

## Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia

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*This article develops a conflict approach for studying the field of international criminal law. Focusing on the International Criminal Tribunal for the Former Yugoslavia, we draw on Burawoy's (2003) elaboration of reflexive ethnography to determine how external political changes affect the work of an international legal institution. We explore how political frameworks of legal liberalism, ad hoc legalism, and legal exceptionalism result in internal office, organizational, and normative changes within this Tribunal, thereby linking national political transformations with the construction of the global. Drawing on rolling field interviews and a two-wave panel survey, we conclude that the claims to universals that underwrite transnational legal fields cannot be understood solely through an analysis of external political forces, but must be combined with attention to how these are refracted through internal organizational change within international institutions.*

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This research was supported by grants from the National Science Foundation (SES-0111755), the Social Sciences and Humanities Research Council of Canada (410-2001-1643), the American Bar Foundation, and the Canadian Institute for Advanced Research. We are grateful to Marion Fourcade, Bryant Garth, Joachim Savelsberg, and Ann Swidler for their insights and comments on this article. This paper benefited from conversations and meetings of the Successful Societies Program of the Canadian Institute for Advanced Research.

## INTRODUCTION

“That four great nations,” Justice Robert Jackson remarked in his opening statement at Nuremberg, “stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason” (Jackson 1945). Justice Jackson’s rhetorical eloquence did not, of course, deter others from perceiving Nuremberg as a retroactive enforcement of “victor’s justice.” This has often served as an argument about the limits of international criminal law and the problems in relying on criminal sanctions in the context of state transitions (Leman-Langlois 2002).

In more recent years, however, political historians, working particularly in the United States, have sought to recover the Nuremberg legacy as a touchstone for international liberal legalism. This is reflected most notably in the work of Gary Bass (2000, 24), who argues that “an amalgam of basically fair liberal legal arrangements” is “still easily discernible from a Soviet-style show trial.” This resurgent endorsement of international criminal law gained institutional currency in the 1990s when, in the period after the Cold War, the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were established by the United Nations. Nearly fifty years after Nuremberg, these tribunals (and the ICTY in particular, due to the attention that the prosecution of European war crimes received internationally) were extolled as new beacons of international legal liberalism.

Yet if we wish to document how transnational legal institutions such as the ICTY emerge, we must be careful in relying on arguments that emphasize their promise or futility. Such position-takings are difficult to disentangle from the structure and hierarchies of academic subfields relating to law (Bourdieu and Wacquant 1992; Garth and Sterling 1998; Tomlins 2000). Sociologically, we can instead conceive of these transnational institutions as bodies that “actualize schemas”—such as legal liberalism—and as “resources” through which these schemas are instantiated, justified, and reproduced (Sewell 1992, 13). Rather than arguing for or against the institution or the ideas it claims to instantiate, the task is to study how a set of contested ideas becomes structural, as mutually constitutive schemas and resources (Sewell 1992).

In this way, shedding an empirical lens on how a concept, such as international legal liberalism, takes hold institutionally requires attention not only to rhetorical and normative shifts, but also to the economic pressures wielded by powerful states, the renewed emphasis on law in matters of international development, the role of norm entrepreneurs, and the like (Dezalay and Garth 1996, 2000, 2002; Guilhot 2005; Hagan 2003; Hagan and Levi 2004, 2005). The empirical goal is to study the social and legal production of an organization such as the ICTY, in order to explore how international criminal law is produced within a network of actors, institutions, and practices that influence legal developments (rather than through “globalization,” “legal globalization,” or “legal imperialism” *tout court* (Bourdieu 1996; Garth 2003)).

In contrast, to assess the transformative potential of such institutions—such as whether the normative goals, political direction, and legal effects of the ICTY are beneficial to Balkan states, ravaged by war and economic instabilities—would require attention to often subaltern voices that are beyond the borders of the institution (Spivak 1988). This is perhaps especially the case when these very voices are invoked and represented by actors seeking to promote the field's legitimacy (Chatterjee 2004). What one gains by instead taking the institution as the empirical site for studying the production of law, transnationalism, or globalization is the potential to “provincialize” these practices, to investigate how law is mobilized and defined, and how these practices, institutions, programs, and fantasies become normative, both locally and internationally (Chakrabarty 2000, 27–46).

With this as our starting point, it is important to note that the ICTY has already attracted a succession of analyses, including Scharf's (1997) legal analysis of the ICTY's first trial, Bass's (2000) political history of war crimes tribunals, and Hagan and Levi's (Hagan 2003; Hagan and Levi 2004, 2005) studies of the Office of the Prosecutor. These analyses record the ICTY as a U.S.-assisted pursuit of liberal legalism—including how the ICTY promotes U.S. and homologous interests, and how the Tribunal's practices may be generating a broader field of international criminal law. This requires continued attention, since contests over the goals of this field—and the values that are to be normative for its participants (Bourdieu 1987)—are still unfolding.

In this article, we focus on how an institution, such as the ICTY, copes with a changing political environment, and how, in a field of law so closely tied to the broader field of power (see Bourdieu 1996, 261–339; Turk 1969), external political influences are refracted within and through the organizational work of a transnational institution. At present, perhaps the most salient political influence is the challenge to permanent tribunals in this field. This is being articulated through a U.S. promotion of ad hoc legalism and legal exceptionalism as alternative policy agendas to liberal legalism (see Figure 1).

This political transition within the United States is an important moment for exploring the links between the local and the international. It is an opportunity to explore the role of “domestic palace wars” in powerful states, and how they construct the possibilities and limits of the “global” (Dezalay and Garth 2002; Bourdieu and Wacquant 1999). As a result, this conjuncture represents a foundational, yet contingent, moment in the sociopolitical formation of an international legal field, and the promotion of “global” norms of criminality (Jenness 2004).<sup>1</sup>

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1. Although sociologists of law have often sought to focus on normative innovation in criminal law (e.g., offenses relating to vagrancy, drugs, prostitution, or hate crimes), in domestic contexts, the expansion or contraction of substantive criminal law has proceeded slowly, particularly in comparison with criminal procedure (Arenella 1983). This inertia makes it rare to witness a new field and practice of criminal law, including legal and political debate over the constituent elements of core offenses, created and contested in our own time (see Bourdieu 1987).

Legal Regime	Signature Element	International Framework	Principal Features
Liberal legalism	Universal rule of law	Multilateral	Permanent & free-Standing
Ad hoc legalism	Law in the breach	Bi- & multilateral	Impermanent & adaptive
Legal exceptionalism	U.S. immunity from rogue court	Unilateral	National sovereignty

Figure 1. Overview of Positions on International Criminal Law.

## CONFLICT THEORY AND INTERNATIONAL CRIMINAL JUSTICE

At present, the International Criminal Tribunal for the Former Yugoslavia is the most visible institution in the field of international criminal law. This article focuses on how external politics have been refracted organizationally within the Tribunal, and on how this legal institution operates within a heteronomous and politically contested field.

To understand this organizational refraction, international criminal justice—and the aspirations to universals that motivate and underwrite it—needs to be contextualized within the role of law in “globalization.” This is a core element of Hardt and Negri’s analysis of *Empire* (2000), in which they suggest that supranational juridical institutions reflect a broader shift in the location and ontological status of sovereignty. Yet, these shifts in the juridical as “global” or “universal” have material underpinnings (Dezalay and Garth 1996, 2000, 2002; Koskeniemi 2004). In this way, the establishment and transformation of fields such as international criminal law often reflect “internal power relations” within powerful states (Hardt and Negri 2000, 10, 182; Hagan and Levi 2005).

Such analysis of political interests in the development of legal norms is a key premise of conflict theories of crime and law. These theories argue that the roots of criminal law are political, so that interests and ideologies shape the creation and enforcement of criminal sanctions (from Weber 1946; through Chambliss and Seidman 1971; Hay 1975; Thompson 1975; and Turk 1969, 1982; to Jenness and Grattet 2001). Conflict theories of criminal law are Dahrendorfian if not Marxian—explaining, for instance, the emergence and relaxing of vagrancy laws from the twelfth through the sixteenth centuries as a function of labor supply (Chambliss 1964), or the ruling class use of the criminal law and pardons in eighteenth century England (Hay 1975).<sup>2</sup>

In international fields, however, the relationship of political interests to criminal law is often invoked more crudely. In its crudest form, this motivates

2. In the domestic context, this theoretical perspective is gaining renewed attention in studies of imprisonment and control (Garland 2001; Pettit and Western 2004; Feeley and Simon 1992; Silbey 2002; Simon 1993; Wacquant 1999, 2001, 2003).

the dismissal of Nuremberg as “merely victor’s justice,” and even finds echoes in Milosevic’s defense that the ICTY is “simply political” and beholden to the whims of Western powers (Parenti 2000; Mandel 2004). But these assertions are based on a set of assumptions regarding the scope of both the “political” and the “legal.” In contrast, within a conflict approach, these political and economic interests are inevitable to the development of legal norms (Chambliss 1964, 1974), an analytical point stressed at an earlier time by a prominent mid-twentieth century criminologist, testifying in support of the Nuremberg trials before Congress (Glueck 1944, 2).

In the contemporary context, the ICTY was initially regarded by human rights activists as a Western political cover for failing to intervene militarily against ethnic cleansing in the former Yugoslavia. After all, the Tribunal began in 1993 with little more than a U.N. Security Council resolution and a handful of employees, with no sustaining budget, no building, no policing mechanism, or personnel, and most notably, no detainees to place on trial (Hagan 2003). Yet, by the end of the decade, and therefore by the end of the Clinton Administration in the United States, the Tribunal enjoyed an expansion of resources—with a \$100 million annual budget, three courtrooms, and six simultaneous ongoing trials, more than 1,000 employees, more than forty detainees, and the former head of state, Slobodan Milosevic, on trial. The United States was indirectly, through the United Nations, providing more than half the annual funding for the ICTY. The Clinton Administration created an Ambassador for War Crimes position in the State Department, first held by David Scheffer, and U.S. justice, defense, and intelligence agencies were assisting in the work of the ICTY.

This U.S. support did not mean there was consensus about the configuration of international criminal institutions. Disagreements abounded over whether this field was to be organized around “international diplomacy” or “criminal justice” (see Bassiouni 1974; Wedgwood 1995).<sup>3</sup> Yet while there were certainly U.S. reservations about the scope of international criminal law (Lippman 1998; NBC News 1998; Scheffer 1998; Turner 1998), supporting the expansion of the Tribunal was a core element of a U.S. liberal legal strategy, which also had the effect of placing U.S.-trained personnel in important roles in this legal field. This was undoubtedly to the advantage of the United States and other Western states. But it also provided the ICTY with a base of resources, expertise, and political support—a base from which to generate norms, practices, and relatively autonomous stances against overt political control, even if the field’s general direction was set by powerful preconceptions of the role of law in state rebuilding (Hagan and Levi 2005; Dezalay and Garth 2002; see Bourdieu 1987).

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3. In terms of legal architecture, the Clinton Administration here moved beyond the four-nation Nuremberg Military Tribunal to support an International Criminal Tribunal in The Hague, with judges drawn from the full membership of U.N. states (see Robertson 1999; also Meron 1998; Neier 1998).

Analyses of the politics of international criminal justice are generally focused exclusively on this initial stage, namely the setting up of a Tribunal and choosing which violations to prosecute (e.g., Mégrét 2001). Yet, there is surprisingly little theory or research that accents the *continued* refractory role of political interests and ideologies in the everyday organization and operation of international criminal law (Hagan 1989; but see Dezalay and Garth 2000). This is so despite the high degree of journalistic attention that is paid to the everyday work of the ICTY, including the widely reported Foca rape and Srebrenica genocide trials, and the successful indictment but languishing trial of Slobodan Milosevic, which ended without a verdict upon his death in 2006 (Judah 2002; *Prosecutor v. Milosevic*, Mar. 14, 2006).<sup>4</sup> An elaborated conflict perspective, focusing not only on law creation but on its daily organization, requires that we link continuing analysis of the *external* political contestations over the evolution of this field to an analysis of the changing *internal* practices of court leadership figures and the organization of work groups and activities within the court.

The challenge is to theoretically understand the alignment and realignment of external interests and ideologies with court leadership and internal court operations. This is key to understanding *where* political contestations emerge in this field, and *how* they influence international legal developments. As we discuss below, this requires a methodological approach designed to focus on institutional change and political contestations—that is, it requires seeing an institution like the ICTY as a site of continual and dynamic change.

We suggest that this emphasis on the ongoing role played by political interests is particularly important for developing a more fully elaborated conflict theory of international legal fields. In the domestic context, Western criminal courts are typically organized into judicial, defense, and prosecutorial divisions that are linked to organized policing agencies, possibly so that bureaucratic imperatives can forestall external political influence (Dixon 1995). In contrast, international criminal courts have an overtly political quality to even their most routine and essential legal tasks. These courts lack well-developed links to policing agencies (Sadat and Carden 2000), and therefore require proactive political liaisons, working on the international stage and through sovereign states. The assistance of states, then, is a key element in implementing international norms of criminalization (Schabas 2001), and for this purpose local political forces determine the very viability of the transnational.

Not surprisingly, many of the states concerned in these international criminal prosecutions—whose police forces are crucial to arresting defendants

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4. This is not restricted to the Yugoslavia trials. Successful prosecutions at the ICTR, such as the conviction of “hate media” leaders, have received little theoretical or research attention (but see MacKinnon 2004); and while the revocation of “sovereign immunity” is debated in the Pinochet proceedings, there is little attention to the mixture of political interests and legal doctrines that coalesce in this process (but see Sugarman 2002).

and collecting evidence (Reiss 1974)—are themselves experiencing periods of significant conflict and change. The task of negotiating with these states, and inducing their cooperation (often in quite illiberal ways) (Meyer 1987), falls to the prosecutor's office in international criminal tribunals. This office must balance political and legal strategies, and link arrests with the collection of evidence, the organization of prosecutions, and the completion of trials (Scharf 2000). This dynamic makes the prosecutor's office the focal point for the *continued* imposition of external political will, and therefore the scene of ongoing *internal* office politics as well.

## EXTERNAL POLITICS AND INTERNAL EFFECTS

We return, then, to the ICTY. The Clinton Administration under the mantle of liberal legalism cautiously and sometimes surreptitiously supported the creation and mobilization of the Tribunal. Yet once the ICTY was established through this political process, there remained key political questions to be answered: if this largely Western-sponsored Tribunal was going to pursue a liberal legal agenda, *who* would be prosecuted, *how* would the prosecutions take place, and *to what extent* would the prosecutorial mandate be pursued?

These are political questions about the mobilization of law (Black 1973), and at the ICTY they have been addressed by promoting a liberal legal framework of due process and defensible standards of evidence, the possibility of acquittals, and the prospect of proportionate punishments (Bass 2000). This surely created political dilemmas when applied inconsistently, particularly with economic and political pressures brought to bear on Balkan states to turn over defendants (Hagan and Levi 2005). But even *within* the political frame of a liberal legal framework, pursuing these norms created political dilemmas at the ICTY's operational level. Organizationally, to prosecute high-level persons required the proactive development of a tightly coupled criminal justice operation leading to arrests, and the accumulation of persuasive evidence that would facilitate convictions. Making arrests required aligning the legal authority of the ICTY with the armed and coercive capacity to take indicted suspects into custody. This required political intervention, backed by the threat of armed force, directly or indirectly with the acquiescence of the United States. This meant the interests of the ICTY and the United States would have to converge, or more pointedly, not diverge.

Most recently, this liberal legal agenda has confronted a challenge from the Bush Administration and its political efforts in the United States, which proactively emphasize the exceptional immunity of the United States and other peacekeeping entities from potential prosecution. Whereas the strategy of liberal legalism may have been an organizational boon for the ICTY, newer strategies of legal exceptionalism and ad hoc legalism have asserted the time and place bound impermanence of the field as a whole.

As with the earlier promotion of a liberal legal agenda, this political intervention cannot be studied as merely external to the Tribunal. It has required a shift in the organization of the ICTY, and a scheduled end to new war crimes investigations in the Balkans. In response to these external political initiatives, we will see below that investigators have been displaced and replaced in importance by lawyers, whose mandate is to oversee the Tribunal's "completion strategy," and who are thereby charged with winding down the ICTY's operations. Through this shift in prominence and personnel, the change in external political influence has placed courtroom law in resource competition with crime scene investigation: and the increased reliance on lawyers provides a mechanism for preempting new investigations that could have political repercussions. Instead, emphasis is placed on the development of more specialized court work that defuses potential conflicts into more readily circumscribed doctrinal disputes and "pure law" (Bourdieu 1987; Dezalay 1986, 103; see Wacquant 2001, 118).

In sum, the key to developing a conflict theory of international criminal justice involves establishing how the shifting external political ideologies of liberal and ad hoc legalism and legal exceptionalism are linked to the internal realignment of system operations. A conflict theory can highlight these realignments by explaining the expansion and contraction of international criminal law as an ongoing political process, in which the local and global are imbricated—thereby linking this field to the conflictual politics that drive, limit, and underwrite it.

## FROM CONFLICT THEORY TO SOCIAL MOVEMENTS AND INTERNATIONAL CRIMINAL JUSTICE

In elaborating a conflict theory of international criminal justice, internationalization itself brings a further dimension to the theoretical stage (Jenness 2004). The challenge involves understanding the more amorphous organization of transnational legal settings (Riles 2000) to grasp the mechanisms through which political interests operate, and the effects that different political opportunities and pressures place on the personnel that make up this field. Most notably, in the international legal context, we find a prominence of nongovernmental organizations (NGOs) with varied relationships to states (Keck and Sikkink 1998; Mathews 1997). As a result, there is a need to link conflict theory's emphasis on the political sphere with social movement analyses of the recruitment, mobilization, and retention of legal actors (e.g., McAdam, McCarthy, and Zald 1996), who often enter international fields at the behest of movement activists.

Although sociological theories of crime and law often pay attention to social movements, there remains a state-centric quality to these analyses, since it is *in* and *through* the state that these movements seek to gain sway



over the legal process (e.g., Chambliss and Seidman 1971; Eskridge 2002; Gusfield 1963; Quinney 1970; Rubin 2001; Sellin 1938; Sutherland 1956; Turk 1969; Vold 1958). In international settings, however, one finds a political dynamic that includes states, but often in a decentered way (Slaughter 1997, 2000). As a result, understanding the role of social movements in establishing international norms requires attention to states as well as to transnational actors working through NGOs to influence politics and achieve legal reform (Keck and Sikkink 1998). As Mathews (1997, 58–59) suggests:

Until recently, international organizations were institutions of, by, and for nation-states. Now, they are building constituencies of their own, and, through NGOs, establishing direct connections to the peoples of the world . . . Behind each new [international] agreement are scientists and lawyers who worked on it, diplomats who negotiated it, and NGOs that back it, most of them committed for the long haul. The new constituency also includes a burgeoning, influential class of international civil servants responsible for implementing, monitoring, and enforcing this enormous new body of law.

While Mathews may heuristically overstate the declining power of states (Slaughter 1997), the point is that attention must be paid not only to the political promotion of interests through the state, but also to their promotion in more diffused locations, and in particular in institutional settings such as the ICTY.

One finds at the ICTY two groups of actors active in *creating* the field and in its *continued* sociopolitical development. Social movement activists, and in particular women's groups, were essential in developing public awareness of the civilian casualties of the Balkan wars. By the fall of 1992, women's and human rights groups had joined with the print and television media to provide a chilling picture from Bosnia of massacres, rapes, expulsions, and detentions that was reminiscent of the Nazi atrocities. Helsinki Watch prepared a two-volume report on *War Crimes in Bosnia-Herzegovina* (1992–93) and demanded international action to *Prosecute Now!* (1993). The Chair of the Commission that paved the way for the ICTY, Cherif Bassiouni, was able to boast that "we had almost 30 feminist organizations, mostly from outside the U.S., many German, French and other organizations that had been active in fighting violence against women and rape" (Hagan 2003, 52).

However, once the Tribunal gained funding and contingent support from powerful states, ICTY leadership and staff began to create distance between social movements and the Tribunal. Movement activists were not hired for positions, and once the ICTY attained a more secure footing, the Office of the Prosecutor ceased meeting regularly with activists. Early in her term as Chief Prosecutor, Louise Arbour remarked that "we have to stop talking to the NGOs. We're not going to make arrests if we spend our time talking" (Hagan 2003, 100). A lawyer who was present in the early period of recruitment

in the ICTY's prosecutor's office emphasized the concerted effort "to get well balanced people, not to get 'political animals'; not to get too many persons who are more human rights activists than professional criminal justice lawyers and investigators" (see Hagan 2003, 66).

Thus, once the social movement activists were appeased through the creation of the Tribunal, they were largely excluded from its daily operation; and these activists increasingly had other forums to which they could turn, such as the International Criminal Court. Meanwhile a second ICTY constituency was recruited, those who Mathews (1997, 59) refers to as the "bourgeoning, influential class of international civil servants." At the Tribunal, these were mostly lawyers and investigators, hired from Western countries to promote the work of the ICTY. These new recruits may themselves be contemplated as professional activists, with perhaps even more clout than those they replaced—but while these professionals viewed their work as an opportunity to be involved with a transnational social movement, in this role they did not explicitly invest in the same overt political commitments.

We will see that this alternation of individuals made the Tribunal more vulnerable to a new era of political influence. Disengaged from its social movement base, the Tribunal was more politically exposed to the sway of the state. So while this detachment may have added a sense of objectivity and professionalism to the Tribunal's pursuit of liberal legalism, it also removed a source of resistance to political intervention. As we discuss below, the shift in U.S. policy later brought domestic politics to bear in a way that allowed and received little resistance.

## THE ROLLING REVISIT AND THE ICTY

The ICTY has a sweeping U.N. 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. The focus of this study is on the Tribunal's Office of the Prosecutor (OTP) and the three ICTY courtrooms where the prosecution's cases are brought under judicial and defense scrutiny.

This study is based on a two-wave panel survey and personally tape-recorded and transcribed interviews with a one-third sample consisting of more than one hundred employees of the OTP, as well as on courtroom observations of ICTY trials and resulting trial transcripts. The two waves of the survey were conducted in 2000–2001 and 2003–2004. The personal interviews were about one hour in length and conducted throughout the five-year period, from 1999 to 2004, allowing for a rolling revisit of the ICTY as a field site (Burawoy 2003; see Hagan 2003). As such, this study engages two newly reinvigorated ethnographic legal traditions, one focusing on courts

and the other on efforts to promote the rule of law more generally (see from Sudnow 1965; Cicourel 1968; Emerson 1969; Feeley 1979; to Yngvesson 1993; Riles 2000; Latour 2002). The goal is to explain, from the inside-out, how the ICTY has developed within a new juridical field of legal practice (Bourdieu 1987), and to explain the links between *external* political forces and the *internal* organization of the Tribunal.

Over the extended course of this study, the presence of the first author at the ICTY continued for periods of one week to a month, every second to third month, with courtroom observations filling in the periods between interviews. The research included repeated interviews with the first U.S. Ambassador on War Crimes, 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 included lawyers and investigators in largest numbers, but also data and case managers, crime and military analysts, clerical assistants, and several demographers and historians. Leadership figures at the Tribunal were interviewed at greater length and repeatedly during the rolling revisits. The interviews from this research are quoted below with reference to respondent identification numbers and interview dates, with multiple interviews with the same respondent further denoted by an alpha notation.

The interviews are the central focus of this article and are analyzed using the relational biographical approach of Dezalay and Garth (2001, 355; 2002, 9–10), who draw on Bourdieu and Wacquant (1992) in developing their methodology. They note that this approach is premised less on the individual stories that emerge from interviews than on the collective accounts that can reveal the habitus and practices of a legal field. “Ideally,” Dezalay and Garth (2001, 355) propose, “we . . . see how groups move into the field of state power, what they bring, how they operate, how they are oriented, and what changes are produced in the institutions and organizations operating in the field.” This is done by exploring, through personal interviews, how individuals are situated in fields of relationships that are constantly changing. The most notable change in our analysis is in the state-based political influence of the Clinton and Bush regimes, as exercised through the prosecutorial regimes of the respective ICTY Chief Prosecutors, Louise Arbour (1996–1999) and Carla Del Ponte (1999–present).

The rolling quality of the field interviews and the two-wave panel survey at the ICTY provide the opportunity to see the operation of external political influence on the internal organizational practices of the ICTY and its prosecutors. Burawoy (2003, 668) notes that field work is often seen as a relatively continuous process that is to be aggregated and synthesized when all the “data” ultimately are in hand. Surveys may have a similar quality when they are done in a succession of sites, such as schools. However, when the sites and the individuals are tracked over longer periods for survey purposes, the creation of a longitudinal panel is often undertaken as an opportunity to

check for continuity versus change. Burawoy (2003, 669) adds that the same can be true of rolling ethnographic field visits, and that “fields have dynamics of their own that often erupt with outside interventions.”

Rolling revisits to the field are opportunities in Burawoy’s approach for a reflexive ethnography that has both a realist as well as constructivist focus.

It demands that the field be understood as always in flux, so that the rolling revisit records the processual dynamics of the site itself. But, more than that, the rolling revisit demands attention to disruptions of the field from outside, which shift its character and take it off in new directions. Still, remember that this field-in-flux can be grasped only through theoretical lenses and through the ethnographer’s interactions with those he or she studies. (2003, 669)

The challenge is thus in knowing and understanding when, how, and why the observed changes are happening.

The ICTY study was confronted with a major external shift with the election of George Bush and his Administration’s insistence on an ad hoc and legal exceptionalist approach to international criminal law. This is precisely the sort of external change that Burawoy emphasizes. Focusing, for instance, on William Foote Whyte’s *Street Corner Society* (1943), Burawoy (2003, 669) notes the ethnographic importance of understanding social change from within the research field, while considering specifically how this change is affected by “external events such as election campaigns and police raids.” Of course, *neither* liberal legalism nor the more recent ad hoc legalism and legal exceptionalism are free of political influence—and the point of a conflict approach is to focus on how these have directed the field of international criminal law. And as Burawoy notes, the changing political direction in turn politicized the theoretical gaze through which we ourselves observed and engaged the ICTY field setting.

## THE LIBERAL LEGALIST BEGINNING

While early on the ICTY was largely a product of social movement activists, once institutionalized, the primary obstacle to initiating the Tribunal’s work was the problem of making arrests. The first Chief Prosecutor, South African Justice Richard Goldstone, did not have a criminal law background (R#134a:Dec. 6, 2000) and left the ICTY after two years, having issued more than seventy indictments and generating financial security for the Tribunal, yet with only a handful of low-level defendants in detention (Hagan 2003, 60–93). The second Chief Prosecutor, the Canadian Justice Louise Arbour, was experienced in criminal law and arrived with the knowledge that she needed to bring higher-level defendants to The Hague for trial (R#128:Feb. 1, 2001). She did this by adopting a “sealed indictment” strategy that received

the tacit approval and assistance of the U.S. Secretary of State, Madeline Albright, even though the Clinton Administration was careful to maintain the deniability of its assent and assistance (R#179:May 7, 2001). The success of this strategy made the ICTY a functioning legal reality and, in the process, lifted the morale of the OTP staff, especially its investigative staff.

To demonstrate the sometimes surreptitious political influence of the Clinton Administration in establishing the ICTY as a functioning liberal legal institution, it is instructive to review the first use of the sealed indictment strategy against an elected public official charged with Balkan war crimes. The official was the Croatian Serb Mayor of Vukovar, Slavko Dokmanovic, who was held responsible for a massacre of 200 individuals whose bodies were exhumed from a nearby mass grave. The success of this arrest was built on the element of surprise and vulnerability preserved by sealing the Dokmanovic indictment and using this element of secrecy to lure this “person of interest” back from his new home in Serbia with a false promise that he could negotiate the sale of property he owned in Vukovar.

The plan was coordinated by a U.S. Justice Department lawyer, Clint Williamson, who was seconded to the Tribunal and was advising the OTP investigation team that exhumed the 200 bodies from the Vukovar hospital massacre. Williamson developed his plan with a general in the U.S. Air Force Reserves, the career U.S. and U.N. diplomat Jacques Klein, who was the appointed U.N. Administrator in Eastern Croatia, which included Vukovar (called UNTAES). Williamson first met with Klein at the U.S. Embassy in Brussels to confirm that Klein, as the newly appointed U.N. Administrator for the area, would facilitate this crime scene investigation: “Klein was very supportive of this and said ‘of course, we’ll make it happen’” (R#200:May 7, 2001).

Before Prosecutor Arbour was even officially sworn into office, Williamson arranged for her to visit the Vukovar massacre exhumation site and meet with General Klein. Williamson then again met with Klein to establish a plan for the arrest of Dokmanovic under a sealed ICTY indictment. “And so I met with Klein and Klein said ‘yes’ he would do the arrest and he made a Polish special forces unit available to work with us on this. There was a U.S. army intelligence officer captain who was there and I really worked very closely with him and with the Poles to set up a scenario where we could make the arrest” (R#128:Feb. 1, 2001).

Arbour, as well, signed on to the plan (R#103a:Nov. 19, 1999), reasoning, in Williamson’s view, that if this secret indictment plan worked, it would then “give her an ace in the hand to go to NATO and say, ‘look, this can be done, they just did it in Vukovar and this was not a well armed U.N. force up there. You’ve got all of the might of NATO behind you, certainly you can do the same in Bosnia’” (R#128:Feb. 1, 2001). The plan worked: when Dokmanovic returned to Vukovar, he was met by Polish soldiers who handcuffed and hooded the shocked former mayor and took him to a military

base. Williamson reported that there a U.S. State Department operations person and a U.S. intelligence officer then helped coordinate his transfer to a Belgian plane that flew him to The Hague and the ICTY detention center (R#200:May 7, 2001): “Klein was out of the country at that time—I was . . . in charge from the ICTY’s side. There was a guy there from the U.S. State Department who was there who was trusted by Klein, and then this U.S. Army Captain [from military intelligence] who was there, so the three of us [all Americans] really ran the different aspects of the operation.”

One way of describing this turning point in developing a strategy that would yield arrests is to conceive of it as an arm’s-length American transaction, a characterization that brought the following interview response:

R#200: This guy who was from the State Department, at this point he was effectively working for Klein over there. He had been seconded to work for Klein. . . . I guess by coincidence the three main players on the ground, or the four main players, were all American—it was Jacques Klein, myself from the Tribunal, the U.S. Army captain heading the military side, and then this State Department advisor dealing with some of the political issues. But I think if anything, the—well the State Department was more supportive certainly than the Defense Department was.

Q: At what level was this support?

R#200: We were still only seven or eight months after the U.S. troops had deployed into Bosnia, and there was this huge fear of getting involved in mission creep, and all of this, and so the Army captain was involved, I think acting much more under sort of Klein’s orders than under the Defense Department hierarchy, and so the U.S. government, the State Department, although it was supportive of the arrest, was not that actively involved, and this was very much something Klein had pushed, albeit with the blessing of Madeleine Albright.

Q: That’s interesting—anyone like Scheffer [U.S. Ambassador on War Crimes] or anyone like that involved as well?

R#200: Scheffer called Kofi Annan and told him in advance that this would happen and Kofi Annan had given his blessing to it.

The point, again, is that while Klein was then serving as a U.N. Administrator, he still held the rank of a U.S. Ambassador and was a career U.S. diplomat, as well as a general in the U.S. Air Force Reserves.

The State Department became further involved after Dokmanovic was delivered to The Hague, as decisions were made about announcing the arrest through the press. Williamson reported that he spoke to Arbour about getting U.S. help with the announcement: “I spoke to her about Klein sending this guy that was from the State Department that had been there so that we could coordinate an approach on press policy. Then he in fact flew up for Monday morning and we met with him” (R#200:May 7, 2001). As a result,

although the ICTY has no arrest authority, *The Observer* reported that “in a daring undercover operation, a snatch squad sent by the International War Crimes Tribunal has captured the former Mayor of Vukovar,” (Doyle 1997), and the *International Herald Tribune* added a quote from Jacques Klein saying that “it was the Tribunal, rather than the U.N. peace-keepers that carried out the arrest” (Reuters 1997). Neither of these accounts fully or accurately depicts the arrest we have described. To add to the confusion, President Clinton (1997) issued a statement through his press secretary saying, “I congratulate the ICTY and UNTAES on their successful apprehension.”

Within weeks of this first arrest, U.S. General Wesley Clark assumed command of NATO. After meeting with Arbour and learning of her sealed indictment strategy, Clark began to authorize the use of first British and then U.S. troops to make arrests. Within a year, the number of defendants in detention in the ICTY’s twenty-four-unit facility more than tripled, many of whom were apprehended on the basis of sealed indictments. At a minimum, the Clinton Administration and Madeleine Albright had used an indirect method of support to help Arbour initiate and complete an arrest policy that led ultimately to the indictment (sealed initially for five days) and transfer of the first sitting head of state, Slobodan Milosevic, for trial on charges of war crimes. The Milosevic indictment’s assertion of extraterritorial jurisdiction was, within the OTP, a high point of the liberal legal pursuit. It would also prove to be a high point in internal morale that would not be long sustained.

## SURVEYED SIGNS OF CHANGE

Our first wave survey of a one-third sample ( $n = 109$ ) of the OTP personnel in 2000–2001 came at the approximate high point in office morale. Arbour had recently left the ICTY to be sworn in as a Justice of the Supreme Court of Canada, soon after successfully indicting Milosevic, and was replaced by the new Swiss Chief Prosecutor, Carla Del Ponte, who, in June of 2001 was able to have Milosevic transferred from a Belgrade prison to the Tribunal detention center. The holding cells were now well stocked with defendants who were being regularly brought to court for trial. Investigation teams were moving rapidly between the field and the Tribunal, developing evidence for new indictments and trials, while trial teams were busily occupied preparing and going to court. Eleven investigation and trial teams comprised the fundamental organizational units of the Tribunal. Both types of groups included investigators, lawyers, clerical staff, and specialists. The Tribunal workload and resources were still, in 2000–2001, steadily growing in size and complexity.

The first wave survey included a set of work satisfaction measures that asked the respondents to estimate how important OTP employees expected their current work to be to them in ten years, how satisfied they were with their current work, and whether if given a choice they would again choose

to do the work they were now doing. These items formed a scale with an alpha reliability coefficient of .63 and a mean of 12.47. However, when we conducted the second wave survey in 2003–2004, less than half of the employees ( $n = 51$ ) were still employed at the Tribunal, a first indication of significant change. The first-wave responses for this remaining group on the work satisfaction scale had been 12.73, indicating that, as might be expected, previously less satisfied employees had left. The responses of the employees who were still at the ICTY and retained in the second-wave survey using the same work satisfaction items was only 11.92. This statistically significant decline in work satisfaction between the 2000/1 and 2003/4 surveys was a clear indication of a drop in morale at the ICTY.

To further distinguish those who left the ICTY from those who stayed, we estimated a logistic regression equation with retention in the sample (coded 1) as the outcome. This prediction equation first included measures of age, gender, year of first employment at the ICTY, and highest educational degree earned. Next we included measures of workplace authority, indicated by a five-point self-report scale that ranged from nonparticipation in decisions to direct participation in all decisions, and workplace autonomy, indicated by a four-point self-report scale that ranged from designing no aspects of everyday work to most aspects. Two further measures included work satisfaction, as described above, and organizational relevance, as indicated by rankings of the satisfaction taken in the ICTY as an organization, in terms of its influence in public affairs, and the opportunity to participate in significant matters. The alpha reliability coefficient for the latter scale was .70. Finally, a binary measure was included of whether the employee's work was on an investigation team (coded 1) as contrasted with a trial team (coded 0).

As anticipated earlier, in Table 1 work satisfaction (T1) significantly increased ( $b = .322, P < .05$ ) the likelihood of retention as an employee at the ICTY. In the second wave of the panel survey, on the other hand, more highly educated employees ( $b = -.433, P < .01$ ) and the members of investigation teams ( $b = -.796, P < .05$ ) were less likely to have been retained and were more likely to have left. Since more highly educated employees tend to have better job prospects, it was not surprising to find them more likely to move on to other opportunities. However, investigation positions in international organizations are less common and more difficult to acquire for less educated respondents.

We looked for further clues in Table 2 as to why investigators had left by analyzing the work satisfaction of the employees who remained. We first regressed the second-wave work satisfaction scale on the same variables as in the retention equation, with the exception that feelings of organizational relevance also were measured in the second wave. Without organizational relevance in the equation, the same variables that predicted retention at the ICTY predicted T2 work satisfaction: that is, work satisfaction at T1 predicted continuity in work satisfaction at T2 ( $b = .441, P < .01$ ), while



**TABLE 1.**  
**Unstandardized Logistic Coefficients from the Regression of T2 employment at ICTY on Demographic and Work Characteristics**

Independent Variable	Coef. ( $\beta$ )	Exp ( $\beta$ )
Year of Birth	.004 (-.029)	1.004
Gender	.332 (.433)	1.393
Year Began at ICTY	.009 (.012)	1.009
Highest Degree	-.433** (-.158)	.649
Authority (T1)	.145 (.199)	1.156
Autonomy (T1)	-.021 (-.25)	.979
Organizational Relevance (T1)	-.029 (.119)	.981
Work Satisfaction (T1)	.322* (.167)	1.379
Investigation Team	-.796* (-.474)	.451
Constant	-3.884 (3.117)	.021
Model chi-square	13.823	
Degrees of Freedom	9	
Number of Cases	109	

Note: Numbers in parentheses are standard errors. Dependent variable equals  $\phi$  if employed at ICTY in 2003 second-wave survey.

\* $p < .05$ .

\*\* $p < .01$  (one-tailed tests).

educational achievement ( $b = -.441$ ,  $P < .05$ ) and investigation team membership ( $b = -1.544$ ,  $P < .01$ ) predicted reductions in work satisfaction. Since T1 work satisfaction was included in this second OLS equation, the results constitute a “change score” analysis. The second equation estimated in Table 2 added the T2 measure of organizational relevance. Inclusion of this variable completely eliminated the significance of investigation team membership ( $b = -.533$ ,  $P > .05$ ).<sup>5</sup> The implication is that the loss of a sense of organizational relevance is the source of the reduction of morale among investigation team members at the ICTY, significant numbers of whom had left or were now indicating dissatisfaction with their employment.

5. Since about half of the sample was no longer present at T2, it is possible that this attrition is a source of bias in the T2 regression analysis. To address this possible issue of sample selection bias, we used Heckman's (1979) procedure to re-estimate our final equation in Table 2. As indicated in Table 1, highest degree, work satisfaction, and investigation team membership are the variables that significantly predict attrition. We examined several equations that varied the inclusion of the significant predictors of attrition and then included the resulting correction factor in the equations for T2 work satisfaction. The results varied marginally; however, the essential finding for our purpose is that the influence of organizational relevance continued to substantially reduce the effect of work satisfaction at T1, as well as investigation team membership on work satisfaction at T2. The utility of the Heckman procedure depends on the selection model being properly specified, with the correct functional form, and with normally distributed errors. Nonetheless, we can at least say that our confidence in our results is not undermined and is provisionally increased by the application of this procedure. These results are available on request.

TABLE 2.

Unstandardized and Standardized OLS Coefficients from the Regressions of T2 Work Satisfaction of ICTY Employees on Demographic and Work Characteristics

Independent Variable	Eq. (1)		Eq. (2)	
	Work Satisfaction (T2)		Work Satisfaction (T2)	
	Unstandardized (b)	Standardized ( $\beta$ )	Unstandardized (b)	Standardized ( $\beta$ )
Year of Birth	.002 (-.04)	.076	.009 (.038)	.384**
Gender	.007 (.559)	.020	.377 (.466)	.100
Year Began at ICTY	-.008 (.019)	-.065	-.009 (-.015)	-.076
Highest Degree	-.348 (.203)	-.303*	-.383 (-.166)	-.326*
Authority (T1)	-.200 (.221)	-.143	-.151 (-.182)	-.107
Autonomy (T1)	.009 (.294)	.050	-.017 (-.243)	-.010
Work Satisfaction (T1)	.441 (.204)	.317**	.287 (-.17)	.207**
Investigation Team	-1.544 (.638)	-.437**	-.533 (.593)	-.148
Organizational Relevance (T2)	—	—	.695 (.149)	.656*
Constant	7.793 (4.290)		-0.872 (4.118)	
R <sup>2</sup>	.241		.532	

Note: Numbers in parentheses are standard errors.

\*p < .05.

\*\*p < .01 (one-tailed tests).

## AD HOC LEGALISM AND THE LEGAL EXCEPTIONALIST TURN

Burawoy (2003), in directing our conceptual and methodological attention to several possible sources of change in return visits to field sites, suggests where to look and how to understand organizational change in ethnographic research. In particular, he suggests a linkage in looking for structural understanding of institutional change, emphasizing that “the emphasis on ‘external forces’ should not come at the expense of the examination of internal processes. The mark of the best structuralist revisits is their attention to the way internal processes mediate the effect of external forces” (Burawoy 2003, 661). It follows that internal processes can be shaped not only by the presence of actors and forces, but also by their absence. In our case, the distancing of human rights and social movement activists from the work of the Tribunal meant that there was no committed internal line of defense against external political challenge.

The externally driven politics of change at the Tribunal were quite apparent, and challenged the movement-initiated form and pace of the

ICTY's international legal agenda. Although the U.S. Secretary of State Powell had worked to get the Federal Republic of Yugoslavia to arrest and transfer Milosevic to the Tribunal by the summer of 2001, the Bush Administration was now also placing pressure on the Tribunal to complete its investigations and trials. The Administration's adamance about winding down the ICTY was intensified when the United Nations announced, soon after the opening of the Milosevic trial in February of 2002, that sixty countries had ratified the Rome Treaty authorizing a permanent International Criminal Court (ICC) (United Nations Information Service 2002a, 2002b). The Administration was willing to tolerate and even pay much of the cost through the United Nations for the Tribunal as a transient institution of international law, but it also wanted this institution to publicly reflect its impermanence and acknowledge its pending closure as a counterpoint to the prospect of a permanent ICC.

The external political push for ICTY closure was articulated by the new Ambassador for War Crimes Issues, Pierre-Richard Prosper (2002), who appeared before a congressional international relations committee to deliver a pointed statement about "The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?" His remarks were widely reported in the media (e.g., Barber 2002; Bennett and Hoyos 2002; Buncombe 2002; Richter 2002) and included the conclusion that "in both tribunals" the process "has been costly, has lacked efficiency, has been too slow, and has been too removed from the everyday experience of the people and the victims." While Human Rights Watch (2002) issued a statement in defense of the Tribunal's progress (see also Crossette 2002; Neier 2003), the professionalized distance that now existed between human rights groups and the Tribunal made it unlikely that much else would be done in terms of a social movement response, or that Tribunal lawyers or investigators would adopt the role of movement-motivated actors in opposition to this challenge.

Within a week, Prosper met with the Tribunal's Chief Prosecutor, Carla Del Ponte (Kelemen 2002; *New York Times* 2002). His visit was coordinated with parallel efforts by the Administration to characterize a permanent ICC as a potential "rogue court" from which U.S. citizens should be granted immunity. This argument for legal exceptionalism represented a symbolic challenge to the liberal legal agenda. Meanwhile, the Administration wanted a check on the ICTY's longevity, and Ambassador Prosper found in Del Ponte a prosecutor who saw little alternative but to accommodate and implement the Administration's ad hoc intentions.

Del Ponte does not convey her predecessor Arbour's aptitude for using the media to advance and defend Tribunal goals, and if Arbour had established a tactful distance from the human rights groups, Del Ponte was now paying them little attention at all. Within the Tribunal, her relations with the staff also appeared fraught: one senior colleague remarked that "people skills" are not Del Ponte's "thing" (R#128:Aug. 3, 1999), while an administrative aide,

who departed soon after Del Ponte's arrival, lamented that "I just couldn't speak to her . . . I just figured that it wasn't going to work at all and it really didn't work at all. I couldn't communicate with her" (R#201:Apr. 10, 2004).

Del Ponte is nonetheless acutely attentive to the political dimensions of her position as ICTY Prosecutor. The colleague cited above reports that "this is a key feature of her administration, and she has a small cluster of people around her who she trusts." Del Ponte's core group reportedly keeps close tabs on the international and political media: "she has two P4s (a U.N. administrative rank) and a P3 who do nothing but read newspapers." Another colleague commented on a reluctance to consult beyond this circle by observing that this is "the way she operates. I mean she has an idea, that's the idea, that's the way she wants things to happen. You know, it's not going to be complicated" (R#201:Apr. 10, 2004).

Del Ponte and her inner circle saw the Bush Administration's push for ICTY closure coming, and, in anticipation, she initiated her own reorganization of ICTY investigation work in the spring of 2001. Del Ponte built on her experience with the continental civil law tradition in which investigatory power tends to be more centrally located with judges and prosecutors, rather than with a more independent police authority in the common law tradition. From the civil law perspective, a sharp separation of office investigation and prosecution functions was impeding more strategic efforts to prepare evidence and cases for trial (R#124:July 5, 2002; R#111c:Feb. 1, 2001). Del Ponte responded by placing legal advisers in charge of investigation teams, which meant reducing the authority and independence of investigators. This also meant changing internal operating practices and the balance of power on investigation teams, which from the beginning of the Tribunal had been led by investigators.

Patrick Lopez Terres, who was trained as a lawyer in the French civil law tradition, was chosen to replace a departing Australian Chief of Investigations who had overseen the previous common law model. Lopez had no doubts about why Del Ponte selected him for the job: "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." He continued, "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:July 2, 2002).

This organizational change in OTP investigations was implemented before as well as during the aftermath of 9/11, and it was a sign of further changes to come. It was the beginning of an organizational de-emphasis on investigation work, but one whose impact at first seemed manageable within the culture of the OTP. An official in charge of implementing the change remarked that "the negative impacts of it were overcome fairly quickly," noting that while "there might have been one or two individuals who have

left in recent times who sort of were bitter to the end,” most of the investigators accepted the change in leadership of their teams and got on with their work (R#111d:Apr. 10, 2004). At this stage, it was not the substance of the changes being imposed that raised concern. He added, “it was a natural change . . . , in the end the thing I take issue with was the way it was implemented.”

Thus, at least in retrospect, it is apparent that it was the process, and not the substantive outcome, that was the issue. The process of policy change anticipated the internal dynamics that would guide the response to external political pressure. Management-level officials in the OTP particularly lamented “the top down sort of way it happened.” The policy ultimately was described by Del Ponte in Vietnam-era language as an “exit” or “completion strategy” in which the Tribunal would end twenty current investigations of one hundred suspects by 2004, finish trials by 2008, and complete all appeals by 2010 (see e.g., Office of the Prosecutor 2002, 2004). U.S. Ambassador Prosper joined Prosecutor Del Ponte in the above noted press conference to say that they were “side by side with the tribunal” (Kelemen 2002). But this public display of consensus at the higher levels concealed a growing discontent and resentment in the administrative as well as lower ranks of the OTP.

Thus, on a research revisit to the Tribunal in the spring of 2004 and the reporting of the survey finding of a drop in work satisfaction within the OTP, no one seemed surprised. The first ICTY administrator (R#202:Apr. 10, 2004) interviewed was in a position outside the OTP and quickly indicated that “it’s no secret, I mean . . . [several members of the Prosecutor’s managerial team] are in the process of leaving, basically because of problems or because of certain issues of the Prosecutor, or loss of confidence in them, or whatever. I’m sure they’ll tell you the details.” He concluded his assessment of the turmoil in the management team by surmising that “the relationship doesn’t really exist anymore. . . . She didn’t believe that they were loyal to her is what it comes down to.”

The principals in this dissolving relationship were even more direct in their comments, and they located the source of the problem with the U.S. and British determination to bring the ICTY’s work to an early end. A leading OTP managerial figure (R#111d:Apr. 10, 2004) remarked that,

The . . . area where there has been a negative change . . . has been in . . . this completion strategy. Trying to make sure that we reduce the number of investigations that we’re doing, thereby reducing the number of trials that we will have to do, and I think that amounted to political pressure on the Tribunal, and I think it was inappropriate and amounted to interference with what we were doing. If the Security Council wanted to stop it, well then they have the power, but we didn’t believe it was appropriate for individual member states to be effectively dictating to us what their views were as to what we should be doing. And it got pretty close to that, so in that regard Pierre-Richard Prosper was

not our biggest supporter or our biggest friend, so I'd be very critical of him and the current Administration in that regard. But having said that . . . , there were other countries as well, like Great Britain.

For this insider at the Tribunal, the consequences of the external application of pressure by the Bush and Blair governments was clear. Pierre-Richard Prosper was the bearer of bad news, and the internal actions of Del Ponte were the crucial mediating mechanisms for its implementation.

Again, the first mechanism was the introduction of legally trained leaders into the investigation teams. The response, especially from middle management, was focused more on the top-down, hierarchical manner in which this change was imposed than on the realignment of power that it represented. "The real cause for concern," this senior official reported, "was rather the way Mrs. Del Ponte just basically said she had no confidence anymore in her senior staff, and she was going to implement this change and wouldn't discuss it with us . . . and issued an edict that this was the way it was to be done. It caused a lot of ripples when people couldn't understand why it was being done." This official was obviously disturbed personally as well as professionally, saying "it was a turning point in our relationship . . . it's been downhill ever since, she's just been waiting for me to leave. [She'll] probably be fairly happy now that I'm leaving."

The unfolding of operational policy in Del Ponte's OTP was increasingly seen as the hostage of outside pressures. Del Ponte coordinated her compliance with President Jorda of the Tribunal's judicial chambers, who announced that ICTY trials would end in 2008. This led one of the officials cited above to remark that "I don't believe that the 2008 deadline for the completion of trials is realistic. It was a date frankly that President Jorda plucked out of the air as far as I can see. We institutionally never really endorsed it, although Mrs. Del Ponte agreed with it; but again, there was no basis for the agreement in any realistic analysis of the work that had to be done. . . . We won't be finishing the trials until likely 2010, and then the appeals some years after that."

Del Ponte's addition to Jorda's declaration was to promise an end of ICTY investigations in 2004. Another senior prosecutor from the OTP mocked a joint appearance by Del Ponte and Jorda before the U.N. Security Council. He charged that "Claude Jorda and Carla Del Ponte went into the Security Council with this exit strategy as their completion strategy, with no . . . examination of the options, they did it in order to show the international community and the Security Council that they were—that they had succeeded in completing the task for the ICTY."

The implications of this response, in combination with the pressure from the Bush Administration and the Security Council, were nearly immediate for the ICTY's budget. A high official of the Tribunal explained in the spring of 2004:

What happened . . . in the current budget for this year and next year, we reached the magic psychological barrier of \$300 million dollars for the two year period. We went beyond that. And I think what we were seeking for this biennium was something like \$326 million, and for the people in New York, that was a bit too far, so they arbitrarily cut \$20 million off our budget to bring it back to the \$300 million mark. . . . There were lots of arguments as to where it should come from, and they were focusing on the investigations division, using the argument that, “well, if in 2004 you will see the end of the investigations and there are no more indictments, why do you need an investigation division?”

The result of this determination to cut the ICTY budget by \$20 million was that sixty-one positions were eliminated, almost all of which were investigator positions. The Chief Prosecutor’s commitment to begin no new investigations was used as a rationale for the budget cut.

Ultimately, this is why it came as little surprise to OTP insiders that the panel survey revealed a decline in work satisfaction among investigators at the Tribunal. A seasoned prosecutor (R#111d:Apr. 10, 2004) responded to the survey finding by saying:

It’s almost as if there’s been an air of panic creep into the place, particularly those who see their future in this Tribunal as being more long term than short term. And particularly if you’re on the investigation side. The whole introduction of the completion strategy and the dates that came with that made people realize that maybe it’s not going to be around as long as we hoped it would. . . . For the first time, they were seeing an actual downsizing on our part.

This same prosecutor concluded that “all those things put together introduce panic into the place, morale has gone down as a consequence, it’s gone down for other reasons as well, but you add that to the mix. There are a lot of people here who are not happy campers. We’re seeing a lot more people now seeking employment elsewhere.”

For the senior OTP managerial staff, the resulting challenge is to find a way, within a period of imposed ad hoc legal policies oriented to completion and closure, to pursue the legal ideals that inspired the establishment of the Tribunal with a liberal claim to universality. Thus, some of the internal OTP critics of Del Ponte’s compliance with this ad hoc policy have tried to be optimistic about their situation, noting that a paradoxical consequence of the departure of employees concerned with job tenure is that more committed individuals who value the Tribunal experience itself, regardless of its impermanence, might enjoy more prominence and establish a renewed sense of morale. There is some empirical support for this view in our finding that those who remain in the second wave of our panel survey, and express new dissatisfaction with their jobs, are nonetheless still motivated by concerns

about the organizational relevance of the ICTY. That is, their dissatisfaction was arguably combined with resolution.

Those people who are unhappy or uncertain will move on and then we will have these vacant positions, and then my guess is that people will still accept that you can get very valuable experience at this Tribunal, which is operational and doing important work. . . . I think we will still remain attractive for the type of people and expertise we need. So that being the case, we'll get out of this slump and we'll start to pick up again.

This same individual could not resist a final expression of dismay, however, at the ad hoc emphasis on disrupting the liberal legal pursuit of the ICTY, saying "again, being so successful in what we're doing, why would you want to 'curtain it' when there's no guarantee that any other court is going to be as successful?"

In a nutshell, that is the political cul-de-sac in which the ICTY has found itself—beholden to the liberal legal ideals that created it, and now faced with a political change resulting from domestic palace wars within the United States. And having distanced itself from the social movement and human rights community that fought to establish it, there is probably less institutional resistance to this change than might otherwise have been the case.

## THE VISIBLE POLITICAL HAND

The standard challenge to the establishment of international criminal courts is their alleged prospect of being politically hijacked by peripheral, rogue countries and out-of-control "Doctor Strangelove" prosecutors (Schabas 2001, 97). Yet, we argue that the more salient political problem of international criminal justice, at least in its formative period, is a prevalent tendency for major states to alternate in pushing and pulling such institutions in conflicting directions of liberal and ad hoc legalism. Liberal legalism advocates an expansion and institutionalization of international criminal law—albeit consistent with the pursuit of powerful interests, representing a more fluid sort of empire than might have been sought in the past (Chatterjee 2004). In turn, ad hoc legalism insists on its contraction and deinstitutionalization, with legal exceptionalism seeking yet further escape routes. The institutions charged with developing "transnational law" are thereby caught betwixt and between.

This problem can only partially be understood by viewing from outside the internal operations of international institutions, which are, alternatively, more meaningfully studied from the inside-out, and with close attention to changes in external-internal linkages. We have adopted a rolling ethnographic



revisit methodology to provide an account of change and uncertainty at the ICTY, with particular attention to its current prosecutorial predicament.

As investigators continue to leave the ICTY for positions in more secure settings, the OTP is left with vacancies that the Tribunal's completion and budgetary policies prevent it from filling. This means not only that new investigations of war crimes in the Balkans cannot begin, but also that selective priorities must be established among ongoing cases and those newly arriving in response to existing indictments. It is possible that some of the cases that cannot be actively pursued in The Hague can be referred back to the newly independent states of the former Yugoslavia. By this indirect process, the Bush Administration's ad hoc legalism encourages the relocation of war crimes cases from the ICTY to Balkan states.

Yet this international to local transition is more plausible in some state settings than others. There is broad-based agreement that the Bosnian judiciary is much better positioned and prepared to try Balkan war crimes cases than are the judiciaries in Croatia and Serbia (Ellis 2004; *Financial Times* 2004; Human Rights Watch 2004), whose militaries were more frequently the aggressors against Bosnia. For this reason, the United Nations and the ICTY have been more willing to facilitate transfers of cases to Bosnia than elsewhere. Partly as a result of internal conflicts within the OTP in The Hague, a new Deputy Prosecutor with firsthand experience in in-country operations has been appointed at the ICTY, while a high-level prosecutor from The Hague has been appointed as the Registrar (i.e., the head administrator) of the new Bosnian state court on war crimes. Both of these individuals are highly committed to the successful transition of war crimes cases into the Bosnian jurisdiction. The new Bosnian state court Registrar underlined, in an interview for this study, his commitment to ending the participation in this court of international judges and prosecutors, as well as himself, within one year.

The policy of eliminating investigators and ending investigations by the end of 2004 leaves mainly lawyers to finish existing cases. Yet, lacking investigators to assist the Tribunal as case "finders," the lawyers who remain are limited to their roles as "minders and grinders" (Nelson 1981). Organizationally, this political shift must be accommodated within the OTP, with more frequent pretrial release, financial assistance to defendants' families, and plea bargains (Combs 2002). Combined with the sorts of threats and promises of economic assistance that led to the transfer of Milosevic to the ICTY, these accommodations have increased the willingness of indictees to surrender to the Tribunal (Simons 2005). This in turn has increased the pressure on the Tribunal to process more cases and trials, and to do so more quickly.

In the earlier Clinton era of liberal legalism, the ICTY was on an institutional fast growth trajectory. Among some, there was even a heady hope that this Tribunal might transform itself into the permanent International Criminal Court. Yet, given the relationship of international criminal law to

powerful state interests, the Tribunal is now reversing course and taking up a new mandate leading to closure. The internal leadership of the ICTY has become a compliant part of the devolutionary ad hoc policy.

An elaborated conflict approach presents new opportunities for understanding the changing politics of the field of international criminal law. The restrictive attention that is often paid to the potential for a “runaway” international court ignores the influence of local (and especially U.S.-based) politics in the everyday social and legal organization of a transnational legal field. The eagerness of the ICTY to gain legitimacy, by distancing itself from the foundational social movements involved in its creation, has contributed to its ongoing vulnerability to the intrusion of domestic political struggles emanating from influential, sponsoring states—including Great Britain as well as the United States. As we indicate in this article, this is most evident when one examines the *internal* reorganization of personnel that has taken place in the Office of the Prosecutor at the Tribunal, as distinguished from focusing exclusively on the *external* politics of the Tribunal.

These findings resonate closely with parallel research on judicial independence in international settings. This work examines the extent to which judicial decision making in international courts is controlled by states—or whether international courts are instead motivated by politics of legitimacy and expertise that might transcend narrowly defined state interests (Alter 2004, 2006; Posner and de Figueiredo 2004; *American Society of International Law* 2005). Developing a grounded understanding of the relationship between international courts and state politics, however, requires attention to the opportunities and constraints within a given field, including attention to the legal tools, institutional capacities, and local politics that carry effects throughout (*American Society of International Law* 2005). A study of international criminal tribunals provides a critical angle for considering these “field effects” (Bourdieu and Wacquant 1992), since many of the political forces that seek to expand or constrain this area of law are mediated organizationally through the Office of the Prosecutor. Through this study, we find that a fuller understanding of the independence of international tribunals requires attention not only to judicial decisions, but to the internal organization and building of institutional capacities needed for investigations and prosecutions. This is of particular import for analyses of the International Criminal Court, given the wide range of investigatory activities coordinated through international criminal law (unlike other international fields) (Alter 2006)—yet our findings more broadly indicate that the study of international courts can usefully draw on ethnographic traditions to study their internal organization, to more fully document the effects of political influence on legal directions.

In the present context, we conclude that what is emerging is a double game at the core of international criminal law. Although it is now largely detached from its social movement underpinnings, the ICTY continues to project its commitment to human rights objectives, mainly through courtroom

trials. On the other hand, the investigation side of the Tribunal is ending much of its ongoing work. This is met with a homologous sequence organizationally: while investigators are leaving and being let go in increasing numbers, lawyers are increasingly moving to center stage.

As the schemas motivating international criminal law are disentangled from institutional resources, there may be further effects for the ways in which they can be drawn on by actors in local contexts (Sewell 1992). As “bits of structure,” the existence of the Tribunal and the institutionalization of international legal liberalism can generate uncertain results. Its polysemy, and the uses to which it may be put or transposed (Sewell 1992)—such as by actors distant from the Tribunal, whose local cultural repertoires may be changed by its existence, or by the (remote) possibility of making claims in the name of human rights or international law—is always an issue to be studied empirically. But what we do see from within the Tribunal’s walls is that the shift to the “pure law” (Dezalay 1986) aspect of the ICTY’s mandate provides a mechanism for celebrating liberal legal ideals through publicized courtroom trials, while promoting completion and closure by changing internal organizational practices, including court-ratified plea bargaining. Chief Prosecutor Del Ponte recently observed that, “instead of pulling and pushing to get detainees, our work has moved more fully into the courtrooms, which is where it belongs” (Simons 2005, 3). In this specific context, this elevation of courtroom trials with the devaluation of ongoing field investigations may also be, to paraphrase Justice Jackson, one of the more significant means by which international criminal law pays tribute to power.

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