Entering Evidence: Cross-Examining the Court Records of the ICTY

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Fig. 1. "As conflict rages across the former Yugoslavia, the Security Council, spurred to action by reports of atrocities and pressure from international public opinion, unanimously adopts Resolution 827, formally establishing the International Criminal Tribunal for the former Yugoslavia." 3217th meeting of the Security Council, May 25, 1993, New York. Source: ICTY.

Fig. 2. ICTY Court in session in The Hague. Photo: REUTERS/Damir Sagolj.

Part I: The Archive

> It is wrong always, everywhere, and for everyone, to believe anything upon insufficient evidence.
> —William James[1]

On February 11, 1994, the United Nations adopted the "Rules of Procedure and Evidence pursuant to Article 15 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991." This document would set in motion the juridical apparatus and evidential protocols for the investigation and prosecution of alleged war-crimes taking place in the Balkans. Reports of grave wrongdoings in Bosnia and mounting pressure from the international community had prompted the UN Security Council to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY) one year earlier on May 25, 1993, in accordance with Resolution 827. This temporary ad hoc institution was granted specific prosecutorial jurisdiction over allegations of crimes against humanity committed across the territories of the former Yugoslavia.

"When the first judges arrived at the Tribunal in November 1993, there were no rules of procedure, no cases and no prosecutor. By the time the first prosecutor arrived in the Hague in August 1994, the judges had drafted the Rules of Procedure and Evidence, and the Deputy Prosecutor had set up the structures of the Office of the Prosecutor (OTP), and recruited the first investigators and begun mounting investigations in what was, in some cases, hostile territory."[2] This document crafted by the judges lays down the 125 rules that provide the fundamental legal architecture of the entire Tribunal, from its organizational structure, prosecutorial operations, witness management, and evidentiary processes, to its technical and media requirements.[3] It has been amended forty-nine times over the lifetime of the Tribunal, which is now in its final stages, with only four cases still on trial and seven more on appeal.

As a quasi-historic body with the majority of its cases completed and sentencing rendered, thousands of the ICTY's Court Records have been made public and are accessible online or by written request. These artifacts stand not only as a comprehensive legal archive of the first international criminal law court—the product of a process of war-crimes prosecution that began with the Nuremberg and Tokyo Trials in the 1940s and continued with the further creation of the International Criminal Tribunal for Rwanda (UNICTR) in 1994—they also provide extraordinary insight into the complex inner workings of an international court. In particular, they disclose the procedures and practices that convert testimony and material artifacts into matters of legal evidence capable of presiding over questions of public truth.

These unrestricted offerings are of course a small fraction of the actual volume of materials gathered and records produced by the Tribunal since its inception in 1993. Full disclosure with provisions for protected witnesses remains one of its core ambitions.[4] Today the vast archival holdings of the ICTY exceed 9.3 million entries and include photographs, diaries, maps, diagrams, exhumation records, X-rays, radio intercepts, audio recordings and videotapes, as well as physical objects such as scale models, computer hard drives, personal effects, munitions, and even remnants of charred timber and stone. All is here, save biohazardous materials such as blood-soaked clothing, which would have been documented and then disposed of. By 2010, the ICTY Court Records required 3,704 meters of storage shelving. In addition to OTP exhibits, transcripts of the cases and procedural documents are also scanned and entered into the e-court database of the Records of the Trial and Appeals Chambers.

I have been particularly interested in examining the issues that arise when media and other non-textual evidence enters into legal proceedings as a "material witness" entrusted with the task of testifying to history. An important dimension of this overall research, to which my exploration into the ICTY Court Records contributes, has been to conceptually interrogate the ways in which the postproduction treatment of media materials—their copying, editing, digitizing, and chain-of-custody handling—impacts upon their evidentiary capacity to produce the truth claims that are required for "the justice of law" to answer to the "injustices of war."[5] This is especially pertinent to materials coming out of conflict zones that are often produced under extremely challenging conditions. A textbook case that I encountered during my research was that of the collapse of the Old Bridge in Mostar, in which corroborating video evidence was thrown into doubt when an expert witness proved that the videotape in question had been spliced and reedited, thus nullifying the argument that the bridge was not intentionally destroyed through shelling.[6] The poor quality of many videotapes in the custody of the OTP could raise serious legal challenges, because courts typically rely upon unadulterated materials to assert the legal merits of evidence. While mobile-phone video uploads have dramatically increased the reach of citizen journalism when it comes to reporting human rights abuses, much of this online content is edited and captioned by its producers. Although this would be standard practice and wouldn't necessarily hinder the capacity of these materials to produce a public truth, such processing troubles the court and weakens the ability of jurists to make a legal truth using such evidence. If available, raw, unedited files—ideally burned directly to disc without being previewed in a software package such as iPhoto or QuickTime—are the gold standard of forensic human rights investigators. Nonetheless, previewed or edited versions are often the only materials that prosecutors have at their disposal to support or reject a legal claim. Disputes around accusations of genocide and war-crimes are thus archived by media whose status is in dispute not merely at the level of representation

but also potentially at the level of its composition, where corrupt data or technical inconsistencies can raise legal doubts. Furthermore, regardless of how materially compromised evidence might be prior to entering the administrative circuits of the court (decomposed objects recovered from a mass grave, clothing soiled by bodily fluids, documents damaged by moisture, videos hurriedly shot and copied) what emerges as one makes one's way through these archival holdings is ultimately the extent to which the Tribunal itself becomes a processing machine that works over the materials that enter its legal infrastructure, and in the process also actively transforms them.

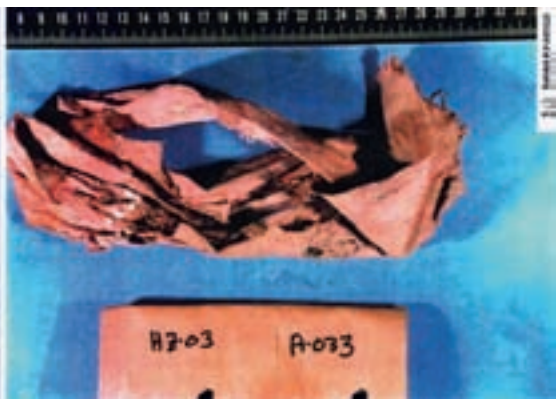


Fig. 3. Bullet taken from the Luka detention facility near Brčko, Bosnia and Herzegovina. Source: ICTY Court Records.

Fig. 4. Ligature used to bind a victim's hands in Srebrenica, unearthed during an exhumation in Srebrenica, Bosnia and Herzegovina. Source: ICTY Court Records.

In the early days of the Tribunal, unsolicited items arrived with regularity through the post—photo albums, family mementos, home movies, and private papers—sent as potential legal evidence from members of the public who had personal stakes in the outcome of the trials taking place in UN courtrooms in The Hague. These were all dutifully logged and evaluated by the OTP as to their evidential value, even though their chain-of-custody handling prior to their arrival at the court could not be corroborated. In some rare cases these items tendered by the public did make their way through the elaborate mechanisms of the Tribunal to become exhibits and are now archived among the evidential artifacts stored in the vaults of the OTP. The archives of the Tribunal are in fact divided into three areas of jurisdiction, which also mirror the tripartite structure of most international criminal courts: Chambers (courtrooms), Office of the Prosecutor (investigation and prosecution), and Registry (administrative functions). Each of these areas of responsibility generates records and in the case of the OTP, which also manages the evidence unit of the ICTY, are subject to strict guidelines as to the access, management, and conservation of such historically significant material. The archives of the ICTY are organized as follows:

i) *Records of the Trial and Appeals Chambers* holds all the documents produced by the daily functioning of the court, the most important of which are the records of court proceedings.

ii) *Records of the Office of the Prosecutor* holds all evidential material and is responsible for maintaining electronic evidence records. As of October 2004, the evidence unit contained:

- Paper, maps, still photographs, and photographic slides: 5,807,761 items
- Electronic scanned copies of the 5,807,761 items
- Audiotapes: 2,800 (some of 60 minutes, others of 90 or 120 minutes)
- Videotapes: 5,500 (some of 30 minutes, others of 60, 120 or 240 minutes)
- CDs: 1,500 (some 650 megabytes, others 700 megabytes)
- Artifacts: 13,200 (obtained as evidence or used in trials for explanatory purposes—physical objects are not technically records) [7]

iii) *Records of the Registry* holds the administrative paper records of the ICTY Registry including personnel and staff medical files.

All records of court proceedings are available online, and digital copies of evidential material are also systematically being made public through a searchable database as cases conclude and decisions over appeals are determined. However, the actual records and artifacts of the Office of the Prosecutor are sealed off from public scrutiny since the vast majority will never make their way into a case. Materials related to ongoing cases and appeals are also withheld. I was extremely fortunate to have been able to tour the OTP vault when I interviewed Bob Reid, Chief of Operations for the ICTY, and peer into several of its evidence boxes. It is in this archive that the most sensitive and rare materials are stored, including all the exhumation records and X-rays from Srebrenica as well as the eighteen Mladic notebooks, containing 3,500 pages of meticulous handwritten notes documenting every meeting that he (General Ratko Mladic) attended during the war in Bosnia from 1992 to 1995. These are, in fact, one of the few OTP seizures whose authenticity was questioned by the defense, requiring their extraction from the vault and scientific examination and verification by the Netherlands Forensic Institute. This forensic testing was demanded despite the fact that Mladic said they were his notebooks, which Karadzić confirmed, and that they were found hidden in Mladic's house behind a wall.[8]

Row upon row of brown archival storage boxes and grey files teeming with materials. The organizational schema of the OTP vault is disquietingly pragmatic yet also surprisingly idiosyncratic and lacks the high-tech facade that we have come to expect of secure storage facilities, such as that of Iron Mountain, located in a former limestone mine in Boyers, Pennsylvania, where Bill Gates's Corbis photographic collection is famously interred some sixty-seven meters below ground.[9] As a "temporary" court, the ICTY operates in the former Aegon Insurance Building, a retrofitted structure whose records storage will be replaced by a new purpose-built archive when the Tribunal closes.

Fig. 5. Vault of the Office of the Prosecutor. Photo: REUTERS/Damir Sagolj.

In the vault of the OTP the numeric labels assigned to each storage unit are preceded by a letter that immediately denotes their contents: *K* is for Kosovo, *O* for Omarska, *S* for Srebrenica, *X* for exhumation, *V* for videotape, *T* for transcript, and so on. If the vault is the de facto final resting place of the legal archive that now chronicles more than twenty years of war-crimes prosecution, the tumultuous journey of evidential materials from the field through the mechanisms of the Tribunal is itself contradicted by the mundane regularity and humble cardboard boxes that now house the legal traces of such heinous acts. Differentiated only by their numerical identification and the occasional Post-it note, these ordered boxes stand in stark contrast to the frenzied violence out of which their contents emerged. The only visible denotation of difference appeared when I rounded the corner of one aisle and noticed that neon-yellow triangular reflectors were affixed to a number of archival boxes. These luminescent markers signal an urgent salvage instruction for hard-copy records in the event of power failure or disaster, such as the flooding of the vault—they are the most valuable evidential records of the court and must be saved first.[10] The shocking Scorpion video, a Serbian paramilitary unit that captured its execution of six male Bosniak prisoners on tape as a perverse trophy recording, is stored within this screaming display of yellow-tagged high-priority boxes.[11]

The details of the future disclosure of these OTP evidential records, and those of the ICTY more generally, have yet to be fully agreed upon, as they are complicated not only by the sheer volume of records that require

Fig. 6. Videotapes, CDs, and audio recordings in the vault of the Office of the Prosecutor. Photo: REUTERS/Damir Sagolj.

retention appraisal—what to save and/or destroy—but also by the question as to what should be revisited and translated. "Between 1994 and 2000, both the complete and the public-use versions of the videotape [of courtroom proceedings] carried only the sound of the floor language and, in some cases, the English interpretation. This means that prior to 2001, the audiotapes are the only source for all interpreted languages."[12] The publication of court records also raises issues concerning the treatment of classified documents and of how to maintain ongoing protection for witnesses. Nonetheless, provisions are underway to house the entirety of the ICTY archives in a permanent facility in The Hague as a legacy project—in contrast to earlier plans to sequester them in New York, as is standard practice for a UN body that has completed its mandate. Even this decision—to maintain the archives in Europe—has been controversial, in that many legal scholars and historians contend that these materials should be returned to the nations of the former Yugoslavia as part of their legal heritage and made available as a localized resource in the areas where their impact and access will be most deeply felt. I too would argue for the records to be returned to their local contexts, as the museological approach of housing the artifactual legacies of the weak in the institutions of the strong reenacts the asymmetries of power that contributed to the conflicts in the first place. The imaging and digitization of its complete holdings suggests that a virtual version of the ICTY archives will be the compromise solution.[13] During my conversation with Bob Reid, he mentioned in passing that scores of letters requesting further

Figs. 7, 8. ICTY audio-visual booths. Courtesy of the ICTY.

indictments were regularly received from members of the public, including requests to the prosecutor to lay war-crimes charges against George W. Bush and Tony Blair for the invasion of Iraq. These too are filed away somewhere in the OTP as a faint echo of the more radical potential of the court to pursue injustice wherever it might appear, in spite of the ICTY's specific mandate to try the violations that took place during the Balkan conflicts of the 1990s. These misplaced demands, whether in the form of offerings of evidence or prosecutorial requests, suggest that the ICTY has entered public consciousness as *the* global war-crimes Tribunal.

Arguably the most significant records of the Tribunal are those documenting the legal proceedings of the trials themselves. "The audiovisual recording of the proceedings at the ICTY was decided by the Judges as early as 1994 for three main reasons: to make sure that justice would be seen to be done, to dispel any misunderstandings that might otherwise arise as to the role and the nature of the Tribunal proceedings and to fulfill the educational task of the Tribunal."[14] A 1998 study commissioned by the ICTY and conducted by Dr. Paul Mason (Coordinator of the Centre for Media and Justice at Southampton Institute, UK) reviewed the impact that such "gavel-to-gavel" audiovisual coverage had on the courts' proceedings and reported that "there was a general consensus that court participants are not affected by cameras in court. This was true in both self-assessment and in evaluation of the impact of cameras upon other court participants. […] Cameras can inform the international community of the workings of the Tribunal whilst ensuring a transparent and fair system of justice is in operation. It was suggested by many that the audio-visual policy of the Tribunal could be successfully adopted by other international judicial proceedings, including the Lockerbie trial. There was uncertainty concerning televising domestic court proceedings."[15] In May 2005 archivist Trudy Huskamp Peterson of the National Peace Foundation (USA) conducted another survey of ICTY court proceedings and found that every hour in court results in the production of four written transcripts and twelve to fourteen audiovisual recordings in each of the languages of the Tribunal. An inventory of all the audiovisual recordings of proceedings generated by the court up until that time tallied at 75,868 units made up variously of CDs, audiocassettes, and videotapes.[16]

Part II: The Evidence

> The most savage controversies are about matters as to which there is no good evidence either way.
> —Bertrand Russell[17]

The following excerpt is taken from the transcript of a Status Conference on the Tribunal in 2005. Case IT-05-87-PT, the Prosecutor versus Milan Milutinović and others:

MR. ACKERMAN: Since being assigned to this case, I've received I believe 206 CDs. That number may be a little soft; it may be 208 or 204. And I understand there are more to come. Mr. Bakrac tells me he's received 280, which means I may have another 74 or something headed my way. I don't know the basis for that discrepancy at all.

In the time I've been assigned, I have concentrated a significant portion of my time on just trying to figure out what is on each of those CDs. I've managed to get through 80 of them in the last 30 days or so, and that doesn't mean I'm looking at them for content particularly but to determine what they are and thereby know whether to assign them to another member of my staff. For instance, a number of them are either one-hour or two-hour broadcasts of news programmes from Belgrade television during the course of the war in Kosovo. I can't understand a thing that's on those, and so I have to send those off to my co-counsel in Belgrade to have him look at them and determine what they contain. That process, obviously, is going to take a significant additional time just to make the preliminary decision regarding those, and then extracting the content is another matter entirely.

There is the electronic disclosure materials. When I first came on the case, I think there were two batches there, maybe three. It's now risen to five just in the short time that I've been there.

JUDGE BONOMY: Is there any reason to think, though, that there is material which isn't on the CDs?

MR. ACKERMAN: It's definitely not on the CDs. […] The Prosecution cannot tell me how many pages of material are there. The estimates that I've heard range between 250.000 pages and 1 million pages.[…] We throw these numbers around in this Tribunal to the point where they have, I think, lost meaning in terms of the number of pages of discovery. 250.000 pages of material

is an overwhelming amount of material, Your Honour. If you put it in binders at 500 pages per binder, you've got 500 binders of material. It's 500, 500-page books. I told you reading at two minutes per page, a 40-hour week, it would take 208 weeks just to read it. Just to read it. So two counsel working on it couldn't even complete in a year and get through the material. And that's the EDS material.[…]

There are the 12 expert reports that you've suggested today that I need to make a rather priority and get those and read through those. I don't have any idea how many pages that is and how long it will take me.[…] There are I don't know how many witness statements that are disclosed in various ways that I will need to deal with. […]

JUDGE BONOMY: Are you saying that the 206 CDs plus the EDS material is not witness statements? Witness statements are over and above that?

MR. ACKERMAN: I don't think so. I think they're contained within that material. I don't know but I think they are. I think that's — it's fair to assume that they are.[…] Your Honour, to understand, it is not just reading through the material. If that were all that was involved, it would make the matter much easier. It is analysing that material, correlating that material, cross-referencing that material, getting that material into some form so that if — if I need in the future something that I remember having read as I go through this I'll know how to find it, where it is. I'll have cross-reference it had in some way that I can use of it.[…]

I've suggested if you just take the EDS material, reading it two minutes per page, two counsel, two years — one year, two counsel, one year just to get through that, I think it's a reasonable estimate, Your Honour, that in compliance with the Statute of this Tribunal that I cannot be ready to try this case before about the fall of 2007, and that's if we don'thave a major problem arising out of this new 1998 material which I didn't consider when I filed my opposition to the motion for joinder.

It would be — it would be malpractice and a violation of my oath as a counsel and a violation of the — of the ethical standards both in the bar to which I belong and the — and this Tribunal to go to trial without having properly prepared. I couldn't possibly go to trial with not having read, for instance, every page of the Rule 68 material.[…]

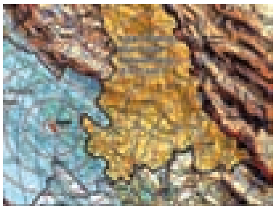
JUDGE BONOMY: We're going to have a break shortly because we have little time left on the tape, so can you give me

some indication of timing here? We're not far from the end of the Status Conference but it's in your hands.

MR. ACKERMAN: I think my speech is virtually ended, Your Honour.[18]

This exchange between Judge Bonomy and Mr. Ackerman, defense co-counsel, detailed in a status conference from August 25, 2005, emphasizes the magnitude of information that is generated by a single case in the ICTY and explains why there are 9.3-million-plus artifacts in its archives—a huge percentage of which are self-generated. But it also highlights the multiple media platforms that participate in staging the mise-en-scène of International Humanitarian Law (IHL) as well as the additional complications such technologies introduce. What is perhaps even more revealing in this contretemps between judge and defense is the degree to which Ackerman must first engage with the materials quantitatively, when one might well expect a war-crimes tribunal to be overly preoccupied with the qualitative dimensions of data. His ethical obligation to mount a meticulous defense is challenged by the sheer volume of material he must process, combined with his inability to comprehend the Serbian audio recordings that also grow daily in number, and which he must in turn outsource for translation. Ackerman's frustration has turned him into a calculating machine … counting pages, indexing documents, scanning audio CDs, and marking time. But so too is the judge himself a timekeeper as he hurries Ackerman along, noting that the time left on the tape is fast running out.

This tension between the quantitative dimensions of a trial, its metadata so to speak, and the qualitative, content-rich information disclosed by its records through the testimonials of witnesses and experts, will come to play a crucial role in our understanding of how and by what procedures such legal records become evidential or significant of something in the first place; that is to say, even before the particularities of their content (their encoded subjectivities) are explicated in court. Elsewhere I refer to this condition of double-articulation as that of the "material witness."[19] By this I mean an entity (object or unit) whose physical properties or technical organization not only records evidence of passing events to which it can actively bear witness (the material crime-scene evidence sequestered in the vaults of the OTP, for example), but also the means by which the event of evidence is itself made manifest (the rules of procedure and evidence that govern the presentation of such materials in court and adjudicate over their admission into evidence). In developing the concept of the material witness I have primarily examined media artifacts, which archive trace-evidence of the violent events that generated their context and explore the ways in which these materials enter into various public forums as agents of dispute. These are materials that have come out of situations of political conflict and crisis—images, for example, whose content bruises the public eye—but they are also materials that have had violence done to them. Matter, in effect, only becomes

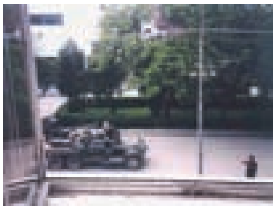
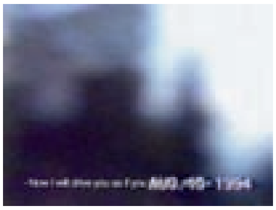
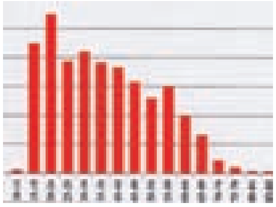






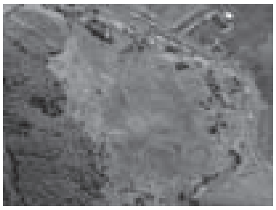










a *material witness* when the complex histories entangled within objects are unfolded, translated, and transformed into legible formats that can be offered up for public consideration and debate. The conventions regarding which public forums are able to confer legitimacy upon the speech acts of objects and which agreed-upon standards will permit material evidence to stand up to the scrutiny of epistemological frameworks that evaluate and pass judgment upon them, needs, of course, to be continually queried and tested. Yet without this dimension of public discourse artifacts cannot fully attain the status of the witness but remain virtual, carrying their archives of encrypted data into the future as mere latent potential.

It is this public feature of witnessing, whereby materials become the objects/agents of dispute and contestation over what claims can be made or rebuked in their name that permits them to testify to the specific historical conditions out of which they emerged. The ICTY is thus a paradigmatic site or forum for conducting this research not only because it is now, effectively, a closed system whose objects have been dutifully logged and evaluated, but because its Rules of Procedure and Evidence have been scrupulously attended to and documented throughout the course of its operations.

The staggering figure of 75,868 audiovisual recordings produced during the first decade of the Tribunal's operations (1994–2005) does not include any of the AV exhibits and evidence actually procured by OTP investigators in the field. An average of two thousand exhibits are presented during the lifespan of a typical case in the ICTY, only a certain percentage of which are admitted by the judge and registrar into a proceeding as evidence. The remaining presentation materials are used as "aide-mémoires" to assist with witness testimony and are often marked by

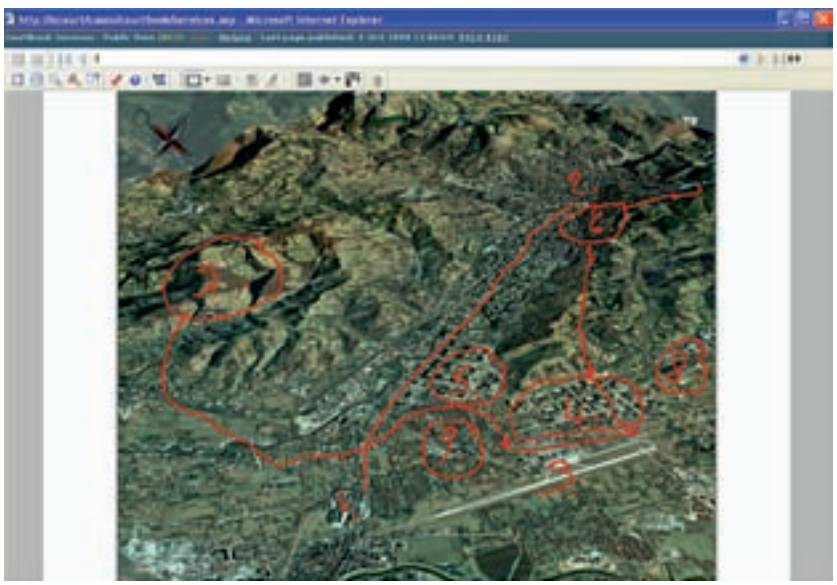


Fig. 9. IT-04-81: Perisic [TIF] Satellite photo of Sarajevo marked by the witness. Document Type: Exhibit P00001 • Date: 03/10/2008 • By: Prosecution. This e-court image precedes the photograph, which was entered into evidence one year later. Source: ICTY Court Records.

witnesses using a red digital stylus. The following, almost farcical, exchange around just such a process highlights the degree to which technologies, both their shortcomings and advantages, have come to play a determinant role in the rhythm and production of legal content. An entanglement in this particular case between the technologies of the map, screen, pen, chair, microphone, and body, each of which intervenes in the smooth functioning of the law and exposes its fundamental machinic nature. Law is not so much written as it is machined in the ICTY through the prosthetic enhancements of witnessing by technological means.

MR. SAXON: Thank you, Your Honour. We're waiting for the image to come up in e-court.
JUDGE MOLOTO: You want the image to come up here. I'm advised that the court officer is having difficulty with this thing. Is it possible to use hard copies until the technician has sorted out the problem? And does the witness have a hard copy before him at this time?
MR. SAXON: Not at the moment, but we'll give him one, with the assistance of the usher, right now, Your Honour.
JUDGE MOLOTO: Thank you very much.

MR. SAXON: So, Mr. van Lynden, you should have a satellite image of the city of Sarajevo in front of you. Do you recognise it?
A. Yes, I do.
Q. Okay. And for the — for the orientation of the Judges, first of all, we see the city elongated in this valley floor and we see what appears to be a road running through the centre of the city. Do you see that?
A. Yes.
Q. Can you tell us what that road is, or was?
A. The main road through Sarajevo.
MR. SAXON: I'm wondering, with the usher's assistance, could Mr. van Lynden's map be placed on the ELMO, and then he could view it on the monitor.
Q. Do you see this same map now on the screen in front of you, Mr. van Lynden?
A. I do.

Q. Mr. van Lynden, on the monitor to your right, there is a pen attached to it. Maybe with the usher's assistance, there's a marker, could you —
MR. SAXON: One moment, please, Your Honour.
JUDGE MOLOTO: You have a moment.

MR. SAXON: If a pen or a marker could be given to —
THE WITNESS: There is a pen here.

MR. SAXON: But we may need some better pens. I know this may be uncomfortable, but I'm going to ask you to lean over a little bit towards that ELMO, and perhaps if you could draw a line up that main street. [Marks]

Q. And if you could stop right there and just place a number 1 by that green line to indicate that street. [Marks]

Q. At the other end of the street where you stopped the green line […] — do you recall the name of that part of Sarajevo, Mr. van Lynden?
A. It was called Stari Grad, the old city.
Q. Okay. And could you place a 2, then, besides Stari Grad. [Marks]

JUDGE MOLOTO: Is there a way we can make Mr. van Lynden's life a little more comfortable?
THE WITNESS: It's okay, Your Honour.
MR. GUY-SMITH: I'll give you a chair.
JUDGE MOLOTO: If we can give you a second chair.

MR. SAXON: Perhaps if the microphone could be pushed a little bit more towards Mr. van Lynden's left.
MR. GUY-SMITH: You can switch between the chairs. That works for me.
MR. SAXON: Mr. van Lynden, do you see —

JUDGE MOLOTO: I'm sorry, Mr. Saxon, to interrupt you once again. We are now being advised that we can work from e-court.
MR. SAXON: Very well, Your Honours.
THE WITNESS: Shall I switch back?
JUDGE MOLOTO: We will come back to e-court, Mr. van Lynden, and you will be more comfortable.
THE WITNESS: If you could explain what e-court is.

JUDGE MOLOTO: You'll see it now on the monitor and you can write on the monitor itself.

THE WITNESS: On here?

JUDGE MOLOTO: Yes. But they will give you a special pen for that. Does Mr. van Lynden have a pen for the monitor? Excellent.[20]

When bodies and technologies come together they form what Deleuze and Guattari call a "machinic assemblage" in which the functional equilibrium of a set of relations gives way to processes of change, so much so that it deterritorializes matter (bodies and entities) into new categories of assembly.[21] The unfolding of many legal cases in the ICTY express, perhaps one should say with caution given that I am writing from the perspective of a media scholar rather than that of a legal practitioner, the same machinic conditions. When the functional operations of the law are interrupted by a technological glitch such as the failure of the e-court system, the lack of a pen, the contortion of a body as it tries to reach a screen without a chair, the distance between

mouth and microphone, they open up a line of flight that takes the proceedings somewhere other than intended—deterritorializing the legal process and creating a new assemblage. Legal-media scholar Cornelia Vismann has referred to the court as a "translation machine" in the way it remediates heterogeneous discourses into the form of legal evidence.[22] Yet in contrast to a regular court trial, which achieves this task in part through the high value it attaches to silence (the minimization of background noise), the international tribunal involves such an apparatus of technical machinery for interpretation and recording that "language gaps" (*Sprachbrüche*), distortions, and omissions are inevitable: testimony and evidence are not only translated but *transmuted.* Examining the use of a telephonic interpretation system for simultaneous translation at the Nuremberg Trials, she argues that what at first may appear to be "a mere tool for the resolution of language problems" in fact reveals "a fundamental disorder within the translational machinery called justice."[23] The technical requirements for operating such a system, and the burden placed on interpreters by these noisy conditions, not only invert the hierarchy of the court by supplanting the discursive priority of the judge, but allow for the deliberate, unconscious, or accidental concealment of certain facets of the evidence, and the overemphasis or production of others.

Despite these breaks in the smooth functioning of the law, over time, the legal proceeding regains its control over events—the e-court system whirs back to life, a chair is located for the witness—and a state of functional equilibrium is achieved again. This newfound stability is, however, one that must now also fold the technical infrastructure and machinations of the courtroom into the performance and writing of the law. In contrast to the Nuremberg Trials, whose transcripts, as Vismann notes, were "sanitized" of all linguistic confusion and background noise in the production of "clean" manuscripts for posterity,[24] in the ICTY proceedings, glitches, interruptions, and adaptations, including the act of the witness writing denoted by the additional parenthesis "[Marks]" are recorded verbatim into the court record and become part of the official legal transcript. As judge, jurist, and witness adjust to this novel state of affairs they are reterritorialized into a new machinic assemblage altogether different than the one they were participants in before the breakdown in proceedings occurred. There are also many instances when a video, map, photo, or diagram presented in court as an inducement to witness-recall was at a certain crucial juncture in the trial transformed into a legal proof, at which point it was assigned an exhibit number by the registrar and admitted into evidence by the judge. So while all materials presented in court do not enter with the de facto legal status of "evidence," some may attain this through the debates that are activated by the artifact in question.

Fig. 10. IT-02-54: Milošević [WMV] Videotape of Izbica Massacre (extracts). Document Type: Exhibit P308A • Date: 03/09/2002 • By: Prosecution. Source: ICTY Court Records.

Q. Now, Mr. Loshi, moving on to another subject. You state in your — in your evidence, in your written evidence, that a month later after filming the — this — these sites you left Izbica and Kosovo and headed to Albania to try to distribute the tape. Did you later return to Kosovo after the war?
A. Yes, I did. I returned to Kosovo after NATO got in. I was there by 22nd of June and went to Izbica. And now I had my own camera. […] So I used it to tape — to tape that burial site which was — which was with no graves anymore. There were no bodies, no graves. Everything was flattened.

Q. What do you mean there were no graves? […]
A. I just heard rumours. Like they were taken — somebody said they were taken again in two directions. Somebody said they were taken in the direction of Klina, which is on the right side when you go to Turiqevc, and somebody else told me that later on they were found in Mitrovica somewhere. But this information wasn't clear to me, so I don't know much about this.

Q. Okay. Very well. Thank you very much.

MS. KRAVETZ: Your Honour, these are all my questions for this witness. I would like to tender this witness — the video that this witness has been referring to which is Exhibit P232. There are also a set of photographs which are still photos from the same video which are referred to in his statement dated 23rd to 25th September 2002 — 2001, and these are Exhibits P230 and 231.

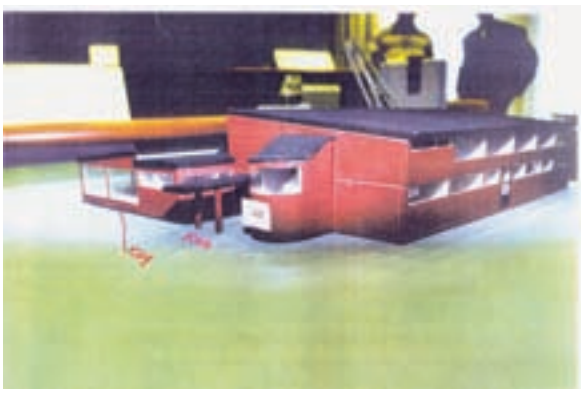
JUDGE BONOMY: Well, these will be admitted. The other film that's just been referred to taken after the 22nd of June isn't an exhibit, I don't think?

MS. KRAVETZ: I don't think that's an exhibit in this case.

THE WITNESS: Your Honour, I never brought the tape here because I was never asked for that. But if the Prosecution needs that, I would provide them with it, if they need it as an evidence.[25]

While the vast majority (99 percent) of ICTY court records consist of paper documents followed in number by maps and then photographs, even physical objects are documented and presented as visuals on screen. Many times these too are duplicated and reused in different cases. "Judges will accept copies in place of originals; if originals have been introduced, judges may decide that a copy can be substituted in the case file and the original returned to the evidence control office."[26] Multiple versions of the same piece of evidence—a photograph of the scale model of the Omarska camp, for example—had been presented during multiple proceedings. Oftentimes the

Figs. 11–17. Photographs or photocopies of the model of the Omarska camp including images marked by witnesses, 2000. Source: ICTY Court Records.



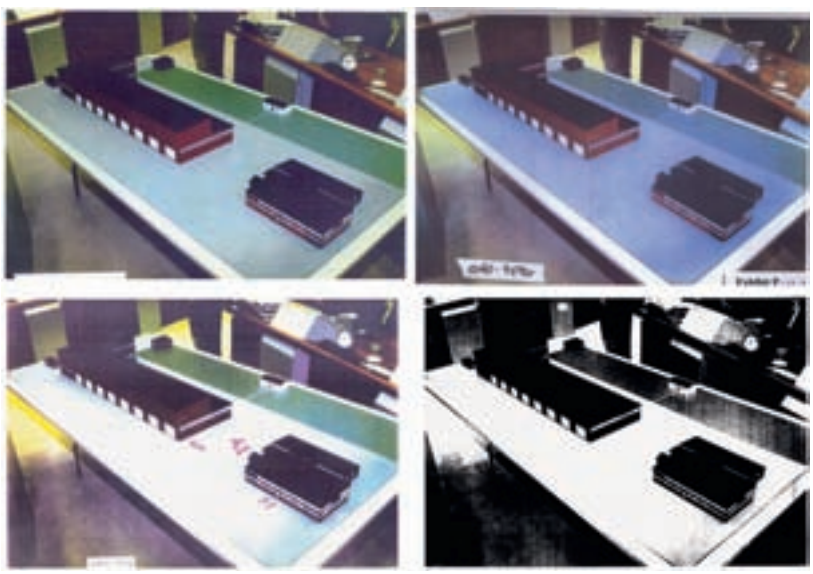
color photograph reappeared as a photocopied duplicate, which substantially degraded its image quality. This duplicate might then re-appear copied again but this time in B&W, or labeled, cropped, and/or marked by witnesses.

S. SCHUPPLI I'm interested in the relationship between the original document, which as you say would never or rarely leave the vaults, and these kinds of reproductions.

B. REID The witness will mark a copy of the original on the computer, it might for example be a military map with the front lines or it may be a photograph, or a map, and the witness will say I was captured here and he would mark A, then they took me to here, and they would mark, B, and then eventually I saw the murders at C, and they would mark it on the map. And then [this marked up map or photograph] is tendered, and that's it. When prosecution or the defense are finished with that particular aspect—the drawing, the map, the photograph, whatever it is—they then tender it into evidence but it can be objected against and then the Judges rule.

S. SCHUPPLI The object that is marked by the witness has the capacity to enter into evidence, but the original may not have been entered into evidence?

B. REID No, the original would have gone into evidence, but it would have been a copy—a computer copy, a digital copy of it. I mean we do have originals that are marked. But that's very, very rare. Everything we do now is done in the courtroom and its done digitally.



Figs. 18–21. Photographs or photocopies of the model of the Omarska Camp including images marked by witnesses, 2000. Source: ICTY Court Records.

The same image might also reappear as a digital screen capture, with the ICTY desktop and Microsoft Internet Explorer window prominently incorporated into the image as its extended material substrate. Images can also reappear as a photocopy printed directly from a binder or photo album with its punch holes still visible.

These telltale signs of reprocessing alert us the degree to which materials are made to circulate within the image-economy of the court to both support and refute witness statements and expert opinions. Donna Haraway contends that "redistributing the narrative field by telling another version of a crucial myth is a major process in crafting new meanings. One version never replaces another, but the whole field is rearranged in interrelation among all the versions in tension with each other."[27] Bringing a certain forensic attention to bear upon these court records enables me to read these visible traces as a sedimented history in which all previous versions of events are encrypted and can hypothetically be made to speak. When materials, including digital files, are subject to external processes that bring about their structural reordering, they produce what philosopher of science Isabelle Stengers has called an "informed material," in the sense that they become progressively enriched by information.[28] The notion of informed materiality, which I relied upon to develop the concept of the material witness, is particularly useful for decoding the transformations that take place as materials make their way through the elaborate mechanisms of a war-crimes tribunal, from their acquisition in the field by an investigator, their accession into the registry, digital processing and uploading to e-court, through to their pretrial disclosure by the prosecutor, and eventual presentation before the trial chamber, from whence an object or image might emerge as bona fide evidence and be assigned an exhibit number. The singularity of an event, writes Miriam Fraser, is based not simply on the fact that certain things come together, but on their coming together in a particular way. The question as to whether an entity —a legal artifact—is merely an aide-mémoire or whether it is evidence is thus displaced in favor of the question: What can it do?[29] Rendering visible the protocols and partisan practices that must come together in highly particular ways to produce the event of legal judgment sheds light on the circumstances whereby a conditional public truth might be made to appear out of the machinic assembly that is the ICTY.

Fig. 22. (above) IT-95-14/2: Kordic and Cerkez [PPT]. Behrici Photo Album (English, 3 Pages). Document Type: Exhibit 1663 • Date: 1999 • By: Prosecution. Source: ICTY Court Records.

Fig. 23. (below) IT-95-14/2: Kordic and Cerkez [PPT]. Set of 54 photographs of destroyed buildings in Han Ploca. Document Type: Exhibit 1837 • Date: 1999 • By: Prosecution. Source: ICTY Court Records.

Charles Heller (a contributor to this volume) explores what he calls "fractured chains-of-custody," denoting situations in which images move seemingly untethered between different contexts to reappear in sometimes radically oppositional discourses. As he tracks the movement of a particular image—that of boats set on fire and documented by the Moroccan military after the migrants that had built them were captured while trying to flee—he notes how each context adapted and transformed the image and in so doing "redistributed" its narrative field. Minute changes to the image are revealed through the operations of cropping and misaligned scanning that reveal, in turn, a new (image) border condition. These processes divulge important clues that enable us to trace the image-migration and investigate the multiple versions of events out of which each image emerged.[30] The situation in the ICTY is somewhat different to that explored by Heller, in that each artifact (with the exception of those posted to the office of the OTP by members of the public) must enter the legal archive through their strict compliance with chain-of-custody requirements. However once they are permitted entry, their distribution across legal proceedings enacts a similar kind of informatic overlay that can likewise be decoded.

When the Tribunal began, Bob Reid, who was then an investigations team leader, was dispatched to Bosnia to oversee the seizure, bagging, and logging of evidence, including biohazardous objects such as bloody clothing, ligatures, and blindfolds. When I questioned him about whether any issues had ever arisen pertaining to uncertain audit trails of evidence gathered during the chaos of an ongoing war, he told me it was rare. In the early days of the Tribunal he personally oversaw trucks being loaded with material evidence from Prijedor, escorted via the British military to the Bosnian border from where it was taken to the Zagreb field office. There the evidence was sealed overnight, photographed, put back into the trucks the following day and transported overland to The Hague.

Fig. 24. IT-04-74: Prlic and Others [TIF] Annex I (CD) to Slobodan Praljak's motion for the admission of Franjo Lozic's statement, the Bosnian Muslim press conference transcript, and associated Ministry of Justice Netherlands Forensic Institute documents. Document Type: Motions • Date: 20/04/2010 • Defense counsel. Source: ICTY Court Records.


Date: 20 April 2010 Case No.: IT-04-74-T

This is to certify that a CD-Rom has been filed with Registry page number D59277

Conceptualizing all recoded material as informationally enriched troubles a certain distinction between the analogue and the digital, whereby information is generally regarded as belonging to the purview of immaterial data, whereas properties are what define physical matter. ICTY protocols regarding the chain-of-custody of digital evidence remarkably collapse this distinction. While conducting my research, I was rather surprised to find that DVDs containing videos or CDs with images, PowerPoint presentations, and audio files were always photographed or photocopied in their plastic casing and labeled with their appropriate case file numbers. Even the machines required to send and receive audio signals, such as radio

transmitters, were photographed and labeled. The transit of any digitally derived evidence through the operations of the court and the substrates upon which such information is stored, be it a polymer disc or magnetic hard drive, requires that it be treated as a discrete physical object (a practice that was also enshrined in my training course in forensic photography for human rights investigators with Stefan Schmitt). From its initial seizure to its subsequent transfer, analysis, and disposition, continuity between the material inscription of data and its content must be rigorously maintained for evidence to achieve its legal standing as "evidence" in court. However it is not enough to treat data simply as an analogue object, it must also be transformed into an image that can provide an audit trail of this inextricable bond: visual evidence of the physical existence, condition, and labeling of the disc or hard drive as it changes hands throughout a trial.

During the proceedings of the Tribunal it was not uncommon for upwards of seven different versions of a single piece of evidence to move through various case files, each logged by the registrar and given a unique exhibit or identifying number. Cases themselves are often nested within the court records when multiple accused are tried for the same crimes and thus evidentiary materials and exhibits must move between them. Tracking these materials as they journey through different cases and are translated into different media formats and carried by different technologies became one of my primary methodological tasks. This was a forensics, if you will, of the transit of documents through the legal-media apparatus of the court that enabled me to observe the extent to which such materials carry the imprint of these processes in their very DNA, as visuals recombine with duplicating machines to evolve a new order of legal-image hybrid.

Fig. 25. IT-05-88: Popvic et al. [TIF] Picture 01925 Photograph of reel-to-reel tape recorder marked by witness PW-130 (English). Document Type: Exhibit PIC00056 • Date 07/12/2006 • By Prosecution. Source: ICTY Court Records.

Fig. 26. IT-05-88: Popvic et al. [TIF] Pictures 02298 Photograph of an antennae marked by witness PW-130 (English). Document Type: Exhibit PIC00055 • Date 07/12/2006 • By Prosecution. Source: ICTY Court Records.

Because of the relatively low number of videotapes and visual images of other physical objects, such as scale models and machines, I have managed to review the majority if not all of these holdings within the publicly available court records of the ICTY—provided that the search-term parameters remained relatively consistent. Keyword searches such as video, videotape[s], film[s], movie[s] are used to source materials that fall within the same general category. Mislabeling and misidentification is unavoidable when managing such vast archival holdings—as the screen grab of the radio transmitter shown above clearly indicates. Though labeled as "Photograph of a reel-to-reel tape recorder marked by witness," it is obviously a radio and was discussed as such in court by the witness, who marked the functioning of the machine with respect to a series of radio transmissions that were intercepted and recorded onto audiotapes (probably accounting for the erroneous label) that are now held in the vault of the OTP. The same witness also marked the antennas that were required to send, receive, and intercept the radio signals. These are the only two examples of transmission antennae in the court records. One might typically expect photographic evidence to carry representational information about an event that can be easily decoded, for example a photograph of the weapon that was used to kill someone. In this case the evidence—satellite radio antennae—was the means by which instructions to kill were communicated. Both the erroneously labeled radio transmitter and the antennae were carriers of information that led to a series of war-crimes, but were not directly implicated in carrying out the violence per se. What these images "marked by witness" highlight is the degree to which the technical infrastructure of conflict has entered into legal discourse on par with other more incriminatory evidential forms of wrongdoing. A discussion between the

Fig. 27. IT-06-90: Gotovina et Al. [WMV] Video clip comparing two OTP videos, dated 04 August 1995. Document Type: Exhibit D00013 • Date: 08/04/2008 • By: Defense counsel. Source: ICTY Court Records.

judge and defense counsel ensues in which the recording of a radio intercept onto audiotape and status of the original copy of the audio is disputed.

MR. ZIVANOVIC: [Interpretation] I also have an objection, Your Honour, linked to the documents submitted by the Prosecution. Of course, in addition to the general remarks that have already been heard in the proceedings and about which the Trial Chamber will rule, I would like in particular to indicate that I oppose to the admission of Prosecution numbers 1395E and 1395F. This is an intercepted conversation dated the 2nd of August, 1995 at 1300 hours. And on the list, it is indicated that it is an audio tape. We did not hear the audio tape here. We heard a CD or a DVD, I don't know exactly which.

Secondly, it is not indicated here that it is a copy, and it is not indicated what the source was, what the original from which the copy was made. So I think an erroneous decision could create an erroneous impression that we are admitting an original audio tape. Furthermore, when an original audio tape has not been produced in open court, and also in view of the fact that the other party has it and has listened to it together with the witness as the witness has confirmed in the proceedings, I think that the admission of such evidence would be undermining the integrity of these proceedings, because what this Chamber should know, they should know exactly whether this is the original and whether the copy that is being tendered corresponds to the original, especially in a situation when someone is challenging it.

JUDGE AGIUS: […] We will take it as a submission made which will be considered later when we weigh the pros and cons or the plus and minuses in admitting this document or not admitting it. Yes, Mr. Nicholls.

MR. NICHOLLS: That's right, Your Honour. I think that's fine. There are just a few of these audio intercepts that we have and we can deal with that. I would just point out that the witness authenticated the recording that we heard in court, that it was the same and it was the one that he had heard on August 2nd and transcribed.

JUDGE AGIUS: All right. Incidentally, Mr. Zivanovic, you don't seem to have asked the — or expect or demand from the Prosecution the production of the original audio, do you? We had an indication from Mr. — I don't know who, I think Mr. McCloskey, two days ago that the original is in the vault, so it is available. I understand it was made clear. I don't interpret your objection as amounting to a request that the Prosecution bring forward this original audio. I didn't understand you that way any way. I understood you as objecting to the tendering of what we have here, what the Prosecution is seeking to tender. Yes.

MR. ZIVANOVIC: [Interpretation] Correct. I made an objection here, among other things, to the admission of what the Prosecutor has tendered. However, even back then, I wanted clarification, and when the Prosecutor offered to show me the tape in the Office of the Prosecutor, I understood you to say then that that can be done only in this courtroom. If the Court — if the tape needs to be heard at all. And I relied on that. I think that was perfectly appropriate, and I have no interest in listening to the tape on my own. My interest is in having the tape heard in the courtroom.[31]

The following excerpt offers another another instance in which the integrity of an audio recording and the witness who testified on its behalf were called into question. This time it is the audio track of a video that is up for dispute, as two versions of the same video presented on consecutive days in court reveal two different audio tracks: one is populated by the sound of sirens and the other by that of birds, although the image track remains consistent. Reading through the full court transcript reveals that the source of the audio tampering and the stage at which it occurred were never found out; but the incident constitutes a rather unique example of contested evidence. While there are many examples, as I have already noted, in which materials are clearly transformed through processes of digitization and duplication, these subtle and sometimes not so subtle material alterations generally did not appear to perturb or hinder the legal process. Rarely did I encounter instances of doubt being cast onto the materials themselves, with their authenticity and integrity called into question: while the aggregate impurities of the materials that I have, in effect, cross-examined, emerge as a key resource for generating new insights into the event of evidence, these perturbations seem to go largely unexamined by the court. Perhaps because such procedures are deemed to be without intent to obfuscate or hinder the operations of the law, the alterations that accrue when exhibits (especially media materials) are repeatedly copied, translated, uploaded, and so on, are regarded as a mere by-products of an otherwise essential activity. In short, my interests and those of the court are not in the least congruent. Where the court sees nothing amiss or at least nothing worth laboring over, from

a perspective attuned to the micro-events encrypted within such legal materials, a whole new world begins to appear. As Walter Benjamin writes, it may be possible to "assemble the large-scale constructions out of the smallest and most precisely cut components. Indeed, to discover in the analysis of the small individual moment the crystal of the total event."[32]

Q. Between the time you received the video, approximately a year after you arrived in Belgrade, until your appearance in court yesterday, do you know of any changes to the audio or video that was shown in court?
A. As far as I know, no changes were made. You can find the same footage elsewhere as well. This is just one copy of it. I suppose there must be dozens or hundreds of it floating around. […]

Q. Are you aware that the Office of the Prosecutor has the unedited video that was originally shot on the 4th of August?
A. I'm not aware of that.
Q. Are you aware that the audio from the original video has been distorted in the video that you presented in court yesterday?

A. I'm not aware of that either.

Q. Let me show you a comparison of the original video that was produced to the Defense by the Office of the Prosecutor versus the video you presented in court. You will recall the scene of women and children running across the street under an air raid siren, and I'll let you compare the one video that was produced by the Prosecution to the Defense and then the video you presented in court yesterday.

JUDGE ORIE: Mr. Misetic, you have referred several times to the audio as well. The audio is not in evidence, at least is not being ignored by the Chamber.

MR. MISETIC: I'm not talking about the voiceover. I'm talking about the actual sound what was happening in Knin, and I believe, Your Honour, you did indicate that you were able to —
JUDGE ORIE: Yes, indeed, the sound of the shelling.
MR. MISETIC: Correct. Correct. [Videotape played] […]

JUDGE ORIE: I do understand. I do understand that we saw partof what we saw yesterday, and we saw a different version of the same picture but different sound.
MR. MISETIC: Correct.
JUDGE ORIE: Now, you'd like to have this in evidence, I take it? […]

Q. Witness, do you know who added the siren to the video you played yesterday? […]

A. I don't think I can tell. I suppose the original tape that I handed over for a copy to be made should be the copy that arrived here,in addition to which I think the original tape must still be available. I could have it sent to you personally, if that means anything, so that you can cross-reference it to your tapes. It was Veritas, was it not? I think not, because the only thing they had to do was make a copy of that tape. I don't think they actually had the equipment to introduce any new editing moves or to change the original footing.

JUDGE ORIE: It appears that the witness has no knowledge on what has been done, so let's stop speculating. Please proceed.[33]

Part III: The Tape

> All credibility, all good conscience, all evidence of truth come only from the senses.
> —Friedrich Nietzsche[34]

On a hazy morning in October 2013, Steffen Krämer, Srdjan Hercigonja, and I made our way to Izbica, the tiny rural village a two-hour drive to the south of Pristina, Kosovo, where Liri Loshi had shot his incriminatory video documenting the aftermath of the Izbica and Padalishte massacres of 1999, in which more than 120 Kosovar Albanians had been brutally murdered. The video and his testimony were debated within the war-crimes prosecutions of both Milošević and Milutinović. With satellite images and Google Earth screen-grabs to guide us we eventually found the unmarked road that would lead us back to this tragic site of ethnic violence. It was a sobering journey, generated in part by a conviction that making contact with the site and its remaining residents might somehow begin to supplement an event that the legal protocols of the court had, I felt at the time, systematically disarticulated and thus evacuated of all affect. As the residual haze that clung to the rolling hills slowly lifted, the landscape became all the more remarkable, not for the horrific past that one might imagine it would still manage to disclose, but for it's apparent absence. A farmer ploughed his field with an aging tractor and a dog growled at slow moving cattle. There was little to see as we approached the meadow.

This experience of returning to a site of extreme trauma and violence to be confronted by a lack of visible proof that something horrible happened is a common enough experience, one that is often the result of a simple need for life to return to "normal." If history is to be invoked it generally comes in the form of memorials and cemeteries—markers that designate the official

Fig. 28. Video shot at the site of the Izbica massacre in Kosovo, October 7, 2013. Still from Susan Schuppli (dir.) and Steffen Krämer (cinematographer), *Material Witness* (UK, 2014).

geographies of loss. In a recent conversation I had with documentary filmmaker Philip Scheffner about his film *Revision* (2012) made with Merle Kröger, we spoke about the paradox of being in a location where violent events had happened and yet not being able to discern evidence of that history regardless of how recently the event in question had taken place. He insisted that there is always something to see or to intuit if we look with sufficient intensity and are fully aware of what it is we are actually looking at or for. The seeing that we both had in mind was not an encounter with a concrete reality that would readily disclose its violent history through visible proofs such as a bullet-scarred building, but rather a kind of Benjaminian stereoscopic or dimensional vision that could peer into the "depths of historical shadows" and discover the latency expressed by ordinary things—such as a patch of new growth in a meadow where graves had been disturbed—the significance of which might otherwise go unnoticed.

Having spent a great deal of time reviewing the video footage that Loshi shot at Izbica and Padalishte, and after pouring through the hundreds of related pages of ICTY court transcripts, I have finally come to realize that the affective remainder of the Izbica massacre has not in fact been flattened by the legal protocols that were mobilized to attend to such a horrific event, as I had earlier surmised. On the contrary, a bureaucratic excess, albeit not one resonant with emotive affect, was produced by the very elaborate recoding processes through which the material evidence was made to move and speak. The more the video was played, edited into sequential clips by the court, translated into multiple languages, rewound, fast-forwarded, stopped, and cross-examined, the more saturated or impregnated with

information it became. Two histories were now evidenced by the object: the tape as recorded and copied by Loshi and the process of legal arbitration to which the video had been submitted. Something happened to the video as it worked its way from its procurement in Albania, through its pre-trial proceedings and disclosure by the prosecutor, to its presentation before the trial chambers wherein corroborating testimonies were disputed, and its final entry into evidence as official exhibit P232. The violence captured at the scene of the crime was, to a certain degree, complemented by the tape's machinic afterlife as it was submitted to the relentless legal machinery of the court.

[Videotape played]

JUDGE BONOMY: And you say in that statement under oath: "I recorded this videotape myself on March 31st, 1999, and this original exhibit has been in my constructive possession from the time of filming until now." Now, we already know, thanks to the testimony that you gave in statement you made under oath is not true and accurate because Mr. Thaqi is the one who recorded the video. Now, is it also the case that the second part of this statement, that is to say that you had the original tape in your constructive possession at all times before delivery to the Prosecutor, that statement is not accurate and in fact is false. Isn't that correct?

A. No. This is correct, but I believe this is a misunderstanding. Because what I was — what I said there or what I was trying to explain there, and I did — I believe I did so, was that just after the taping was done by Sefedin Thaqi in — after a few days, I believe this was April 3rd or 4th, I can't remember it now, we transferred the whole filming from his tape to VHS tape, which I had it all the time in my possession. But that tape I couldn't bring with myself to Albania because I found it very dangerous to take it with myself. Later on I meant I could and I would, but I never did because I found it too dangerous. And then I was trying to get a hold of Sefedin Thaqi's tape, which I did. And this is how this Sefedin Thaqi's tape got into Tribunal and not my tape that you're referring to, which, of course, like you said, was in my possession all the time. And I believe now it's in a possession of Tribunal of The Hague as well.

Q. Now, with respect to Mr. Thaqi's tape, am I correct that this tape was at one point in time stolen by some thieves?

A. Yes. At the time where I was looking for this tape, his own camera was stolen, I believe not because of the tape but because — the tape was stolen because of camera. The thieves didn't even know what was in. And then with the help of Shaban Dragaj I get a hold of this tape again.[35]

Within a juridical context the material witness is a person who is deemed to have information germane to the subject matter of a lawsuit or criminal prosecution that is significant enough to affect the outcome of the trial. In other words, the witness, by means of the information they may possess, is considered sufficiently "pertinent" to the legal proceedings that every effort must be made to procure their testimony. Humans become witnesses when their knowledge or experience positions them as semantically "material" to a case. However, the mere fact that materials capture and archive eventful processes within themselves or harbor information as metadata does not convert such entities into de facto material witnesses capable of testifying before the tribunals of history. All matter registers evidence of certain histories, but not all materials become evidential in the sense of disclosing or bearing witness to these historical processes. Emphasizing the classical distinction between legal evidence, as that which belongs to the domain of the technical archive, and testimony, understood as a sworn pledge (made by a person) to tell the truth, Jacques Derrida has argued that "to be a witness consists in seeing, in hearing, etc., but to bear witness is always to speak, to engage in and uphold, to sign a discourse. It is not possible to bear witness without a discourse."[36] What Derrida shows, however, is that this (legal) discourse is already to some degree technical by the very nature of the iterative protocols that organize the taking of the oath. The appeal to technics that he identifies within the structurally performative dimension of entering the law as a witness—I swear to tell the truth, the whole truth, and nothing but the truth—exposes the degree to which it becomes difficult to differentiate between a conception of material evidence and pure testimony, with this difficulty turning exclusively on the question of technology. This ambiguity is at the heart of a discussion around the amateur video footage shot by Loshi in the aftermath of the massacres at Izbica and Padalishte.

Appearing initially as erratic magnetic interference, the damaged materiality of exhibit P232 eventually migrates into the image-field as the mute horror of dead bodies slowly coalesces to reveal itself to the camera/viewer. The material violations evidenced in the dense overlay of defects caused by the repeated copying and over-coding of the tape immediately alerts us to the material violations of the body proper that will soon emerge as the intended subject matter of the image. In cinema such frenzied distortion in the visual field has come to signal immanent danger and threat, as the stability of a world organized as a coherent picture falls apart and is consumed by violence, a trope that a director like Michael Haneke has relentlessly resisted in extruding violence out of his restrained and overly passive images. The flat, orderly image cleansed of animated surface noise is the most terrifying in a Haneke film and the rupture when it occurs all the more ferocious. His films *Funny Games* (1997) and *Caché* (2005) are exemplary in this regard. The massacre video cannot, of course, be compared to the narrative constructions of cinema given its status as documentary evidence of a crime.

Fig. 29. Video frame-grabs from Liri Loshi's footage shot in the aftermath of the Padalishte Massacre, Kosovo, March 26, 1999. Source: ICTY Case No. IT-02-54: Milošević. Source: ICTY Court Records.

But the impoverished condition of the tape, with its material degradations and destabilized image-field, are disturbingly resonant with chilling affect, reminding us of the political program that sought to eradicate difference through ethnic cleansing.

Literary critic Shoshana Felman has argued that the very difficulty of producing an intelligible narrative in the face of historical trauma is that which characterizes the true act of bearing witness. Drawing upon the filmed documentation of the Eichmann trial in which a witness, Yehiel Dinoor/K-Zetnik, fainted while attempting to testify, she asks under what circumstances and in what ways the withdrawal of the legal conventions of speech can constitute a form of legal testimony in its own right.[37] When recounting his own experiences of Auschwitz, Primo Levi likens his memory traces to the machinic operations of a tape recorder, which can rewind and play back history: "I still have a visual and acoustic memory of the experience that I cannot explain. […] Sentences in languages I do not know have remained etched in my memory, like on a magnetic tape."[38] K-Zetnik's memory erased the trauma of the camp, whereas Levi's memory recorded it. In both cases the capacity to bear witness occurs not through acts of spoken testimony but through technologies of inscription: the fainting body, the mnemonic operations that rewind and play back like a tape recorder. Likewise, rather than reducing its capacity to stand convincingly before the Tribunal as a witness to a crime, the degraded quality of Loshi's videotape enhances its capacity for testimony insofar as the epistemic dimensions of an image-regime typically called upon to account for historical violence through explicative narration are refused. Instead its material defects saturate the tape with a different kind of information, producing a form of ontological reckoning that doesn't require the supplementary intervention of a human witness endowed with the task of extracting meaning from errant electrons or executed bodies. Forcing wholeness and clarity from the massacre videotape's erratic image-data would, in my mind, violate the events anew—which is exactly what happened during the cross-examination of Loshi in court. What the footage can tell us about the historic events to

which it gestures as a technical witness, is matched in relevance by its struggle to meet the court's demand for coherent accounts of history.

When writing about Francis Bacon's paintings, Gilles Deleuze contends that "photographs cannot produce an intensity of sensation, or rather cannot produce differences within sensation," in that, unlike painting, they do not activate the body and provide different ways of seeing. Rather, they are merely a recording and a resemblance of what we see.[39] Painting, says Deleuze, requires the cooperation of the artist's hand, which is always in a relationship of imbalance with the eye. What the eye sees can never be registered absolutely by the hand: something different always emerges from within the depths of paint. I contend that many of the media artifacts presented during the legal proceedings of the ICTY emphatically register this imbalance at the level of the machinic. In each case, sensation emerges out of the technical reorganization of the image-event; that is to say, out of its material depths rather than out of its mimetic regime. A different strata of knowledge about these events of crisis—knowledge that arises out of processing—is impelled into presence, activating the sensorial domain of testimony at the moment that the plane of resemblance (the appearance of things) gives way to the furtive emissions of the ontological substratum. At these moments of intensified image-compression a new material witness might be said to emerge from within the depths of magnetic particles or pixels.

Q. My next question — there are only going to be two more questions, and that is going to conclude my cross-examination. So my first question has to do with the authenticity of the footage in relation to the date when it was made. Is there some compelling evidence that would prove the date when this was taken? Was it exactly June 1999? […]
A. With regard to your first question, my sentence uttered on the tape is, "We are in Izbica, 23rd of June, 1999, 1215 is the time, 15 minutes after noon." This is my opening line when the recording starts, and then I explain what I'm doing.[40]

Q. My final question, sir: You've told us, both in the statement and under cross-examination, about the actual videotapes, and you talked about differences in format and then re-recording. The first format of the original tape, I'm holding up a very small videotape. Would you look at it, please. Is that the original format of the tape which was designated as 1733, is that the format of the original tape?
A. From the format that I can see from here, I can't make it out all that clearly, but it could well be the cassette that I brought to this court.

Q. Then I'm holding up a larger, normal size videotape that is usually in use at video stores, et cetera.

Is that the size of videotape that you recorded or re-recorded what was on the smaller tape? Is that the two different sizes?
A. Which one, the small one or the big one?

Q. Now looking at a bigger one.
A. Yes. That's the size of the cassette that I used to transfer the material from the small cassette to the large one, because later I used a small cassette of the kind that you're holding in your other hand.[41]

As this book *Forensis* makes explicit throughout, the primacy of human testimony is increasingly giving way to a forensic account of events that has shifted the emphasis towards an object-oriented juridical culture immersed in matter and in code. Yet in order for a legal object to bear witness legally, given that it can't swear to tell the truth, it must move through a sequence of bureaucratic stages that address its relevant features or structurally recompose it. The visceral defects of Loshi's massacre video bear sensate and even symbolic witness to acts of palpable violence. And somewhat surprisingly (to me) its electronic degradation did not raise questions as to the credibility of Loshi himself as a material witness, in spite of the fact that under cross-examination he admitted that the camera containing the crucial Izbica tape (IT-05-87) was stolen and later recovered in Albania along with the video. Loshi's admission corroborates the damaged state of the tape, which in addition to dropout shows signs of extensive image-loss, indicating that it was likely reprocessed by incorrect video codecs when transferred. Moreover, the presence of rolling scan lines and yellow streaks suggest that at one point the video may have been copied by filming directly from a television screen. These are all factors that point towards the tape's ongoing transformation as it traveled between Kosovo, Albania, and The Hague—a situation that could introduce doubt into the legal proceedings if the tape's chain-of-custody were to become an issue. Given the extraordinary events documented by the video, and the perilous conditions under which it was made, equivocations as to its veracity were minimal.

Slobodan Milošević cross-examining Liri Loshi:

Q. Yes. We're going to look at all that very carefully, don't you worry about that. And experts will take a look at that too, never you mind. But what I would like you to tell me is how, by showing a picture of a body in a meadow, you set out to prove that death was caused by execution. And then you go a step further and say that death occurred through execution and that the execution was carried out by the Serb army and police. How do you prove that by showing the picture of a dead body, of a dead man in a meadow? […]

JUDGE MAY: I'm going to stop you. I'm going to stop you.

Fig. 30. IT-02-54: Milošević [WMV] Videotape of Izbica Massacre (extracts). Document Type: Exhibit P308A • Date: 03/09/2002 • By: Prosecution. Source: ICTY Court Records.

All this is argument. There's no point arguing with the witness. He's given his evidence. He's described what he filmed. There's no point asking him what it's supposed to prove. That's a matter which we're going to have to decide. You know this. You argue with witnesses and it's pointless.[42]

"But what I would like you to tell me is how, by showing a picture of a body in a meadow, you set out to prove that death was caused by execution?" This meta-question posed by former Yugoslav President Slobodan Milošević does not doubt the fact of the tape's existence, nor the condition of its production—chain-of-custody queries would tend to suggest there is something on the tape worth interfering with and would thus reinstate the significance of the object—his question instead casts doubt on the capacity of the image to *prove* rather than merely show that something happened. Given that the court's evidential holdings now enter the trial images almost exclusively as screen images scanned to e-court, whether buildings, soiled clothing, or bullets, the question could in many ways unravel its entire legal infrastructure, had the probative value of images been further disputed. My analysis of the ICTY Court Records is itself not concerned directly with representational matters, but with matter as captured by different forms of technology and processed by different kinds of legal apparatuses. It may be understood as a cross-examination that does not disavow the status of representation, inasmuch as it asserts the witnessing capacity of micro-material events and reveals their discursive uptake within the administrative circuits of the law. Despite the mere appearance of things, there is always something more

that can be discerned when "entering evidence," not as a jurist or archivist charged with the task of admitting materials into evidence and guarding their history against external forces, but as a researcher plunging into evidence and following its lines of flight as they cut across the legal architectures of the court.

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