:164–70.) When legal practices achieve their full effect, then, it is often through their operation as doxa — thereby becoming self-evident and uncontested.

Not surprisingly, Bourdieu here draws closely on Weber's emphasis on the formal rationality of state law. For Bourdieu (1987:833), any predictability of state law (that Weber sought to understand through his analysis of legal rationality) is itself shaped *by* socialized actors, *using* formalized texts. In Bourdieu's terms, law's predictability and rationality stem from the repeated practices derived through legal studies and legal practice; and in this way a "legal habitus" is formed that shapes decision-making. Bourdieu also builds on Weber in acknowledging that law's rationalization itself carries important symbolic effects. Bourdieu (849–50) explains that this is precisely because legal actors can count on the norms of the legal game, for which they have the requisite knowledge and manners to develop successfully. In this way Bourdieu joins with Weber in giving attention to the promotion of legal knowledge, which emphasizes the process through which social conflicts are translated and formalized on legal terrains while also focusing on how legality is produced within the hierarchical constraints of the profession. (See also Dezalay 1986.)

Bourdieu's theory of the juridical field further allows for, and anticipates, individual innovation. (See also Bourdieu 1977:95.) In extreme moments, when the iterative function of habitus is disrupted, individuals may initiate strategic change (Wacquant 1989:44). Yet even on a daily basis, actors will innovate in seeking advantage within the field. For instance, in the legal context, the courtroom work group is made up of individuals who are well socialized to both strategically work within and improvise beyond the previously understood rules of the game they are playing. In this way, predisposed and socially located actors

— conceiving of the field through their habitus and structured dispositions while innovating in their practice — are what allows the emergence, evolution and reproduction of law. In Dezalay's terms (1986:104–5), it is often these very innovations that are then drawn into the legal field to maintain its legitimacy, so that law maintains a process of "continuous re-creation" through which the "quasi-heretical *avant-gardes*" — those who seek change on legal terrains and thereby continue to grant faith and belief in legality — gain legitimacy in the field.

In their transnational research on international commercial arbitration and rule of law reforms in Latin America, Dezalay and Garth (1996 2002) elaborate Bourdieu's framework to demonstrate the importance — even in these international legal fields — of national predispositions, contacts, forms of capital and career paths. As they demonstrate, internationalization allows for the development of new legal regimes while also providing a forum in which individuals can pursue opportunities that promote their own national careers. Both the exportation and importation of law can provide individuals with competitive advantages, and the globalization of law thereby provides a multiplication of opportunities for reproducing and gaining power and prestige (Dezalay and Garth 2001:372*n*1).

The accounts that Dezalay and Garth provide explain the substantive development of a field of law as an effect of the opportunities that are opened for participants in the legal field, and of the objective positions that individuals hold and take within it. Combined with attention to how substantive developments in a field can attain institutionalized force, this can provide sociological purchase on Arendt's concern — namely, how legal and political practices can become available in response to future atrocities. Our analysis takes up this question, by drawing on a Bourdieuian approach to explain the emergence and development of international criminal law at the ICTY. We focus most closely on the prosecutorial teams, which we call prosecutorial regimes, and on the courtroom playing field and its judges during the period of the ICTY's rapid growth and development over the past decade.

IV. Applying Bourdieu's Framework to the ICTY

Our analysis thus emphasizes the strategic competition within and between four investigative and prosecutorial regimes that have established the force and influence of the ICTY. This institutional analysis includes the regime of the ambitious Chair of the Commission of Experts Cherif Bassiouni, who headed a UN-mandated investigative body that presaged the ICTY; a second regime whose chief prosecutor, Richard Goldstone, launched the Tribunal's first inauspicious prosecutions; the successor regime led by the innovative first female Chief Prosecutor, Louise Arbour, who indicted Slobodan Milosevic for crimes against

humanity; and her bombastic successor, Carla Del Ponte, who reorganized the ICTY prosecutorial office and brought Milosevic to trial for genocide as well as for his crimes against humanity. Our argument is that the driving force in the struggle that has established the ICTY as a new juridical field is the strategic competition within and between these prosecutorial regimes and the judges who hear the cases tried at the ICTY. As with Dezalay and Garth's findings (1996, 2002), this competition is motivated by the different national resources and practices that each prosecutor has brought to bear, so that the competitions themselves should be understood as reflections of national reproduction in an international setting.

Each of the above prosecutorial regimes built and advanced its institutional capital in unique ways, sometimes in an implicitly retrospective but path dependent competition with each other, as well as prospectively in conflict with the judges who heard their cases: such as the initial Tadic case,[1] the Karadzic-Mladic Rule 61 hearing,[2] the Srebrenica genocide trial,[3] the Foca rape case[4] and the Milosevic trial.[5] Although formally divided into their separate domains at the ICTY, the prosecutors and judges are the paid and internally housed employees who drive this institution.

In contrast, the defense counsel and defendants are outsiders to the court (cf. Blumberg 1967) and often are unfamiliar with the habitus of this hybrid common and civil law venue. Their participation ranges from the arrogance of Slobodan Milosevic acting as his own defense counsel to the uncertainty and timidity of lawyers from the Balkans who are paid but not housed by the UN to act on behalf of defendants. As research similarly suggests in the American courts (Flemming et al. 1992), we will see in the following account that it is more often the ICTY judges than the defense counsel who rein in and limit the initiatives of the prosecutors, often denying and redirecting their efforts. The law gains its force and the juridical field advances out of this type of Bourdieuian competition for legal control, so that the force of law does not derive simply from case precedent, but from an interlocking and cumulative set of practices more generally.

For example, below we first observe an evolution from the investigatory capacity to amass largely anonymous, hearsay evidence of atrocities, to the systematic exhumation of mass graves and the collection of documentary evidence through search and seizure operations. We then describe a sequence in which the Tribunal augmented its path-breaking development of a coercive arrest capacity through NATO, with the addition of a cooperative use of financial inducements by the World Bank and other international actors to undertake arrests and transfers of defendants using more peaceful means on its behalf. We further observe an expansion of charging options that builds from a narrow naming of crimes against humanity to a broadened application that includes rape and sexual enslavement and to a further evolution in applying the charge of genocide. The available sources of legal efficacy multiply at each turn, and we argue that the

force of international law available to the prosecution at the end of this process was geometrically bigger than at the beginning with a proportionate increase in cumulative force.

V. The Research Setting

The ICTY has a sweeping UN mandate to prosecute persons responsible for serious violations of international humanitarian and criminal law committed on the territory of the former Yugoslavia since 1991. It is as a result a secretive and security-conscious institution where some of the most allegedly prolific murderers and torturers of the last half century are brought to trial. The focus of this study is on the Tribunal's office of the prosecutor (OTP) and the ICTY courtrooms where the prosecution's cases are brought under judicial and defense scrutiny.

This study is based on more than 100 tape-recorded and transcribed interviews conducted in the OTP from 1999 to 2003 and on courtroom observations of ICTY trials and resulting trial transcripts for this same period. As a result, this study is part of two reinvigorated ethnographic traditions, one focusing on courts and the other on efforts to promote the rule of law more generally. (See Cicourel 1968; Emerson 1969; Feeley 1979; Sudnow 1965 to Latour 2002; Riles 2000; Yngvesson 1993.) The goal is to explain, from the inside-out, how the ICTY has developed a set of practices that allow it to operate with relative autonomy and influence that extends beyond its own newly defined institutional sphere.

The first author was present at the ICTY for periods of one week to a month, every second to third month, with courtroom observations filling in the periods between scheduled interviews. The interviews are built around an approximate one-third sample of OTP employees that is representative in gender, age and national origin. The research included repeated interviews with the chair of the Commission of Experts that preceded the ICTY, all three ICTY chief prosecutors, the deputy prosecutor, four chiefs of investigations and prosecutions, and employees at all levels. These include lawyers and investigators in the largest numbers, but also data and case managers, crime and military analysts, clerical assistants and several demographers and historians. Public figures at the Tribunal are quoted by name.

This study of the ICTY began by focusing on the Commission of Experts that first sought to establish an evidentiary foundation for the ICTY as the forum from which to build a new juridical field. As Bourdieu would predict, this was a period of pitched conflict between powerful individuals and positions. The still nascent field of international criminal law confronted the preliminary necessity of resisting opposing forces that sought to block its first steps.

VI. Experts on Atrocity

In the wake of the Balkan crisis, a struggle emerged between law and political diplomacy — a struggle over which would become the paradigmatic discourse in responding to atrocities — and this became the core contest from which two central groups emerged. One group was led by the British Lord David Owen and the American Cyrus Vance, and struggled persistently to broker various Balkan peace plans in the early 1990s. Meanwhile, women's and human rights groups documented the appalling carnage that mounted in the wake of these peace plans, and worked with journalists to expose shocking concentration camp conditions and accompanying massacres and rapes. The latter groups insisted the Serbs were the more deadly aggressors in the Balkans and that legal culpability must be imposed by an international tribunal.

Dezalay and Garth (2002) argue that this Bourdieuian competition between political power brokers and advocates of legal humanitarian approaches, is the foundation for a "transnational legal field" that joins the agency of human rights activism with international humanitarian law. Groups within this field compete for media attention, funding and political influence — and in the process, law provides a forum for these groups to define their interests, positions and causes. (See Espeland 1998.)

The efforts of the human rights activists forced the politicians to acknowledge their failed policy of "moral equivalency" and its unfounded claims, namely that all parties — Bosnian, Croat and Serb — were equally responsible for the atrocities (R#165a:02/01/01)[6]. This battle, nonetheless, persisted in the UN Legal Affairs office, where Owen and his British compatriots continued to resist legal interventions they believed would undercut their peace negotiations (R#106:09/26/00). Ultimately, Lord Owen was reduced to defending his initiatives against charges of appeasement (Binder 1993; Guest 1995:104). This conflict took a further turn when, in October 1992, the UN Security Council passed Resolution 780, creating a Commission of Experts to gather evidence in support of establishing a tribunal for the former Yugoslavia.

Yet the struggle between law and political diplomacy — over which discursive paradigm would gain continuing control of the process — persisted. The legal route of a Commission of Experts was placed in the leadership hands of a retired Dutch legal academic, Frits Kalshoven. Kalshoven was picked as the first chair of the commission over the Muslim-American law professor, Cherif Bassiouni (Guest 1995:57). Bassiouni had invested much of his career in developing the doctrinal bases for an international criminal law, while simultaneously advocating the case for international criminal law to prosecute perpetrators of atrocities, rather than defer to diplomatic remedies (Sula 1999). Meanwhile, even if Kalshoven had wished to pursue evidence of atrocities, he was given no budget by the UN with which to work, and the British (who continued to promote a diplomatic approach) went on to covertly stall the commission's efforts (Gutman 1993). This

included indications to Kalshoven that the commission should not pursue high-level Serbian officials, including Milosevic. In these ways, a discursive legal form — the UN Resolution establishing a Commission of Experts to gather evidence — was captured and filled with a competing content (in this case, political diplomacy). International criminal law may have been advancing formally, but it continued to be informed by a logic of political diplomacy and an emphasis on moral equivalency.

Bassiouni was initially appointed as a voluntary member of the commission and believed that the appointment of Kalshoven and the withholding of resources were efforts to stall the commission's work. He nonetheless succeeded on his own in raising a million dollars in funding from the MacArthur and Soros foundations, both of which were heavily invested in the support of NGOs and the human rights paradigm. (See Dezalay and Garth 2000; Keck and Sikkink 1998.) Bassiouni persuaded Chicago's DePaul University, which was itself interested in developing a distinctive human rights law specialization, to donate a half floor of law school space for the collection of evidence of Balkan war crimes. Bassiouni described this work as a "dragnet" for evidence that could build a prima facie case of war crimes (R#106:09/26/00) and for UN establishment of a tribunal (R#108:07/19/00). This soon became a resource base for a preliminary force field that could drive forward the cause of international criminal law while simultaneously fighting off its political opposition.[7]

This struggle between opposing modalities took an unexpected turn when evidence of British stalling at the UN became public. A reporter investigating the commission discovered — from both the UN's Office of Legal Affairs and the U.S. Ambassador to the UN in Geneva — that Lord Owen was the source of the instructions to sidetrack the commission's efforts (Gutman 1993).

The story embarrassed the UN into allowing the commission to get investigations underway. At this point, Kalshoven, himself frustrated and fatigued, resigned and Bassiouni finally was named chair of the commission. Working out of DePaul's law school and moving along the doctrinal academic lines of international criminal law that he had advocated throughout his career, Bassiouni adopted an explicitly legal framework, arguing that the computerized database he had developed contained nearly 6,000 "cases" of putative war crimes violations. The focus on case-based evidence was an obvious appeal to the orthodoxy of conventional court work — precisely the work that Bourdieu associates with the juridical field. The information in the archive had a corroborative weight that could be used to establish patterns of violations. For example, it could be concluded convincingly that "the data base contains substantially more allegations of violations committed by Serbian and Bosnian Serb forces against Bosnian Muslim civilians than by or against any other ethnic or religious group" (Bassiouni 1994:297). This conclusion was a conspicuous and compelling challenge to the previously orthodox UN presumption of moral equivalency (R#106:09/26/00).

Further UN resolutions establishing the ICTY were passed in the spring of 1993, while the commission was told to continue its work into 1994.

In March of 1994 Bassiouni made a provocative proposal to the U.S. State Department that would have raised the political and legal stakes by helping the Tribunal prepare a case for the legal prosecution of three Bosnian Serb generals for the siege of Sarajevo:

> I could tell you who the commanding general was over the three generals who were in command of the Sarajevo Romanija First Corps who surrounded Sarajevo…. I could document that in the three years of the siege, on a daily basis, how many rounds of artillery and mortar fell, how many sniper shots were fired, how many people were injured or wounded. If I can show you also the targeting of civilians, the recurrence of the targets, and even the timing of it, then I have made a case for command responsibility for that general…. Now that suddenly gives a whole different dimension than the individual person who was targeting somebody. That puts the commanding general at risk, and if you see that the commanding general… was a member of what would be the equivalent to their Joint Chiefs of Staff, under Mladic,… and that the supplies and artillery shells came directly from Serbia, and so on and so forth, you've got a dammed good case of command responsibility. (R#106:09/26/00)

Bassiouni, however, never received a response to this proposal.

This struggle between law and political diplomacy — and the continuation of a hybrid diplomatic frame within the apparently legal form of the commission and forthcoming tribunal — continued when Bassiouni's effort to become the first ICTY chief prosecutor was rejected by the UN Security Council. Bassiouni speculated that this defeat and his proposals to extend the work of the commission by developing a major Sarajevo case were scuttled because he had aimed too high, and that this again disturbed the British:

> From the beginning I said I was not interested in going after the little soldier who commits the individual crime. I was after building a case against the leaders who make the decisions. So I was going to establish that there was ethnic cleansing as a policy, that there was systematic rape as a policy, that there was destruction of cultural property as a policy, that the destruction of Sarajevo was a systematic process. What I didn't realize was that this was precisely what the British, and to some extent the French and the Russians, did not want…. [T]hat was not the political reality (quoted in Sula 1999:26).

The London *Times* agreed, noting that, while the official reason given for rejecting Bassiouni was lack of actual administrative experience as a prosecutor, "diplomatic sources said the real reason is that the European countries are afraid Dr. Bassiouni will move too quickly to charge Serb and possibly Croat leaders with war crimes"

(Bone 1993). Bassiouni was forced to settle for producing a report that could provide a political springboard for the Tribunal.

The commission's Final Report is backed by more than 65,000 pages of documents and 300 hours of videotaped testimony and news footage, as well as a 3,300-page, five-volume appendix supporting its conclusions (Final Report of the Commission of Experts 1994). All of this material was placed in a cargo container and shipped to The Hague Tribunal in the spring of 1994 (R#106:09/26/00). Little of this evidence would become part of the formal case law of the Tribunal. Yet, as we discuss below, this legal paradigm would eventually win out over political diplomacy and moral equivalency even by losing in the short-run. By accumulating evidence of atrocities, the commission gave a preliminary force of law to the work of the Tribunal, and helped to establish this nascent institution and the resurgent field of international criminal law that was *potentially* capable of addressing — even if in the short term, unable to address — the still unfolding military and political events in the Balkans.

VII. The Virtual Tribunal

It took the UN Security Council more than a year to agree on the appointment of Justice Richard Goldstone of South Africa as its first chief prosecutor in 1994. Although held in high esteem, Goldstone's own legal practice was in commercial law, and he had no experience as a prosecutor or in criminal law generally (R#134a:12/06/00). Yet his symbolic capital was impeccable: he had just finished as chair of the South African Commission that exposed high level, right wing government instigated police violence. Goldstone's appointment could thereby accommodate political interests. Unlike others vying for the position, he was experienced in diplomacy and came recommended for the position by Nelson Mandela — who had himself just been inaugurated in May 1994 as President of South Africa. Britain and France swiftly agreed to Goldstone's appointment (Scharf 1997).

From the beginning, Goldstone recognized that his advantage lay in his understanding and dexterity within the diplomatic rather than the legal field. An early interviewer at the Tribunal remarked that "upon arriving in The Hague in mid-August of 1994, Goldstone recognized that his was a big-picture diplomatic role and that the hands-on prosecution work could be pushed down" (Horne 1995:7).

Goldstone left most of the office responsibilities to Graham Blewitt, his deputy prosecutor (R#111a:12/14/99), while he traveled incessantly and worked the media, beginning on his first day in The Hague with an interview by Mike Wallace for *60 Minutes*. In a signal of trouble to come, Wallace asked how Goldstone was going to bring the Balkan war criminals to justice, saying, "[Y]ou've got to get them here on trial" (CBS News 1994).

As Bassiouni found before him, Goldstone sensed that in the beginning the UN did not seem to want him to do much (R#134b:04/24/02). As Bassiouni explained, "the green light had not been given" and "the amber light was on," by which he meant that the UN was continuing to give priority to peace negotiations (R#106:09/26/00). As time went on, however, a courtroom was constructed and detention facilities were prepared. Now the UN budget committee was suddenly impatient: "I was advised 'you have to have an indictment out, otherwise you're not going to get any money'…" (R#134a:12/06/00). Meanwhile, several members of Goldstone's staff were working through the report from the Commission of Experts, which featured horrific accounts of the participation of an individual named Dusko Tadic in camp killings and rapes (R#177:06/28/99). Yet there was no apparent evidence that Tadic was an instigator or planner of these crimes (R#165a:02/01/01).

Where Bassiouni had wanted to start with the siege of Sarajevo, Goldstone chose instead to begin with Dusko Tadic. Tadic, who had fled from Bosnia, was picked up by the German police and charged under a unique German provision for the domestic prosecution of genocide. Goldstone reasoned that it was a case of Hobson's choice: "We had an empty prison. There was a great deal of frustration. The judges were frustrated … I didn't mull it over. It seemed an obvious thing to go get him" (R#134b:04/24/02). Yet Tadic was not a leadership figure and Goldstone was taking him from a national jurisdiction with a uniquely suited genocide statute (R#174b:07/02/02). The decision to focus on Tadic signaled to some that he lacked a sense of the field of international law he was attempting to lead (R#114:08/16/02).

Goldstone made a huge organizational commitment to the Tadic case, assigning a team of 20 OTP employees to its pre-trial investigation in the fall of 1994 (R#196:07/07/00). Beginning with this case, Goldstone formed a policy of relying on what became known in the OTP as the Queen's Counsel model of investigations (R#176c:09/16/02). This meant assigning nearly full responsibility for the development of cases to autonomous field investigators in a reactive mode that kept lawyers and prosecutors of the Tribunal at arm's length from the collection of case evidence (R#144:07/10/00).

Two investigations that were exceptions to this Queen's Counsel model were the Foca rape case and the inquiry into the Srebrenica massacre. These investigations were run by legally trained Europeans in the tradition of the continental civil law that would later emerge in a struggle to reorganize the OTP. Neither the Foca nor Srebrenica teams had more than a few members, and they competed unsuccessfully for investigative resources (R#169:07/20/01).

Perhaps also because the Srebrenica massacre was so massive in scale, involving the killing of some 7,000 Muslim men, the investigation necessitated the formation of unique external alliances beyond the Tribunal (R#179:05/07/01). This made Goldstone's diplomatic contacts relevant again. For example, the Srebrenica investigation first involved gaining authorized use of Central Intelligence

Agency (CIA) aerial imagery to identify mass grave sites for exhumation (R#173a:02/01/01). The Tribunal invoked its UN statutory authority — articulated by the Trial Chamber as "a judicial authority which combines elements of common and civil law traditions" and which "will naturally create procedures for which there is no analogue"[8] — to justify entering Bosnian Serb territory. Specifically, Article 18 of the Tribunal Statute states that the prosecutor "shall have the power . . . to conduct on-site investigations" and in so doing "may, as appropriate, seek the assistance of the State authorities concerned."[9]

Since the Bosnian Serb authorities were unwilling to facilitate the exhumations, Goldstone and Blewitt turned to the U.S. State Department for the state assistance they needed (R#156:01/30/01). During negotiations of the Dayton Accords, they were able to convince Richard Holbrooke to place pressure on Slobodan Milosevic to support trips by an Assistant Secretary of State, John Shattuck, into the area around Srebrenica (R#179:05/07/01). As Holbrooke (1999:261) has reported, "A few days later, this request produced a strange sight: Milosevic's special military security forces escorting Shattuck into Banja Luka, which no American official had visited in several years, as he sought access to mass grave sites of massacres committed by Serbs." This opened the door for the Tribunal's exhumation work. Once many of the victims' bodies were exhumed, the Tribunal further claimed search and seizure powers under the Accords to collect documentary evidence from Bosnian Serb military headquarters about the massacre (R#130b:05/07/01). Invoking these early investigatory powers and practices was essential in establishing the evidentiary base for the Srebrencia case.

Yet these powers were not developed and exercised easily. For example, just as Richard Holbrooke was arriving in Sarajevo to engage in shuttle diplomacy associated with the recently signed 1995 Dayton Accords, two senior Bosnian Serb officers made a wrong turn into Bosnian controlled territory outside of Sarajevo, where they were taken into custody by the Bosnian army.[10]

Holbrooke reasoned that the two officers, who were traveling in a civilian car, had been apprehended in a manner that violated the free movement provisions of the Dayton Accords, and he maintained that normally he would have insisted that the Muslims release them immediately: "But Justice Goldstone complicated matters considerably; from the International War Crimes Tribunal in The Hague, he issued a warrant for the two men — even though they had not been indicted" (Holbrooke 1999:332). Holbrooke cooperated in transferring the two men to the Tribunal, but within two months both were released (R#111c:02/01/01). He concluded that "the seizure of the two men, neither of whom was ever indicted, had disrupted the implementation process and set a bad precedent for the future" (Holbrooke 1999:332). Once more, Goldstone's lack of knowledge of criminal law practices had resulted in loss of face with a potential ally.

The Tadic trial also went poorly when key witnesses developed by errant investigators proved unavailable, unreliable or unsuitable. First, just as the case

went to trial the rape charge against Tadic was abruptly dropped. The victim who was placed in a witness protection program became too frightened to testify (R#165a:02/01/01). The prosecution ultimately was able to prove to the court's satisfaction that Tadic was at least present at numerous killings, and he was found guilty of persecution as a crime against humanity.[11] Still, the Tadic case could contribute little to grounding this emerging juridical field (R#114:08/16/02).

Finally, as Goldstone's short two-year term at the OTP was coming to its end, he began to find the means to put his political capital back to work outside the Tribunal. In the early months of 1996, a potential star witness fell into his hands when Drazen Erdemovic confessed to reporters in Serbia that he had personally shot as many as 70 Muslim men in the Srebrencia massacre (R#111c:02/01/01).

When Erdemovic was taken into custody in Belgrade, Goldstone insisted that the authorities there serve a summons ordering him to appear before the Tribunal, later explaining that "the reason I went public with Erdemovic was to save his life" (R#134b:04/24/02). This public demand combined with American government pressure had its desired effect, and Erdemovic was transferred to the ICTY within several weeks. He was soon providing vital information about the location of burial sites around Srebrenica, and Goldstone's previous success in securing CIA and Defense Department assistance with aerial imagery began to pay off in the location and planning of exhumations of mass graves (R#111c:02/01/01).

Goldstone was uncomfortable with striking a plea bargain with Erdemovic (R#134b:04/24/02), thinking as Justice Robert Jackson had at Nuremberg that plea bargaining was an affront to the dispositions of an international court (Robert Houghwout Jackson Oral History:1204). Nonetheless, a plea agreement evolved over time and was later openly endorsed by Goldstone's successor and the judges' chambers as an appropriate way of rewarding cooperation, and as a necessary part of the criminal justice doxa of this court. (See Bohlander 2001; Combs 2002.) The ICTY now had a star witness around which to develop a Srebrencia genocide case, although the Tribunal still had no high ranking defendant in custody to prosecute.

In the summer of 1996, one year after the massacre at Srebrenica, Richard Goldstone's tenure as chief prosecutor was nearly finished. The Tadic trial had not sustained the attention of the media, and meanwhile NATO as well as the U.S. and Britain were not helping the Tribunal to arrest the indicted Bosnian Serb leaders, Karadzic and Mladic, nor many others under indictment. The courtroom and prison, not to mention the judges and prosecutors, continued to be drastically underutilized. Goldstone decided to move ahead with a Rule 61 hearing — a hearing designed essentially to get around the inability of the ICTY to apprehend defendants (R#114:08/16/02).

The concept of an *in absentia hearing* is controversial because it is a variation on a *trial in absentia*, which the UN Security Council Statute creating the Tribunal explicitly forbade. Martin Bormann was tried in absentia at Nuremberg, and

French law permits trials in absentia for persons charged with crimes against humanity. Nonetheless, Guest (1995:126) points out that "such trials are prohibited by the International Covenant on Civil and Political Rights."

Members of the prosecution staff emphasized their reservations about the Rule 61 procedure, arguing strongly that it was essentially a violation of the doxa and legal habitus of accepted criminal procedure (R#114:08/16/02). In contrast, Goldstone believed that a Rule 61 hearing on Karadzic and Mladic could pull together much that had been learned through ongoing investigations and put pressure on international authorities to arrest these indictees (R#134b:04/24/02). The seven-day hearing was convened in the end of June, 1996;[12] as in the Tadic case, Goldstone did not appear in court.

Drazen Erdemovic provided dramatic testimony at the Rule 61 hearing, and the prosecution was able to make public some of the exhumation and other forms of evidence it was collecting in the Srebrenica case (R#173a:02/01/01). The downfall of the hearing was that it also made apparent to the public that only a handful of the more than 70 individuals the ICTY then had under indictment were in custody. The absence of defendants or their legal representatives in the Rule 61 proceeding gave the Tribunal a "virtual" quality. Rather than making this new institution seem substantive and self-evident, Goldstone risked making it seem artificial and contrived: a forced legal abstraction more than a functioning legal reality (R#103b:02/20/02).

Yet even at this low point in its formal substantive development, the Tribunal was gaining some of the force of law in the world outside. The indictment and vilification of Radovan Karadzic at the Rule 61 hearing helped to drive him from elected office, leading Richard Holbrooke (1999:190) to concede that "the tribunal emerged as a valuable instrument of policy that allowed us, for example, to bar Karadzic and all other indicted war criminals from public office." Once Karadzic was displaced, it became easier to enforce provisions in the Dayton Accords and to implement the exhumations and search and seizure operations described above (R#168:02/01/01).

Goldstone further accomplished his goal of getting the institution a sustaining budget of about 30 million dollars a year from the UN. He developed the Tribunal with an emphasis on the political and the diplomatic. His own self-assessment confirms this: "I think I spent more of my time on diplomacy and pushing and talking and screaming and shouting for the Tribunal than on the simply prosecutorial work" (R#134b:04/24/02).

VIII. The Real-Time Tribunal

Goldstone recommended his successor, the Canadian Louise Arbour, and the UN approved her appointment in 1996. Arbour was experienced in criminal law and inherited an OTP staff that understood its basic problem: of 76 persons

Goldstone had indicted, only six were in custody (R#128:02/01/01). Louise Arbour's position as the Tribunal's second prosecutor allowed her to build on Goldstone's tenure; yet in doing so, she brought with her training in criminal law rather than international diplomacy, and legal views and habits formed in relation to a Canadian paradigm of human security. (See Canadian Department of Foreign Affairs and International Trade 1999.) This provided precisely the sort of internal change that international criminal law required in order to retain (and, in this case, develop) its legitimacy. In a Bourdieuan framework, the game of law is contingent on the gradual recognition and acknowledgment of new legally-based frameworks — and the advocates who wield them — as a means of "replying to the challenges" that are presented by entrenched approaches. (See Dezalay 1986:104.)

A faction of idle and frustrated judges was now openly arguing for trials in absentia, which Arbour immediately labeled as an affront to the orthodox expectations of criminal justice by saying, "I didn't go there for theater purposes." She argued instead that orthodox tools of criminal law could be joined with the UN mandate to get arrests underway (R#103a:11/19/99). Arbour's plan involved a policy based on sealed indictments — or more to the point secret indictments (R#103a:11/19/99). Secrecy was a crucial means of introducing surprise and vulnerability so that arresting authorities would be at less risk of reprisals and injuries (R#171:07/05/00).

The use of secret indictments, which are common in national jurisdictions, was presented to the diplomatic world by Arbour as self-assured doxa. In contrast, Goldstone, with his orientation to the diplomatic field, had resisted sealed indictments as an affront to deference and transparency in international relations. Arbour drew on her background in criminal law to convince an international audience that this non-transparent technique of law enforcement was fully appropriate, insisting this practice was simply self-evident to those who know criminal law.

Arbour and her staff sensed that the judges would support the secret indictment policy because it also promised to generate arrests and therefore trials. Arbour explained, "I was absolutely determined, arrest was so clearly the key, because I thought if we start getting arrests, then everybody will be busy." (R#103a:11/19/99) One member of Arbour's legal team, Clint Williamson, was already laying the groundwork for an early secret indictment arrest when Arbour arrived at the Tribunal (R#200:05/07/01).

The arrest plan involved trapping the former mayor of Vukovar (Croatia) who was secretly indicted for taking part in a massacre of 200 hospital patients. Not knowing he was indicted, the mayor agreed to return to Vukovar to discuss compensation for property he owned. The Polish soldiers who met him instead handcuffed the shocked indictee and took him to a military base; there, a Belgian plane then flew him to the ICTY detention center (R#200:05/07/01).

If the secret indictment was orthodox criminal procedure, albeit perhaps not

in the international context, the ensuing arrest was clearly unorthodox. Although the ICTY has no arrest authority, *The Observer* (Doyle 1997) reported that "a snatch squad sent by the International War Crimes Tribunal has captured the former Mayor of Vukovar," and the *International Herald Tribune* (Reuters 1997) observed that "it was the Tribunal, rather than the UN peace-keepers that carried out the arrest." President Bill Clinton (1997) issued a statement through his press secretary saying, "I congratulate the ICTY and UNTAES on their successful apprehension."

An ICTY investigator offered the following explanation: "Yeah, well arrest is a technical term… We were present at the time that he was arrested and then we took over custody of him because, of course, we had no powers of arrest." (R#122:07/20/00) Arbour later added in an interview that "the plot, if I can put it this way, wasn't dead easy to execute, but it was very clean, and we knew that legally we had a very good chance of making it all stand." (R#103b:12/06/00) In this way, her unorthodox sealed indictment strategy became doxa.

Having shown how easily an arrest could be accomplished, Arbour could now push the well-armed and authorized NATO troops to begin using the secret indictments to make arrests (R#200:05/07/01). British-led Stabilization Force (SFOR) troops were the first to make a subsequent arrest (ICTY Press Release CC/PIO/225-E 1997), followed by Dutch-, U.S.-, and later French-led troops.

Arbour and her advisers used the evolving experience in the field as a further strategic opportunity to change the formal procedural rules of the Tribunal. This simultaneously disempowered local Serbian authorities (by removing their protective shield of sovereign immunity) and empowered NATO forces. For example, "the rules that made it look as if you could only send a warrant to a state, so that Republika Srpska eventually had to do the arrest, were changed so that warrants no longer have to be addressed to states, so that they could be addressed to the person on the envelope." (R#174b:07/02/02) NATO SFOR troops could now more directly take on the arrest role that the local Serbian authorities in this region would not. "We tried to take out all the rules that were limiting our flexibility in arrests, and we pushed these proposals through plenary sessions of the ICT,…. to put the legal framework in place so the secret indictment process would run through consistently and… keep the local authorities out of it." (R#174b:07/02/02) These practices were now official ICTY orthodoxy.[13]

The arrestees soon began arriving at a more stable rate of about one or two a month, including the Croatian political leader Dario Kordic (ICTY Press Release CC/PIO/246-E 1997). The Croatian government was showing new signs of cooperation in exchange for foreign-aid money (R#103b:02/20/02). Arbour began insisting in her contacts with diplomatic representatives of the more affluent Western nations that the financial assistance they were providing in the Balkans should be made contingent on cooperation with the ICTY (R#103b:02/20/02). These efforts set a precedent for using financial leverage by getting Croatia to transfer indictees in conjunction with its acceptance into the Council of Europe

and receipt of monetary aid. This *quid pro quo* became a new kind of foreign relations doxa.

By June 1998 about 30 defendants were under detention in the Tribunal's 24-unit facility that just a year before was nearly empty. The result was that the ICTY was now under-budgeted, encouraging Arbour to initiate a campaign for increased funding. This required that Arbour shift her position within the legal field. Rather than maintain the posture of a discrete and presumably impartial judge, Arbour soon took up the role of a publicly available and outspoken prosecutor.

"It took me a while," Arbour observed, "but eventually I started appreciating that the fundamental premises of criminal law, traditionally, were that it's public and local… When I applied that internationally it became apparent that the only way we could even remotely be public and local was through the use of the international media. We had to be out there." (R#103a:11/19/99) Arbour (1999) made her case to the public by emphasizing three points: (1) that the extra-territorial authority of the Tribunal trumped claims of sovereign immunity, (2) that the Tribunal's demeanor was appropriately coercive and intrusive rather than deferential and diplomatic, and (3) that the Tribunal was an agency of real-time law enforcement rather than an after-the-fact institution of historical record.

Having developed a field-based and real-time approach to investigations meant that, by late 1998, ICTY staff members were obliged to investigate the highly visible crime scene that Kosovo was in the process of becoming. Thus when 45 people were found dead near the Macedonian border in the Kosovo town of Racak in January of 1999, Arbour was obliged to react. (See also ICTY Press Release CC/PIU/379-E 1999.) She was accompanied by a team of three investigators, two bodyguards and one legal adviser as she left to enter a war in progress (R#103a:11/19/99). This was the beginning of the Tribunal's role as a real-time institution acting on unfolding events that it was trying to influence — if not control.

The team Arbour led was turned back at the border. This was followed by three futile days of negotiations involving NATO General Wesley Clark (2001:161) with Milosevic in Belgrade. Arbour returned to The Hague ready to resign in defeat until she encountered a completely different reality focused around a picture of her in the *New York Times* "facing down" the border guards:

> When I came back to The Hague I realized that what I had lived, and that what in reality was a failure, had been lived differently in The Hague, because they weren't there, they were seeing it only in the press, as the greatest success story of the Tribunal… What became the conventional wisdom of the reality of those three days was not what I lived but what the Tribunal, the bad guys, NATO, the politicians, the world, my mom, everybody in the world perceived — which was that I had single-handedly put the Tribunal on the map…. I went to the border and I didn't get in. But the spin, the images — as my assistant put it, 'we made the *New York Times*,' she said, 'above the fold!' (R#103b:02/20/02)

Her assistant was referring to the picture of Arbour in a yellow flack jacket, "above the fold" on page one of the *Times* (Perlez 1999). Her three themes had been captured in one image: that of a criminal prosecutor from the ICTY being turned away from a real-time crime scene by a sitting head of state using claims of national sovereignty to conceal evidence in a transparent concession of guilt (R#171:07/03/00).

It still took until the end of the NATO bombing for the ICTY to get its investigators into Kosovo, but then they were able to go in side-by-side with the entering troops. They were armed with leads from interviews in the refugee camps to begin building an indictment of Slobodan Milosevic for crimes against humanity. Once the indictment was begun in late March, it took 52 days to write. It was presented for judicial confirmation on May 22, 1999 (R#165a:02/01/01).

Arbour next reapplied the doxa of secrecy to have this indictment sealed for four days, saying she wanted to protect a humanitarian mission that was underway in Belgrade. The actual reason was to make it more difficult for others to interfere with the indictment decision. Her public relations spokesman later reiterated that "she didn't want to give them the chance to co-opt or slow down the indictment, because that would really get at the heart of her independence as a prosecutor. So she was very careful to have Judge Hunt confirm it and then hold it under wraps, under seal — as we say — for four days, and in that period she made phone calls to each of the foreign ministers." (R#171:07/03/00)

The Clinton administration was ambivalent about the indictment, with voices for the politics of diplomacy yet again arguing that Milosevic could be manipulated to strategic advantage in the peace-making process, perhaps through the promise of amnesty from prosecution. An official in the administration in an interview for this study quoted even Madeleine Albright, the Tribunal's strongest advocate in the cabinet, asking rhetorically, "'Is this exactly the right time to indict this fellow?'" (R#179:05/07/01) Wesley Clark (2001:325) also reported that right up to the May 27, 1999, announcement of the Milosevic indictment, "[S]ome in the Pentagon and the White House were unhappy about this." Albright's question was rhetorical, of course, because the indictment was already done. By initiating the indictment, Arbour in effect "called the bluff" of the American commitment to international humanitarian law and the Tribunal.

Arbour maintains that in the end it was getting the arrests started that was the strategic turning point. She put it this way: "Arrest was the issue and it was clear that if we got people arrested then everybody inside the Tribunal would be busy." (R#103b:02/20/02) She is adamant about the independence she believes the ICTY achieved, saying with regard to the Milosevic indictment, "Many political men believed that I would not be so presumptuous, that I would consult them. But I gave myself one bit of advice: never ask for something that can be refused. So, I said nothing." (Trean 2002) This explicit claim of independence — articulated here as a tension between law and diplomacy ("political men" in Arbour's terms)

— is evidence of what, in Bourdieu's model, provides the legal field with its privilege and autonomy, ensuring that the game is played on "law's" terrain.

Appointed to the Supreme Court of Canada, Arbour left the ICTY soon after the Milosevic indictment in the summer of 1999, one year short of the end of her term.[14] She had tripled the Tribunal budget in three years, multiple trials were now simultaneously underway, and important arrests also had been made in the Foca and Srebrenica cases.

IX. "The Problem from Hell"

Indicting Milosevic was one thing, getting him to The Hague was another, and once there, there was the issue of whether to charge him with genocide, otherwise known as "the problem from hell." (Power 2002) The former Swiss attorney general, Carla Del Ponte, was appointed as Arbour's successor in 1999, becoming the first former prosecutor to serve in this role at the ICTY (ICTY Press Release JL/P.I.S./429-E 1999). With high profile experience in the prosecution of organized crime, Del Ponte's own background — in contrast to her predecessors at the Tribunal — lay in her experience overseeing complex legal prosecutions with large scale financial dimensions, and often organized through international organizations such as the World Trade Organization and World Bank. As demonstrated below, her tenure has involved high-profile trials, an internal reorganization of the OTP, and the coordination of transgovernmental financial inducements with political pressure to accomplish Tribunal goals.

Del Ponte's first efforts were aimed at getting the Bush administration to exert financial pressure on the Serbs to turn over the indicted Milosevic. These efforts built on the earlier success of Arbour with the Croatians. Colin Powell was the principal transnational player who linked the funds to rebuild Yugoslavia's shattered economy to its cooperation with the Tribunal. He led with a U.S. pledge of $181 million to be committed at a donors' conference in Brussels *after* it was made certain that Milosevic would be transferred to the ICTY (Black 2001). The *Daily Telegraph* (2001) reported that "the west bribed Belgrade to hand over the tyrant, and the Serbian nation, weary of its pariah status, acquiesced in the bargain." (See also Crossette 2001.)

John Meyer (1987) notes that when multinational corporations use monetary bribes and threats to manipulate states and regimes (for example, to seal sales and contracts), this often is seen as the height of illegitimacy, but when states and regimes use such tactics they usually are treated as predictable, as self-evidently acceptable, or as what Bourdieu calls doxa. States effectively have a strategic monopoly control over such inducements, with the result (Meyer 1987:65) that they "bribe each other routinely." In this case, the transgovernmental sponsorship of the donors' conference was used to make these monetary manipulations less direct and more legitimate (Ikenberry 2001). Colin Powell was following well established but seldom discussed political doxa that Louise Arbour had already

endorsed and applied. Milosevic was unwillingly delivered from Belgrade to the Tribunal in the summer of 2001 (ICTY Press Release C.C./P.I.S./597-E 2001, F.H/P.I.S./598-E 2001).

The Foca and Srebrenica trials unfolded while Milosevic was still at bay. The Foca case documented the role rape and sexual enslavement can play as instruments of terror in crimes against humanity.[15] The Srebrenica case established that the massacre which took the lives of 7,000 Muslims constituted genocide for which command responsibility could be assigned.[16] The legal struggles over these issues[17] help make Bourdieu's point that it is often competition between contesting parties within the courtroom that produces the force of law.

For example, as the Foca case concluded in June of 2000, the prosecution was confident it had established a widespread or systematic pattern of sexual assaults (R#162:07/25/00). The OTP nonetheless remained concerned about just how widespread or systematic this pattern must be to constitute a crime against humanity.[18] The prosecution therefore asked to present an expert witness who had helped to prepare a report on the occurrence of rape in Bosnia. Presiding Judge Hunt indicated such testimony would be a form of hearsay: "What you are asking us to do is to accept that there was a pattern of allegations of widespread rape, and to jump from that into accepting that it was much more widespread…." (*Prosecutor* v. *Kunarac and Kovac*, Case No. IT-96-23, *Trial Chamber Transcripts*, May 29, 2000:4155-4156.)

While Judge Hunt eventually ruled that this expert testimony could be introduced to provide historical context, the prosecution the following day declined "out of an abundance of caution" to do so (*Prosecutor* v. *Kunarac and Kovac*, Case No. IT-96-23, *Trial Chamber Transcripts*, May 30, 2000:4177). The prosecution decided overnight that the judges were in effect saying, "They had heard enough." (R#176c:09/16/02) Judge Hunt responded to the prosecution decision with the advice that the statute "does not require you to prove that the rapes were widespread, it only requires you to prove that the *armed conflict against the civilian population* was widespread." (*Prosecutor* v. *Kunarac and Kovac*, Case No. IT-96-23, *Trial Chamber Transcripts*, May 30, 2000:4179-80, emphasis added) The prosecution immediately concurred, saying, "Absolutely. Rape is *one* of the constituent ingredients in the widespread or systematic attack." Judge Hunt then reiterated, "We do have to be satisfied beyond a reasonable doubt that the *attacks* were widespread." (4180, emphasis added) Innovative jurisprudence with the force of legal precedent was formed out of this clash on the courtroom playing field. It sprang from the struggle and then synthesis of the judges and prosecutors interacting to make sense and then precedent of the evidence and events before them. The result was new law with new force in new circumstances. This was the kind of precedent Arendt realized only an international tribunal could provide.

In the Srebrenica case, the struggle was over the introduction of an intercepted telephone communication in which the defendant, General Krstic, was allegedly

recorded ordering a subordinate to "kill them all. God damn it.... [Not a] single one must be left alive." (*Prosecutor* v. *Krstic*, Case No. IT-98-33, *Trial Chamber Transcripts*, November 1, 2000:6806-7) This evidence was introduced by the prosecution during rebuttal, leading one of the judges, rather than defense counsel, to interject, "Just one second. I don't quite understand. You've had this for a while or you just got hold of it yourself recently?" (6801) This question was then put aside over the subsequent closing phases of the trial. The intercept was dramatic and attracted considerable publicity. Yet when the presiding judge read the verdict that found General Krstic guilty of genocide, he emphasized that "the Trial Chamber did not admit a recording in which a voice alleged to be that of General Krstic is heard saying, 'Kill them all.' I emphasize this point because it might have appeared that this exhibit was part of the case-file whereas that radio tap has not been admitted and is not an exhibit." (*Prosecutor* v. *Krstic*, Case No. IT-98-33, *Trial Chamber Transcripts*, August 2, 2001:10185) Even though the defense was helped by the judge's intervention to form the objection that excluded this prosecution evidence from the case-file, the intercept formed a persuasive part of a larger body of evidence that established the occurrence of genocide at Srebrenica. This intercept was important both in assessing the specific role of the defendant and the utility and validity of the intercepted communications more generally.

The Foca and Srebrenica cases were thus hard-fought trials in which the judges regularly challenged the prosecution's strategies.[19] From Bourdieu's perspective, these struggles often lend force to strategic courtroom interactions. In significant part as a result of the convictions in these cases, rape became a constituent element of the charge of crimes against humanity in the Milosevic case, while the Srebrenica massacre formed a crucial part of the charge of genocide. Still, the task of adding indictments to the Milosevic case for crimes against humanity in Croatia and genocide in Bosnia was challenging for Del Ponte.

First, the charge of genocide itself was demanding, involving the *intended destruction* of a people in whole or in part, while a crime against humanity more modestly required widespread or systematic *attacks* on civilians (Robertson 1999). Second, the strongest case for genocide was in Bosnia, where Sarajevo, Srebrenica and ethnic cleansing more generally had claimed the largest number of lives; but the chain of command leading to and from Milosevic was clearer in Kosovo because it was still part of Yugoslavia. Third, the events in Bosnia had occurred in the first half of the 1990s, while the events in Kosovo had peaked in the latter half of that decade, leaving fresher evidence (R#165a:02/01/01).

Nearly four months after Milosevic appeared at the Tribunal, in late September of 2001, Del Ponte announced she had signed an indictment for Croatia (ICTY Press Release JL/P.I.S./627e 2001) and that a Bosnian indictment would follow shortly (Simons 2001). The Croatian indictment listed nearly 700 deaths and more than 170,000 deportations.[20] There was speculation that Del Ponte was strategically using her public voice as prosecutor to place internal pressure on

her own investigators to complete the Bosnian indictment, which she indicated would now take another month and include the charge of genocide (Klarin 2001). Adding the genocide charge was the subject of considerable debate inside the Tribunal[21] as well as outside (R#124:07/05/02). Arbour had earlier adopted the view that the Kosovo case of crimes against humanity would result in a swifter and more predictable conviction, while a combined genocide trial with Milosevic at its center risked being more drawn out and less certain in its outcome.

When the Bosnian indictment came in late November, Milosevic was identified as having planned, ordered, or at least inspired genocide and the full range of other crimes as the head of a "joint criminal enterprise."[22] The challenge behind this comprehensive indictment, and the certain cause of its long development, lay in the accumulation of evidence that could persuasively delineate the chain of decision-making that gave Milosevic de facto command responsibility for the events already demonstrated to have occurred in Srebrencia and Foca as well as other places (R#187:01/29/01).

Getting this new kind of evidence focused attention on how the Tribunal was doing its investigative work and linking its results to subsequent prosecutions and trials (R#146:07/03/02). The problem was no longer simply establishing a crime base and securing an indictment that could lead to an arrest, but instead now revolved around the end-game challenge of gaining a conviction. This also coincided with building pressures from the Bush administration for the ICTY to end its investigations and to complete its trials by the end of the decade.

Although the print media followed Del Ponte's role in developing the Croatian and Bosnian indictments of Milosevic, little or no attention was given to the major internal reorganization of the OTP Del Ponte initiated in March of 2001.[23] Del Ponte and Blewitt noted that problems often were resulting from a sharp separation of the investigation and prosecution functions of the OTP (R#124:07/05/02; R#111c:02/01/01). In essence, the problem was that this division was impeding strategic planning and the collection of crucial forms of "inside" evidence.

An experienced trial lawyer described the functional separation in the OTP as what we earlier called a Queen's Counsel model in which the senior trial lawyers were "detached from the investigative component and essentially the recipient of a brief… as opposed to a federal prosecutor's model or public prosecutor's model that you would find in parts say of the British Isles or Canada or the U.S. or in the civil law countries that have investigative magistrates, or the German system with a public prosecutor." (R#176c:09/16/02) This loosely coupled system also involved considerable variation in practices across cases and in general meant that prosecutors had little advance preparation (R#190:07/02/02).

This was the problem the Prosecutor Mark Harmon confronted as lead counsel in the Blaskic prosecution,[24] a case portrayed by a colleague as like a complicated clock in a thousand disassembled pieces (R#118:01/29/01); or the situation

another senior trial attorney similarly described as like "getting inundated with three filing cabinets full of statements and documents" that were incoherently organized, so that in the prosecution phase "you're playing catch up" and left asking the question, "Why do we have X number of our witness statements that have to be redone or rewritten?" (R#176c:09/16/02)

The first step was to appoint a new chief of investigations. Patrick Lopez Terres emerged as a strong internal candidate (R#111c:02/01/01). Lopez Terres had no doubts about why he was chosen: "The real reason I was put in this function, … was as part of the reorganization the prosecutor wanted — to try to put an end to a very strong separation that was in the house between the lawyers and the investigators. The idea was that because of my background, a kind of hybrid person, having been a lawyer dealing with investigative matters most of my career, I could be the right person" (R#190:07/02/02). Initially there was resistance from the investigators to giving lawyers a larger role in overseeing their work.[25]

Blewitt and Del Ponte went on to search for a new chief of prosecutions. After considering internal and external candidates, Blewitt and Del Ponte decided to proactively pursue Michael Johnson, a prosecutor from New Hampshire who had worked periodically on loan to the OTP on procedural matters and in fund-raising efforts.

Decisions about sending investigators on missions now came under closer scrutiny. This involved Lopez Terres "scrutinizing what the teams are doing [on mission]… saying 'no' more often than was ever said before." (R#111c:02/01/01) Significantly, he saw this as a move toward the civil law approach, saying "obviously the background of the prosecutor is very similar to my background… [and] inclines more naturally to have the lawyers in charge of decisions." (R#190:07/02/02) Yet a North American lawyer also commented, "We're more perhaps of an American federal prosecutorial style now." (R#168:02/01/01) Both the Europeans and the North Americans could see elements of their national legal practices in the new approach. By the time the Milosevic trial began early in the new year, the OTP had undergone a major internal transformation that placed the prosecuting lawyers much more firmly and proactively in charge of investigations (R#111c:02/01/01).

The results were variable, with the prosecutors in this case among the first to concede that their success in "turning" high-level witnesses was mixed.[26] Three years after the delivery of Milosevic to The Hague and 200 witnesses into the trial, observers began to comment that no insider, smoking gun witnesses were forthcoming. "At this juncture," the Dutch international law expert, Gerard Strijards, concluded, "[I]t is Milosevic who has the upper hand." (Franks 2002)

In the middle of July 2002, Del Ponte met in Belgrade with Yugoslav President Kostunica. A result was that Yugoslavia freed some former Milosevic associates to reveal confidential information without threat of prosecution at home for revealing state secrets (Kratovac 2002). The stage was set for the delivery of

compelling testimony during the final weeks of the Kosovo phase of the trial. The build-up to this testimony described a Milosevic led cover-up of ethnic cleansing operations in Kosovo and the removal of bodies to Serbia. Two Serb policemen who were characterized as "unwilling insiders" confirmed that the reburial of bodies from Kosovo was ordered by Milosevic and his interior minister (Klarin 2002). Later, as the Milosevic trial shifted to the joint criminal enterprise in Croatia, witnesses from the former Yugoslavian army testified that all significant military decisions were taken in Belgrade. One witness explained that Belgrade was "a synonym for Milosevic," turning at one dramatic point in the cross-examination of Milosevic to say, "You were Belgrade!" (Klarin 2002; *Prosecutor* v. *Milosevic*, Case No. IT-02-54, *Trial Chamber Transcripts*, October 30, 2002:12561)

As this testimony unfolded in an ICTY courtroom, Del Ponte simultaneously addressed the UN Security Council. Speaking in general terms that seemed aimed at the U.S. in particular, Del Ponte insisted, "If the Tribunal is to meet the completion strategy targets and the deadlines that are expected of us,… other problems have to be tackled by the international community." (Klarin 2002) These other problems involved gaining more cooperation from the Belgrade government in accessing archives and making arrests.

The significance of Del Ponte's remarks was that they revealed a chief prosecutor strategically speaking back to the pressure placed on the Tribunal by the Bush administration. The point is frequently made by Milosevic, among other critics of the ICTY (e.g., Parenti 2000), that the Tribunal is a pawn of the U.S., Britain and other Western nations. Yet there is evidence that the ICTY acts without direction from the U.S., the UN and other nations, as evidenced by Arbour's initial Milosevic indictment and by Del Ponte's demands for American and other sources of external assistance. Del Ponte made this point clear in response to the Bush administration's criticism of the ICTY before Congress and in the aftermath of 9/11. She remarked at a joint news conference held with the U.S. Ambassador Prosper in The Hague, "There may be people who are saying [after 9/11] the world has moved on and the issue of the day is now terrorism, [but] we cannot take that view of international justice." (Buncombe 2002)

International criminal law — as developed across four chief prosecutors at the ICTY — is emerging on contested terrain that now is visibly characterized in a competition for authority and legitimacy by blunting political interruption, most evidently in response to the hostility of the Bush administration to the renewal and growth of this juridical field. By studying the Tribunal from the inside-out, we have demonstrated how the force of international criminal law — and the world view that underwrites it — is enacted and promoted through official representations, daily practices and a development of coercive and cooperative mechanisms (see Bourdieu 1987:847-48) that divert contrary political efforts to limit the supply of cases and connected initiatives.

X. The Force Field of International Criminal Law

Pierre Bourdieu describes the competition between artistic generations in the field of cultural production as a struggle between "established figures" and "newcomers." (Bourdieu 1993:60) We describe a homologous sequence in the field of international criminal law in which new legal practices are added by successive prosecutorial regimes to the previously available repertoire. Decisions to initiate exhumations of mass graves on foreign territory, search and seize archival evidence from sovereign nations, seal indictments against citizens of recognized countries, and manipulate financial inducements otherwise known as international assistance — these all involve invocations of normative practices by successive prosecutorial regimes to advance the ICTY's extra-territorial jurisdiction and the moral authority of international law. Although the process is characteristically incremental, the addition of such practices into the field often reflects a process of internal competition as well as cooperation in which different actors bring knowledge and experience of previous national practices to address unresolved international problems. In Bourdieu's terms, this is a process in which "new modes of thought and expression" (1993:60) are asserted, enacted, concretized and thereby converted into legal doxa.

Although there is no doubt the ICTY is subject to external pressure and political influence, a central point of this analysis is that as the juridical field of international criminal law is developing, it is strategically acting back on the world outside its courtrooms, and it does this as much through the force field of its socially organized practices as through the doctrinal detail of the case law it produces. The competition of prosecutors and judges in the social organization of court-connected encounters and scenarios is an essential vehicle through which the force of law is developed and exerted. The social history of the ICTY offers unique contemporary evidence of how this happens in international legal practice, and this study is an effort to document and explain this process from the inside-out and through a succession of prosecutorial regimes.

Cherif Bassiouni, as the eventual head of the Commission of Experts, drew on his cross-national knowledge of domestic and international criminal law and the entrepreneurial possibilities provided by foundation funding to amass a body of evidence to make the prima facie legal case that the Serbs were the primary aggressors in the Balkan conflicts of the early 1990s. Although much of this evidence was hearsay and marked no more than an early stage in the exercise of investigatory powers, the collection of this evidence nonetheless was shaped within the orthodox corroborative habitus of Western common law. That is, the collection of evidence used multiple, corroborative sources to establish a foundation for the initiation of individual indictments. The amassed evidence undercut claims of moral equivalency among the warring parties that were previously used by elite politician-diplomats to privilege peace negotiations over

the criminal prosecutions favored by the new human rights and international law groups.

The latter groups worked alongside Bassiouni in successfully getting the UN to establish the ICTY, although with no sustaining budget and a first prosecutor, Richard Goldstone, who knew little about criminal law and who was hesitant to initially pursue major war criminals. The Tribunal was also initially stalled by its lack of investigation and arrest powers. Neither Bassiouni nor Goldstone had a plausible plan to achieve arrests and transfers of indicted suspects to the ICTY for trial. Nonetheless, the Srebrenica investigation was initiated during Goldstone's tenure and established a power of legal entry to begin mass grave exhumations in areas under Bosnian Serb control, which led in turn to the development of a power to search and seize military evidence about the Srebrenica massacre.

Goldstone's legal policies and procedures threatened the future of the Tribunal when he was unable to convert indictments into arrests or conduct viable trials. He sufficiently vilified the indicted Bosnian Serb leader Radovan Karadzic so that he was removed from office, establishing some force to the ICTY's institutional position, but Goldstone was not able to bring Karadzic or any other major indicted figure to trial, and in the process the ICTY began to take on the appearance of a "virtual tribunal."

In contrast, Louise Arbour drew on her experience as a criminal lawyer in Canada to better establish the prosecutorial powers of the Tribunal. She recognized that her UN mandate could be viewed as granting a criminal law power to use the domestic criminal practice of sealed or secret indictments to facilitate surprise arrests of indicted Balkan war criminals by international authorities, such as NATO military forces. The challenge was to claim the traditional criminal law prerogative of secret indictments as international criminal doxa, notwithstanding expectations of deference and transparency that Goldstone previously emphasized were required by norms of international diplomacy. Arbour used sealed indictments to co-opt U.S., British and other NATO led forces as agents for arrests, and later as a means of controlling the staging and timing of the Milosevic indictment that the U.S. did not consistently support.

Arbour also encouraged international political and financial authorities, starting with the Council of Europe, to make monetary aid contingent on transfers of indicted individuals, thus encouraging Croatia to send indicted war criminals to The Hague. Arbour often assumed rather than requested the authority to initiate and pursue her policies and practices, and with her success in doing so she established a new force to the ICTY and by implication for international criminal law.

With Milosevic removed from office but still in a Belgrade jail awaiting transfer to The Hague, Carla Del Ponte worked to elaborate Arbour's monetary strategy. This strategy drew on her Swiss financial experience and involved convincing the United States to join with the World Bank and European Union in using international aid as an inducement with the new Federal Republic of Yugoslavia.

International financial assistance was made contingent on the transfer of Milosevic and broader Serbian cooperation in providing documentary evidence and fellow indictees to the ICTY. The force of ICTY law was now moving along both the coercive dimension of a forcible arrest power and the cooperative dimension of financial inducement. Del Ponte also expanded the naming power of the Tribunal's criminal law mandate by upping the charges against Milosevic from crimes against humanity in Kosovo to include genocide in Bosnia. Arbour had worried the genocide charge would result in a protracted trial with a less certain outcome. Meanwhile, Del Ponte also introduced a reform in the organization of field operations that placed prosecuting lawyers directly in charge of investigators, from the beginning to the end phases of evidence collection and preparation for trial.

The advances of the ICTY prosecutorial regimes then were based on elements of competition and reproduction. Each regime featured a set of competitive strategies that advanced the work of the Tribunal and, through its actions, the institutionalization of international criminal law; in this way, the practiced strategies of each regime reveal how new force and autonomy can be given to law. We have argued that the current Tribunal has accumulated a combination of coercive and cooperative powers that have an interlocking and cumulative effect in allowing the prosecution a range of options to achieve its enforcement goals.

These powers — to collect onsite forensic evidence; to search and seize archival evidence; to secretly indict and financially, as well as forcibly, induce arrests and transfers of defendants; and to choose among serious charges in a tightly coordinated investigation and prosecutorial regime — were not operational or even clearly comprehended when the Tribunal began. Today they are established elements of the field. The competitive edge in advancing the strategic aims of the Tribunal crucially depends on the practiced application of these multiple powers. The alternation and coordination of these powers is a foundation that gives real world significance to the force field of international law. Of course, there is no claim here that the force of this law is wholly independent of sponsoring parties, such as NATO and especially the United States. Nonetheless, this account and its focus on the competitive strategies of successive prosecutorial regimes tells us something about a process by which a relative autonomy from such powerful parties can be achieved, particularly by those who participate in the process and legitimize it at each turn.

Notes

1. *Prosecutor* v. *Tadic*, Case No. IT-94-1-T, Trial Chamber, May 7, 1997; for an overview, see ICTY Case Information Sheet (Tadic Case), April 18, 2002; and on early proceedings, see generally *Prosecutor v. Tadic and Borovnica*, Case No. IT-94-1-T, *Indictment*, February 13, 1995; ICTY Press Release CC/PIO/004-E 1995, 008-E 1995, 009-E 1995, 011-E 1995, 012-E 1995, 015-E 1995, 016-E 1995.

2. See Prosecutor v. Karadzic and Mladic, Case No. IT-95-18-R61 and IT-95-5-R61, Trial Chamber Transcripts, June 27–28 1996, July 1–11, 1996; ICTY Press Release CC/PIO/092-E 1996.

3. See *Prosecutor v. Krstic*, Case No. IT-98-33, Trial Chamber, August 2, 2001; ICTY Press Release OF/P.I.S./609e; and see *Prosecutor* v. *Krstic*, Case No. IT-98-33, *Indictment*, October 30, 1998.

4. *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 and IT-96-23/1, Trial Chamber, February 22, 2001; and see ICTY Press Release JL/P.I.S./566-e 2001.

5. For background, see the indictments regarding Kosovo (*Prosecutor v. Milosevic, Milutinovic, Sainovic, Ojdanic and Stojiljkovic*, *Indictment*, May 24, 1999, *Amended Indictment*, June 29, 2001, *Second Amended Indictment*, October 29, 2001), Croatia (*Prosecutor v. Milosevic*, *Indictment*, October 8, 2001, *First Amended Indictment*, October 23, 2002), and Bosnia (*Prosecutor v. Milosevic*, *Indictment*, November 22, 2001).

6. Citations in this format denote information gathered from interviews. For additional details, please direct correspondence to John Hagan.

7. Bassiouni wanted to lead the commission himself, but settled temporarily for being its rapporteur, along with a Canadian military lawyer, Bill Fenrick. Fenrick was not himself in tension with Kalshoven's approach, since he more narrowly regarded the commission as an experiment in preparing court ready cases (R#128:06/28/99).

8. *Prosecutor v. Blaskic*, Case No. IT-95-14, *Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum*, July 18, 1997:43.

9. See also *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, *Decision Stating Reasons for Trial Chamber's Ruling of 1 June 1999 Rejecting Defence Motion to Suppress Evidence*, June 25, 1999.

10. *Prosecutor v. Dukic*, Case No. IT-96-20-I, *Indictment*, February 29, 1996); ICTY Press Release CC/PIO/031-E 1996, 032-E 1996, 033-E 1996, 034-E 1996.

11. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber, May 7, 1997.

12. See *Prosecutor v. Karadzic and Mladic*, Case No. IT-95-18-R61 and IT-95-5-R61, *Trial Chamber Transcripts,* 27-28 June 1996, 1-11 July 1996; ICTY Press Release CC/PIO/092-E 1996.

13. As such, the Judges of the International Criminal Tribunal amended and adopted a significant number of rules at the 14th plenary session of the Tribunal, ending on November 12, 1997. For instance, this included the adoption of Rule 53 *bis*, which addresses the ability to serve an indictment on an accused once they are taken into custody, so that "[s]ervice of the indictment shall be effected personally on the accused at the time the accused is taken into custody or as soon as reasonably practicable thereafter." ICTY Annual Report 1998:105; ICTY Rules of Procedure and Evidence: Rule 53 *bis*.

14. The Canadian Federal Cabinet Order in Council confirms that the appointment was approved but undisclosed on May 26, 1999, the day before Arbour's announcement of the Milosevic indictment (Privy Council Office 1999).

15. *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 and IT-96-23/1, Trial Chamber, 22 February 2001:436ff.

16. *Prosecutor v. Krstic*, Case No. IT-98-33, Trial Chamber, August 2, 2001.

17. Field notes, July 2000.

18. Field notes, July 2000.

19. Field notes, July 2000.

20. *Prosecutor v. Milosevic*, *Indictment*, October 8, 2001, *First Amended Indictment*, October 23, 2002.

21. Field notes, July 2001.

22. *Prosecutor v. Milosevic*, *Indictment*, November 22, 2001.

23. Field notes, July 2001.

24. For background, see *Prosecutor v. Kordic*, *Blaskic*, *Cerkez*, *Santic*, *Skopljak*, *and Aleksovski*, Case No. IT-95-14, *Indictment*, November 10, 1995; *Prosecutor* v. *Blaskic*, Case No. IT-95-14, *Amended Indictment*, November 22, 1996, *Second Amended Indictment*, April 25, 1997.

25. Field notes, July 2002.

26. Field notes, July 2001.

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