The hybrid legal geographies of a war crimes court

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**Abstract**

This paper explores the implications of understanding war crime trials as hybrid legal spaces. Drawing on twelve months of residential fieldwork in war crimes trials in the Court of Bosnia and Herzegovina, Sarajevo, it examines the circulation of evidence, the choreography of the court room and the nature and possibilities for legal observation. The concept of spatial hybridity foregrounds the material and embodied nature of the trials, illuminating the forms of comportment, categorisation and exclusion through which law establishes its legitimacy. Rather than emphasising separation and distance, the lens of hybridity illuminates the multiple ways in which war crimes trials are grounded in the social and political context of present day Bosnia and Herzegovina. But more significantly, the argument challenges accounts of the Court of Bosnia and Herzegovina as a 'new' institution, bringing to the fore the material, bodily and political legacies through which it operates. Countering a language of 'nascent' or 'fledgling' state institutions, we conclude by arguing for metaphors of decay or decomposition as a more appropriate rubric for understanding new legal enterprises in Bosnia and Herzegovina.

**Keywords**

Legal geography, Bosnia and Herzegovina, hybrid geographies, war crimes trials
Introduction

The production and enforcement of law involves processes of categorisation. These are particularly evident in the case of international law, where geographical units are variously reconfigured, consolidated and transgressed through its operation. Rather than simply signalling an erosion of state legal sovereignty, the implementation of international legal codes and norms points to a more ambiguous set of geographical consequences as imaginaries of the ‘international’ and the ‘domestic’ are produced through its operation (Elden, 2009; Gregory, 2007). In order to critique these categorisations we can draw from the work of scholars of law over the past thirty years, much of it within geography, which has sought to explore how concepts of law and space are co-produced through the exercise of power (Blomley, 2003, 2008; Delaney, 2001). By rejecting an image of space as an inert backdrop against which legal codes unfold, this scholarship has led to a more profound criticism of the separation of social life from imagined apolitical legal principles (Blomley, 1994, 34; Jeffrey 2011; McEvoy, 2007). Adopting this perspective we can begin to critique the concept of international law, and explore instead the forms of spatiality that are produced under the label of being ‘international.’ Santos (1987) talks of the “supra-state” legal spaces produced through transnational capitalism, though this is not necessarily a contiguous territory or jurisdiction. As James Ferguson (2006) has noted, the form of territorialisation of such an entity is more likely to be an archipelago of enclaves adhering to specific legal norms than an expanding uniform legal territory. In these terms scalar rhetoric masks a fragmented and uneven geography. Building on such insights, we need a clearer engagement with the ontology, as opposed to the epistemology, of international law, as it unfolds in particular places and between particular peoples.

In this paper we will explore the spatial consequences of attempts to implement international criminal law in Bosnia and Herzegovina (BiH), focusing in particular on the establishment of the State Court of Bosnia and Herzegovina (CBiH) in 2005. Drawing on qualitative fieldwork carried out between in October 2009 and between September 2011 and September 2012, we will argue that the
trials at the CBiH need to be understood as practices of spatial hybridity, extending beyond simply the blurring of international or domestic scales. As trials unfold they illustrate the paradox of precise legal categorisation conveyed through the disordered interweaving of humans, materials and language. By observing the unfolding of law over a sustained period of time we begin to trace the limits of war crimes trials, how the fragility of memory, evidence and bodies constrains the possibilities of legal resolution. While the theoretical rubric of this argument advocates complexity and difference; the objective of the paper remains modest: to convey spatial hybridity in order to illustrate the divergence between expectations and outcomes in the workings of a new war crimes court. This matters because judgements of the success or failure of war crimes cases are often assessed from the perspective of numbers of indictments or completions of trials. It is only through an examination of the spatial hybridity of these cases that we can discern why trials slow, why individuals and groups resist the work of the court or how political manipulation of court practices can gain currency.

The hybrid legal geographies of the CBiH emerge both through the trial processes and the context of its creation. The conflict in BiH began in 1992, following the state’s declaration of independence from the remnants of Yugoslavia (see Silber and Little, 1995). The dynamics of the initial violence saw political and military leaders, in particular loyal to Serb causes, combine the desire for national security with the aspiration of territorial ethno-homogeneity (Campbell, 1998; Toal and Dahlman, 2012). The attempt to carve the Republika Srpska as an ethnically pure territory out of the actual existing multi-ethnicity of the Yugoslav Republic of Bosnia required the expulsion or death of non-Serb populations, the destruction of non-Serb cultural and religious buildings and the consequent inscription of Serbian heritage on the landscape (Coward, 2009). But as a significant deviation from international responses to previous conflicts, moves began early within the conflict, initiated by members of the UN Security Council, to view the violence committed on the territory of BiH as a violation of international law. That is, legal instruments and arguments were deployed while the violence was still taking place, rather than as a post-hoc form of retribution (see Goldstone, 2000;
Despite initial reticence (see Hazan, 2004), and following reports of ‘ethnic cleansing’ on the territory of BiH, in 1992 the UN Security Council established a Commission of Experts with the mandate to investigate whether “grave breaches of the Geneva Conventions and other violations of international humanitarian law were being committed in the territory of the former Yugoslavia” (Commission of Experts, 1994). Led by Law Professor Mahmoud Cherif Bassiouni, over the following years the Commission uncovered and documented numerous breaches of international humanitarian law, in particular noting the existence of detention camps, the expulsion of civilian populations and the summary execution of victim groups. For example in the case of the siege of Sarajevo by groups loyal to Serb causes, the Commission wrote:

> [t]he cumulative effect of the number of civilian casualties, the destruction of non-military structures, attacks upon and destruction of protected targets, such as hospitals, cultural property and other impermissible targets, evidence a consistent and repeated pattern of grave breaches of the Geneva Conventions and other violations of international humanitarian law. The length of time over which these violations took place and their recurrence clearly establish that, in at least a large number of incidents, those ordering and carrying out these actions committed such violations. Command responsibility also clearly exists (Commission of Experts, 1994).

Under growing international concern relating to human rights abuses and in light of reporting of the Commission of Experts, on May 25th 1993 the UN Security Council passed Resolution 827 on May 25 establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) with headquarters at The Hague (see Hazan, 2004; Jeffrey, 2009; Nettelfield, 2010; van der Wusten, 2002).

From its initial design the ICTY was conceived as an ad hoc, and therefore temporary, judicial institution. Part of its ‘completion mandate’ comprises the devolution of war crimes cases and prosecution competences to national state courts in Serbia, Croatia and BiH. In August 2003 the UN Security Council passed Resolution 1503, which formally called upon national judiciaries in the
former Yugoslavia to try cases against what were termed “low and mid-level war crimes perpetrators” (ICTY, 2012a). This process of establishing a court and prosecution service had been fraught, as initial collaboration in 2000 between the governments of the Muslim-Croat Federation and the Republika Srpska (the two ‘entities’ that, together with Brčko District, comprise BiH) and the Office of the High Representative\(^1\) (OHR) to draw up the necessary Law on the State Court of Bosnia and Herzegovina had collapsed. Consequently Wolfgang Petrisch, then High Representative (head of the OHR), imposed the Law in November 2000. Following these initiatives two donor conferences were organised, first in The Hague (2003), where €15.7 million was pledged, and in Brussels (2006), where donors pledged €7.7 million. By 2005 the Court was in a position to accept transferred cases from the ICTY. The Court began with an integrated international and domestic judiciary, and in subsequent years international participation in the judicial panels has slowly declined.\(^2\)

At this early stage the CBiH was a ‘hybrid’ entity, where international funding and judiciary were supporting a purportedly ‘national’ court. Exploring the subsequent founding and operation of the court, we will argue that its spatial consequences are indeed ‘hybrid’ but not simply in the integration of the imagined realms of the ‘domestic’ and the ‘international’. The practice of the court itself is a performance of hybridity, where human and non-human agents intersect in producing varied imaginations of scale, space and place. In part these observations are not unique to the CBiH and could be applied to a range of legal settings. But we will argue that there is a specific need to explore spatial hybridity in the case of attempts to establish ‘transitional justice’, that is “[..] a society’s attempts to come to terms with a legacy of past abuses, in order to ensure accountability, serve justice and achieve reconciliation” (United Nations Security Council 2004, 4). Exploring the hybrid practices of law, with its attendant focus on material and social context of legal performances, challenges a purely ‘legalistic’ understanding of transitional justice, where justice is largely understood through the study of legal processes and the perspectives of legal personnel (see McEvoy, 2007; Jeffrey, 2011). By its nature, a hybrid spatial perspective orientates attention to the embodied and situated nature of legal processes and the constructed nature of the distinction
between law and non-law. This is particularly important in transitional contexts, where crimes are already temporally remote and further distanced through the use of legal mechanisms to seek to establish justice. Through the performance of law within a transitional setting we can observe how competing geographical practices and imaginaries interplay through traumatic recollections of the past, emerging alongside fantasies of nationalist homelands, played out through the recollections of aging -- and often absent -- witnesses.

In order to invoke the spatial hybridity of law we have followed a qualitative and ethnographic research design, exploring legal practices as they unfold within BiH. In order to capture this material we undertook a pilot study (October 2009) and a follow-up year of residential fieldwork in BiH (September 2011-September 2012), the latter of which was divided into a series of concurrent data collection activities. The first comprised fifty open-ended interviews with representatives from the CBiH (in particular the Court Public Information and Outreach division), from wider judicial bodies such as the ICTY liaison team in Sarajevo, within other international organisations such as the Office of the High Representative, United Nations Development Programme (UNDP), the European Commission and with international and local NGOs. Second, the research involved monitoring war crimes trials within the CBiH, attempting where possible to track individual trials from the defence and prosecution arguments through to the verdict and (when relevant) sentencing. Through a continual process of note-taking, the monitoring attempted to capture the experience of attending the court, using anthropological techniques of listing the objects observed in the corridors and waiting rooms, noting the comportment and interactions of other trial attendees, in addition to descriptive accounts of legal processes, materials and interactions within the trials themselves (see Navaro-Yashin, 2012). As discussed below, this style of material, architectural and bodily observation is crucial when adopting a theoretical perspective that foregrounds the significance of the non-textual in the production of legal outcomes. Thirdly, over the course of the fieldwork we attended public outreach events organised by the CBiH, the ICTY or NGOs. These events were crucial in tracing the affective responses of groups and individuals to the operation of war crimes trials, often
providing an insight into feelings of anomie and frustration at the pace or scope of legal processes.

Finally, the research involved translating and reviewing institutional literature from the CBiH, the ICTY and the NGO community.

This paper is divided into four further sections. In the first we examine the theoretical implications of using ideas of hybridity to examine war crimes trials. This material explores how legal scholarship over the past thirty years has looked beyond textual understandings of law, to explore instead the political and juridical implications of law as a socially and materially embedded performance. In a second section, we examine the implications of this theoretical material for our understanding of the foundation of the CBiH. Rather than viewing the establishment of the CBiH as the birth of a new judicial institution, this section examines how hybrid geographies usher in a more complex temporality. In our argument we foreground the significance of legacy and decay in shaping the possibilities of legal resolution in the court, where materials and bodies are degrading and limiting the exercise of legal justice. The third section explores the performance of law at the CBiH, examining how audiences comprising victims and human rights NGOs are interpreting and challenging the practices of the CBiH. Constructed through a series of trial events and arguments, we trace how a hybrid understanding of the trial processes illuminates interpretations of the achievement (or otherwise) of justice in BiH. The conclusion outlines the meaning of these arguments for the fields of legal geography and transitional justice.

Hybrid Law

A practical engagement with legal hybridity is freighted with theoretical consequences. Foregrounding a hybrid approach requires challenging some of the cherished classifications that have organised social scientific thought. Perhaps most crucially, from this perspective the distinction between human and non-human agents becomes blurred and frayed, both through a focus on the assemblages of bodies and materials that comprise the social world, but also by querying the concept of the human body as a pristine unit detached from the material world. For Sarah
Whatmore (2002, 3) this duality is at the heart of the hybrid geographical approaches that attend “simultaneously to the inter-corporeal conduct of human knowing and doing and to the affects of a multitude of other ‘message-bearers’ that make their presence felt in the fabric of social life.” Questioning the human/non-human binary has a series of implications for the study of society. First, it centres on categorisation as a form of primary distancing: that the separation of humans from nature and technology allows “easy distinctions to be made between some subjects as pure and others as impure, some as citizens and others as strangers” (Amin, 2012, 2). An embodied and situated account can begin to trace the entanglements of the material and the technology that shape the possibilities of bodily encounters and practices. This affords a series of new lines of analysis, for example foregrounding the role of decay and decomposition of materials and bodies as a form of non-human agency, a process that Caitlin DeSilvey (2006, 323) notes may not be dismissed as “erasure” but rather as “generative of a different kind of knowledge.”

Second, exploring spatial hybridity fosters scepticism as to the unitary nature of the institutions under examination. This approach is not the exclusive preserve of hybrid geographies, for some time scholars in other areas of the social sciences have sought to provide anti-essentialist or post-foundational accounts of discourses, practices and bodies (Butler, 1990; Derrida, 1994; Müller, 2008). Reflecting these perspectives, hybrid approaches have avoided using categories or organisations as points of departure, exploring instead the unitary nature of such institutions as a “precarious achievement” (Law, 1994, 101; cited in Whatmore, 2002, 4). In doing so, hybrid perspectives have fostered attention on the ‘event’ rather than the institution, group or individual as an object of analysis. As Ash Amin (2012, 5) notes “the entanglements of situated practice are taken seriously by interrogating the multiple provenances of judgement that envelope the event – mediated and direct, immediate and remote, purposeful and unintentional, cognitive and non-cognitive, archived and actual.”
Exploring legal hybridity, then, requires an examination of the “multiple provenances of judgement” that shape and situate legal practices. This approach orientates attention to trials as forms of performance or improvisation, where agents (both human and non-human) actively constitute law through gestures, iterations and dispositions. This approach, popularised by legal anthropologists exploring the relationship between law and theatre, marks a significant shift away from understanding law as a textual practice structured around legal codes and constitutions. From the outset this is more than simply about the medium through which law is understood: it orientates the discussion to the primary questions of what constitutes law. As Robert Cover (1985, 180) states in his landmark exegesis concerning the practice of law, on a political level law “connotes legitimacy in the exercise of coercion and in the organisation of authority and privilege,” while on a philosophical level it connotes “universality and objectivity.” The turn to exploring legal theatricality can be understood as part of a wider move to challenge such assertions of universality, and explore instead the resources, bodies and actions that articulate to accomplish law. Perhaps the most prominent example of a theatrical interpretation of legal practice is contained in Hannah Arendt’s (1963) account of the trial of Nazi bureaucrat Adolf Eichmann. According to Arendt, the design of the trial exceeded its juridical function and attempted instead to fulfil a wider dramatic purpose: to act as a stage on which the crime of the Holocaust could be signified through the actions of Adolf Eichmann. But while Arendt is critical of the theatrics of the proceedings, suggesting this distracts from its juridical purpose, others view a theatrical interpretation as a mechanism to capture all that exceeds law in the performance of a trial. For example, Shoshana Felman (2002) examines the moment during the Eichmann trial when witness Yehiel De-Nur (the author K-Zetnik) collapsed while giving testimony to his experiences in Auschwitz. For Felman (2002, 159) this moment points to the limits of legal discourse, illustrating “the tragic unnarratability of the ungraspable disaster and of its immeasurably devastating, unintelligible trauma.”

Felman illustrates that performance can convey something beyond the text, but there are philosophical schisms as to how we understand the relationship between performance and law. The
legal scholar Julie Stone Peters has long studied the relationship between legal practices and theatricality, arguing that trials “exploit iconic props as crucial clues to the unfolding of the narrative, and often rely on space, staging, costume, and spectacle in an attempt to bring back to life the dramatic event they are attempting to recount” (Peters, 2008, 181). This point is extended by Linda Mulcahy (2011) in her recent exploration of the design and architecture of law courts and court rooms. For Mulcahy (2011, 1) the design of the court has implications for wider understandings of the nature and independence of judicial practices:

Each time a section of floor is raised, a barrier installed or a segregated circulation route added it has the potential to create insiders and outsiders; empowered and disempowered participants in a space ostensibly labelled ‘public’ in which the intricacies of civil liberties and participatory democracy are played out.

In this account the court is not a neutral backdrop to the trial process, but rather its architecture, materials and spatial organisation shape the production of law. But Peters goes further, to suggest that studying the performance of law is not simply a more contextualised means through which legal nuance may be captured, rather the performance of law (its unfolding or doing) is constitutive of its force and authority. Consequently like others – most notably Jacques Derrida (1994) and Butler (1990) – Peters is keen to point to the performative force of the staging of law, where rites, ceremonies, dress and comportment are themselves central to the articulation of authority. Within this conceptual framework it is not that law is enacting a pre-existing form of authority, but rather law is actively constituted through such actions.

This performative point extends beyond simply the creation of the law/non-law distinction. As Alain Pottage (2004) has illustrated, the practice of law is constitutive of a range of classificatory acts, where distinctions are reified between people and things. Whether material evidence, an executed corpse, a testifying witness or an indicted defendant, legal practice performs distinctions and thus brings them into being. But, of course, these are not simple classifications to render, as Damir
Arsenijević (2011) illustrates in his study of the cataloguing of mortal remains in Bosnia and Herzegovina after the 1992-5 war. Attempts to identify the mortal remains of missing persons have illuminated a tension between legal decision-making and collective trauma, as collections of bones are granted legal force as a human body, while other material or mortal remains are discarded or overlooked. Arsenijević’s (2011, 194) prose punctures the supposed clinical rationality of law:

Now I ask you: what would you decide to name a set of mortal remains – a femur, a rib, a tooth, part of a skull – as a body, with full identity and history? Are a femur, a tooth, a rib and part of the skull enough for you? What is the bare minimum you would identify as a body, would you call a body?

Part of the power of Arsenijević’s rhetorical questions is their role in illuminating the significant tension between the unspeakable trauma of victims and witnesses, experiencing tragedy and loss, and the exercise of law as a technical practice that seeks to evaluate conflict through textual and instrumental means. This tension is perhaps encapsulated in the desire for legal processes to become ‘detached’ from wider social and political life, to produce a sphere of decision-making that conforms to a closed bureaucratic rationality. It is this detachment that allows law to present its resolutions as unsullied by the messy contextuality and political influences that permeate wider social practices. As Nick Blomley suggests, it is this presentation of detachment that grants law its moral authority (Blomley, 2008, 161). Assuming a hybrid perspective explores the performative nature of such detachment, that it is itself a precarious achievement that is perpetually reinforced through choreography, architecture and performance, rather than existing as a static achievement.

Perhaps the most explicit exploration of the performance of legal detachment has come through Bruno Latour’s (2004, 2010) ethnographic study of the Conseil d’Etat, one of France’s supreme courts. Encapsulating a legal anthropological perspective, Latour explores the production of law through the circulation of materials, employing an actor-network approach to uncover how legal knowledge is produced through quotidian interactions of a range of human and non-human actors.
In these accounts Latour makes a series of direct comparisons between his studies of the practice of science and the laboratory, and the conduct of law and courts:

What makes a comparison between the world of science and law all the more interesting is that both domains emphasise the virtues of a disinterested and unprejudiced approach, based on distance and precision, and in both domains participants speak esoteric languages and reason in carefully cultivated styles (Latour, 2004, 73).

The integrity of what Latour (2004, 113) terms the “legal edifice” is a product of legal practitioners performing the application of law in apparent (though not actual) separation from society at large.

The invocation of hybridity, then, has serious implications for the image of legal practice as operating at a remove from wider social contexts. It is an approach that emerges from theatrical abstraction but demands empirical grounding. In what follows we begin to trace the hybrid legal geographies of the war crimes trials within the CBiH. Foregrounding the corporeal and embodied nature of the war crimes trials illuminates how legal practices are more than simply grounded in social processes; they are productive of new social relations and spaces. Instead of the fantasy of transitional justice as a ‘new’ legal innovation reifying particular territorial assumptions, what emerges from this style of analysis are the legacies that draw connections between the past and present. But there are limits to legal possibilities that emerge from the materials through which law is enacted. Exploring war crimes trials as hybrid legal processes emphasises the decaying nature of legal possibilities, as witnesses die or forget, bodies decompose, evidence degrades and new sites and places are inscribed on the landscape. This is more significant than simply pointing to the relationship between temporality and decay. Instead it points to the political implications of the separation of law as a separate sphere of practice, where the performance of trials illuminates the precarious achievement of justice, grounded as it is in the corporeal, material and imagined spaces of the court.
Fantasy of birth

Men in dark jackets are gathered around the security entrance to the terracotta coloured building, smoking and looking intimidating. The gruff-looking police officers wave at me to enter the security area where I and my belongings are subjected to x-ray machines, which are set off, yet I am ushered through without as much as a raised eyebrow. I enter the courtyard of the CBiH which is littered with small groups of smokers huddling around benches sipping small brown cups of vending machine coffee. I enter the building and immediately present my passport to the reception and am issued a visitors pass for Courtroom 4. As I make my way up the stairs to the courtroom, I notice that the interior of the building is showing signs of aging even though it was only renovated in 2005. I step onto the landing and make my way to the public toilets situated next to Courtroom 4. As I close the door to the toilet stall, the handle falls off in my hand and sends me momentarily into a panic. Once calmed down, the handle is easily re-attached. Returning to stand and wait outside the courtroom, I notice a sign warning that anyone caught smoking would be fined 50,000KM which makes me chuckle and wonder how often that has been put in to force. After about fifteen minutes of waiting, myself and the two other visitors (they are both wearing accreditation, most likely reporters), are ushered into the courtroom. I chose an uncomfortable seat in the back near to the walls where I notice a layer of soot highlighting cracks in the wall where windows used to be and I wonder which room this was in the CBiH’s former life as a Yugoslav People’s Army (Jugoslovenska narodna armija or JNA) barracks and then a military prison during the war. As I continue scanning the room, I look down and see cracks in the floorboards. The defendants enter the courtroom with their police escort which draws my attention to the technical equipment present in the courtroom. The equipment, similar to the facilities is in need of an update (field notes 25th October 2011).
The account could be a narration of countless visits to the CBiH where the security routine of crossing from the street to the court became a bodily habit by the end of the research. But this familiarity masks the legal and spatial force of this threshold. The security procedures attempt to separate the court space from the landscape of the city, monitoring the bodies and materials that enter the closed space of the court building and outdoor areas. It is a reflection of the spread of security infrastructures that such monitoring is expected (see Graham, 2009); it is the norm within BiH for the passage from public space to a government or intergovernmental building to involve x-rays, surrendering possessions and assuming a new identity card. But, as Mulcahy (2011) documents, this expectation of security is a historical anomaly: legal proceedings emerged in ancient Athens and Western Europe as explicitly public affairs performed in accessible locations such as a town square, a prominent hill or in the shade of a large tree. The sense of public accessibility continues to play an important role in justifying the moral authority of court proceedings, “open justice is treated [by many] as synonymous with the notion of a fair and accurate trial because it provides important witness testimony and the partiality of the judge” (Mulcahy, 2011, 10). Visibility and an audience is a crucial component of the desire for justice being seen to be done.

But as Blomley (2008) and Latour (2009) outline above, law also derives its claim to authority from social and spatial separation. In this case the fencing of the court as an enclave within the city can be read as an attempt to perform the detachment of legal space from the surrounding political landscape of BiH. Where politicians, particularly from the Republika Srpska, have sought to criticise the court as biased against certain ethnic groups or following instructions laid down in Brussels or Washington, the security cordon can be suggestive of detachment and independence. But following Wendy Brown’s (2010) examination of nation-state wall building, such expectations are perhaps misplaced. For Brown the recent spate of nation-state wall building, for example on the US/Mexico border or around the West Bank in Israel/Palestine, does not signify emboldened state sovereignty but the opposite: the walls are “imago[s] of sovereign state power in the face of its undoing” (Brown, 2010, 25). This paradox can be seen in the spatial segregation of the CBiH space in Sarajevo.
Rather than suggesting moral authority and detachment, the fencing, security arrangements and monitoring could be identified as evidence of its frail and contested authority. The necessity to physically perform separation is a tangible reminder that the CBiH is an international imposition and has not secured universal public support as an arbiter of law in BiH.

The tension between openness and detachment stems from the materiality of the CBiH: the establishment of new legal codes cannot be implemented aspatially but have to be brought into existence through the buildings, bodies and materials. The relationship between the concept of the court and its materiality has had profound influence on its political reception within BiH. From the outset the CBiH was envisaged by supporters within the OHR as an institution that would assist with the consolidation of the BiH state. It is still understood in those terms, interviews with financial supporters of the CBiH within the Swedish and Norwegian embassies in Sarajevo explicitly understood the institution as a mechanism for consolidating the BiH state. That state consolidation is still a central objection of intervening agencies and is a reflection of the highly-decentralised patchwork of territorialities left by the General Framework Agreement for Peace (GFAP, or Dayton Accords) signed in December 1995. Within this agreement power in BiH was decentralised in particular to the two sub-state entities, the Muslim Croat Federation and Republika Srpska, and the small multi-ethnic Brčko District (Toal and Dahlman, 2012). In 2003 Lord Paddy Ashdown, then High Representative, stated to a conference on war crimes trials in Sarajevo the state-building function of this new judicial institution:

[...] our joint task can be simply stated: to bring justice to the guilty to help bring peace to the innocent. That will entail, we are all agreed, more than the International Criminal Tribunal in The Hague, vital though its work has been and continues to be. It must mean justice here too; justice meted out here in BiH. It must involve equipping this country with the means to deal with these issues itself. That is a pre-requisite for becoming a strong, self-sustaining European democracy wedded to the rule of law (Ashdown, 2003).
Ashdown’s comments reflect a view that the establishment of the CBiH can consolidate the post-GFAP state and that a new locally-embedded judicial instrument is conducive of democratic politics. This aspirational discourse, where intervening agencies can create trusted governmental institutions using a palette of new legal and political codes, has been challenged in practice. As Ashdown suggests, the CBiH was established to play a complementary role to the ICTY by easing its caseload and helping the tribunal in The Hague to meet its completion mandate. Whilst Orentlicher (2010, 107) suggests that this was a “[m]ajor advance for Bosnia’s judicial reckoning for wartime atrocities... and one of the ICTY’s most important legacies”, Bosnian courts (both domestic and military) had been prosecuting suspected war criminals during the conflict using pre-1992 Yugoslav legal codes. This was a necessarily fragmented and localised process, as approaches differed in the Republika Srpska, Muslim-Croat Federation and in Brčko District (and often exhibited variations within these territories). In the post-conflict period international agencies assumed control of the investigation and prosecution of war crimes cases. The ‘Rules of the Road’ procedure, established under the Rome Agreement of 18 February 1996, directing BiH authorities to submit every case to the ICTY thereby relinquishing control over the ability to indict and arrest alleged war criminals (ICTY, 2012b). This obligation ceased in late 2004 on the eve of the establishment of the CBiH (OSCE, 2005). Subsequently the OHR began to remodel the BiH judiciary system with the imposition of Criminal Procedure Code of BiH⁴ and the Criminal Code of BiH⁴ which saw the judicial landscape move from a civil law tradition heavily influenced by Austria, to a mix of common and civil law procedures similar to that of the ICTY.

The establishment of the new legal codes was enshrined in language of localisation and democratisation, discourses which suggest a separation between international supervision and the establishment of locally-controlled legal processes. In some senses this language draws on a sense of detachment and separation conveyed by the security cordon encircling the court complex. But the novelty of the 2003 Criminal Procedure Code of BiH and the Criminal Code of BiH has meant members of the BiH legal profession have had to simultaneously learn a new judicial system while
establishing domestic war crime prosecutions. Significantly, this has created a competence hierarchy elevating international officials, with the imagined credentials of familiarity with the new code of law, above domestic judges who lacked experience working within such legal codes. This hierarchy was reproduced during interviews with legal advocacy NGOs who suggested that BiH attorneys lacked investigative skills, the knowledge of how to effectively cross-examine, and experience of the newly-introduced mechanism of plea bargaining. One legal activist in Sarajevo, when discussing prosecutors, stated

The foreign prosecutors have more experience...and they play an important role but what I am afraid is when they all leave and there is a tendency for leaving, the local prosecutors will not be capable to put up with pressures and they become exposed to public pressures, pressures from us and media. Those who are good quality prosecutors are looking for a better job, they either become judges or attorneys or they undertake cases and positions not dealing with war crimes.⁵

Of course as one member of a legal advocacy NGO remarked “when we are dealing with an institution without precedent, they are all new to its form and processes”⁶. Thus rather than reflecting a neutral adjudication of legal competence, the wider distrust of domestic legal professionals could be suggestive of a reification of the international/local hierarchy produced through the adoption of new legal codes.

But the lack of experience of the legal codes was also changing the choreography and performance of the war crimes trials themselves. According to one member of a human rights NGO:

[...] the war crimes trials something completely new its nothing to do with their [judges] previous experiences and yes they are experienced in running trials but it’s completely a new experience and [...] they have a right to question [under the new system] but they hardly use
this at all; they do not get involved [and] they do not see the way they behave in the court can actually influence the witnesses.⁷

The sense of judicial inexperience amongst BiH legal professionals was further reflected in the series of attempts enacted by international agencies to ‘build the capacity’ of court employees. Mirroring discourses of external expertise that have permeated international development (see Li, 2007), international organisations such as the United Nations Development Programme (UNDP) and Organisation for Security and Cooperation in Europe (OSCE) have funded a series of training initiatives that have viewed improvement in judicial processes through the lens of increasing the competence of domestic legal personnel. The UNDP funded a three year programme entitled *Support to Processing War Crimes Cases in BiH—Building Capacities of Cantonal and District Prosecutors’ Offices and Court in BiH to Process War Crimes Cases*. This programme worked to build capacity of cantonal and district prosecutors in processing war crimes cases. The OSCE for example completed in October 2011 the *War Crimes Justice Project* funded by the European Union and jointly implemented by the OSCE, the ICTY and the United Nations Interregional Crime and Justice Research Institute. The four million Euro project reaching across the legal institution of the former states of Yugoslavia included activities such as training legal professionals on international humanitarian law and hiring thirty young professionals to provide legal support in institutions (OSCE, 2011). These schemes perhaps encapsulate the paradox of elevating international expertise in order to establish domestic legal competences. The fantasy of birth, then, is not simply reflected in the tension between detachment and openness, as discussed in the case of the security cordon. It is also exhibited in this uneasy relationship between the creation of a new institution and the lingering need for international stewardship.

But just as the establishment of new criminal codes can erase the legacy of legal expertise, so too can the materials of the court site erase spatial struggles over memory and trauma in BiH. The participation of international judges within the judiciary and the central role of international training
in developing the competence of BiH judges has led to domestic opposition towards the CBiH, in particular from politicians in Republika Srpska. Mirroring the challenges faced integrating the BiH police (Wisler, 2007), army (Vetschera and Damian, 2006) or local government agencies (Jeffrey, 2006), the establishment of a state judicial institution has been criticised in Republika Srpska as an international imposition, biased against Serbs and failing to follow established legal protocols. Rather than remaining an ideological confrontation, these criticisms have found material form in the court building itself, and subsequently resistance has become a struggle over the use and commemoration of space. At forefront of these concerns has been the selection of the building, a former JNA barracks named ‘Viktor Bubanj’ and located five kilometres from the centre of Sarajevo. During an interview with a CBiH official about the location of the court she dismissed any controversy concerning the building by suggesting that the location was chosen because “all the good buildings in the centre of town had been taken by other government or international organisations.” But this statement highlights that the buildings used by government institutions are rarely new, but are rather appropriated government or military buildings repurposed for a post-conflict role.

In the case of the CBiH it is not the former JNA barracks role that has provided the source of criticism, but the activities that were undertaken at this complex of buildings during the 1992-5 conflict. While accounts of the usage of the CBiH site vary, individuals loyal to Serb causes have argued that the buildings were used as an internment camp by government forces, pointing to the fact that its name was changed to ‘Ramiz Salčin’ in 1992 to commemorate a fighter in the Bosnian Government Army who was killed in the siege of Sarajevo. While facts as to the events that unfolded at the CBiH are sparse, three people (Besim Muderizović, Ramiz Avdović and Iliuan-Nikolae Vintila) were indicted in October 2011 for war crimes against civilian committed at the site (see Balkan Insight, 2012). Radovan Stanković, a now-convicted mass rapist whose case was one of the first to be transferred from the ICTY to the CBiH, used accusations of this usage as a reason to try to prevent the relocation of the trial from The Hague to Sarajevo (see Jeffrey, 2012, 142). For Stanković the
CBiH could not claim neutrality since it was ‘haunted’ by the crimes committed in the past (ICTY, 2005).

Raising the legacy of violence at the CBiH is not to say it is an inappropriate site for the CBiH. Rather that the contestation outlined here is an almost inevitable legacy in the post-conflict period in BiH, where antagonistic groups wage struggles over legitimacy through the appropriation of space and place. The argument here is that an appreciation of the materials and history of the CBiH challenge a narrative of the birth of a new court. The fantasy of birth reflects a desire for a neutral or detached space, removed from the context of the fragmented material and political landscape of BiH. This manoeuvre seeks to render silent the pasts that puncture the smooth linearity of narratives of international intervention. Instead, we see the emergence of an institution that is comprised of interwoven legacies, where a series of different temporalities intersect to produce public reactions to the establishment of law. The political context of the law is not, then, a response to the nature of legal codes, but rather an appreciation of the practice of law as a socially embedded event that is unfolding in a specific set of buildings outside the centre of Sarajevo.

Performing Law

A potted plant and another walkthrough scanner, but this one is unused at the edge of the corridor. The waiting area outside Court Room six is bare, with seating for about ten people. There is a small court yard and the door is slid open, a few court staff are outside smoking cigarettes. I am sitting waiting with a notebook on my lap and the court accreditation round my neck. Sitting next to me is a nervous looking man wearing a black leather jacket and blue trousers. He must be about fifty years old. Another, younger, man comes over and offers him a cigarette, he is better dressed and looks relaxed. My neighbour shakes his head, and wordlessly declines. There is no one else waiting. Suddenly a Clerk of the Court emerges from the court room to switch the door sign to ‘in session’ and we make our way in. It is at this
moment that the younger man puts on a gown, the older man sitting next me is ushered into the court and I go through a different door to the public gallery. From our close proximity we move into the court space to become lawyer, defendant and researcher (field notes, 12th October 2009).

This vignette illustrates the intricate micro-geographies of the court and specifically points to how human subjectivities are reconfigured through space. Bodily adornments and comportment were crucial in specifying the places you were and were not supposed be, but also configured certain roles and dispositions within the performance of law. It was clear that these mechanisms of sorting bodies were limited, and in every trial attended visitors waiting outside the courtrooms were exposed to the possibility of an encounter with witnesses and defendants, who often passed directly in front of the waiting area. While court officials spoke of the use of different entrances and exits for witnesses and defendants, this was only evident when defendants were in court custody and witnesses were testifying in the specific session. These observations emphasise Shoshana Felman’s (2002, 9) description of courts as “physical theatres of justice”, where focusing on bodily interactions and performances points to the possibility for law to retraumatise witnesses and victims through proximity and interaction with perpetrators.

The significance of performance, and the performativity of space, was evident in the trial sessions themselves. The interactions of bodies within the court space illuminated court interactions as exceeding the linguistic domain, to include a range of bodily dispositions. For example, these interactions were observed during a trial in late November 2011 of four defendants indicted for crimes committed in Srebrenica against Bosniak men and boys in 1995:

The expert witness called to the stand was a colonel in the Kenyan military who was an observer in Srebrenica at the time of the massacre. One of the defence lawyer’s body
language was suggestive of anxiety and nervousness. The whole time he questioned the witness his arms were crossed and he kept putting his hand up so the witness would stop speaking, even taking his headphones off (the witness was speaking in English) when he did not want to hear the witness. The lawyer was agitated and sweating profusely. The lawyer for the fourth defendant asked questions and was dismissive to the witness and telling him he could only answer what he (the lawyer) thought was sufficient. The witness said that he needed to explain the answer in order for the rest of the room to understand what he was talking about. The defence lawyers were constantly trying to trip up the witness by asking him roundabout questions and being quite rude. The witness handled the situation well and seemed very knowledgeable and credible. Perhaps that is why the defence lawyer was so worked up and on edge (field notes, 1st November 2011, from the trial Franc Kos and others).

This scene unfolded in courtroom six, the maximum security court equipped with the appropriate facilities to accommodate multiple defendants and their legal teams, in addition to seating for around eighty public visitors (see figure 1). As with many of the other trial sessions observed for this research, the trial was monitored by a representative from the Organisation for Security and Cooperation in Europe (OSCE) and a journalist from the Balkan Investigative Reporting Network (BIRN). With the exception of verdict or sentencing sessions, there were rarely more than five people in the public gallery. Secure behind tinted, bullet-proof glass we watched and listed as the trial session unfolded through an assemblage of bodies, materials and iterations that exceeded textual accounts of war crimes trials. Shaking and sweating, anxious lawyers choreographed their movements and language in order to constrain the evidence from a military witness giving testimony against their client. Technology is enrolled by the legal personnel through the removal of headsets as a means through which testimony may be blocked or silenced.
The use of materials and bodily practices to challenge the production of testimony was highly gendered. The power asymmetry of the interrogations was acknowledged by the prosecutors, who felt concerned about the production of legal masculinities that thrived on the vulnerability of those testifying. During a public dialogue concerning trial practices in Tuzla, one prosecutor emphasised the incapacity of judges or prosecution teams to intervene and the potential for the cross-examination process to be wielded as a tool by defendants to unsettle the witness:

[...] we are talking about very vulnerable individuals. During the interrogations verbal offenses are being used in order to disturb an individual and neither we nor the judge nor the prosecutor can help.⁹

The frequency of these forms of intimidation under cross-examination led representatives of victims associations to suggest during the research that the legal process was protecting indicted defendants at the expense of victims and witnesses. One remarked:

As for the treatment of the Prosecution towards victims, from my point of view, they are treated more like perpetrators and not like victims. Why? Why doesn’t anybody do something to protect us, why doesn’t a judge say: “This cannot be done this way”, but they let defence lawyers to interrogate us as we were the ones who were killing and not them. It sounds like we have done harm to them and not vice-versa. I have testified...I have testified numerous times...[and they were] showing me photos of the entire military squad, you can imagine how big a shock it was for me. One gets lost. As one lady said one gets silent. I didn’t know where I was. I do not remember where I was, what I was looking at in that moment, I was there, I was not here, I cannot describe to you that feeling.¹⁰
She talks of the unspeakable nature of the experience, of the limits to language to convey these embodied exchanges between defendant and victim/witness. These accounts were further complicated by the suggestion by one BiH legal analyst that there were certain expectations of bodily comportment and behaviour for witnesses, and these contributed to the veracity of the testimony being recounted:

It is not just expression it’s the expectations as well, it’s the way they [Judicial trial panel] stop or not, the questions they allow or not [...] it’s expressions, it’s their expressions of faces [...] I have a statement by one of the women who said that they didn’t believe her [about being raped] until she started crying.11

These observations speak to the potential identification of expectations of bodily performance in the trial setting. Rather than adapting the court space or the trial procedure, some respondents, particular within the prosecution service, saw psychological preparation as the responsibility of the individual:

That individual needs to come prepared...and she should be informed that she will undergo some undesirable situations in the court room. The court cannot arrange it in the way which would suit the plaintiff, the victim. The way of interrogation and intonation is something which we cannot put up with easily.12

The performance of law exceeded the bodily interactions between trial participants. The circulation of materials within the court room shaped claims to truth, most explicitly through the presentation of material evidence. The discussion of evidence often related to prosaic of whether or not the documents contained an administrative stamp or the date on which a document was certified. On
one occasion the Prosecutor’s witness was presented by the defence lawyer with a map of BiH and asked to state the acreage of the Srebrenica enclave and then outline it on the map. The map used was a poor quality computer printout reproduced on an A4 paper with no scale to help determine the acreage. The witness said the only thing he could ascertain from the map was that it was of BiH and he would be unable to determine the acreage of the enclave as there was no scale. As the witness clutched the crumpled map in confusion, the defence did not offer an alternative document, indeed there was a large map of BiH on the wall of the courtroom which could have been used (field notes 1 November 2011). Whether the map was deliberately of poor quality in order to cast doubts on the claims of the witness, or whether conversely the map’s quality was an indication of the bureaucratic inadequacies of the defence team is open to debate. What is certain is that the map itself was enrolled into the bodily contestation between defence and witness; a material extension of the anxieties and struggles for claims to truth.

While the map example highlighted the significance of material evidence, the later sessions in the same trial pointed to the forms of non-human agency that may be at work when considering the evidential processes within war crimes trials. In the following session of the same trial the Defence Team offered a series of further submissions of material evidence, largely comprising a variety of identification cards that sought to illustrate their client’s status as a prisoner of war. The document that elicited the most scrutiny was the fake military identification issued during the war in Bijeljina, BiH. A significant amount of time was spent examining the Bijeljina stamp dated 8th December 1994 to determine whether or not it was a real stamp from the war government. The fragment of paper had a particular significance to the room, it was carefully considered by defence and prosecution lawyers, as each tried to gauge whether the stamp was genuine, carefully studying the faded and worn document. The deterioration was a product of the passage of time, it had been stored in the defendant’s house and it had become bleached by the sun and crumpled against other papers. At the conclusion of the discussion the card was carefully placed on a scanner to be recorded.
electronically – frozen in time – and conveniently accessible for potential appeals. The incident once again underscored the significance of materials, but also pointed to the limits of human agency. Each piece of evidence is itself decaying, slowly decomposing as it is exposed to atmosphere, buried in the soil or hidden in amongst mundane objects in potential defendants’ homes.

Conclusions

I think that a greater number of judges should be delegated exclusively to the Court for War Crimes because nature is not an ally in that case, many suspects are dying, many witnesses are dying, and in that respect court justice will not come to those it was intended to, but there is no political will. This situation suits everybody because it is being abused by politics. This suits politicians because they do not deal further with essential life questions.¹³

This paper has examined the establishment and practices of the War Crimes Chamber within the Court of Bosnia and Herzegovina. The argument has drawn theoretical inspiration from work in the field of hybrid geography, forms of scholarship that have sought to challenge the separation of human and non-human actors in order to illustrate the interplay of beings and things in the performance of social life. The purpose of such a perspective extends beyond providing a more nuanced examination of legal processes; rather it is to unsettle the imagination of law and society as separate enterprises. As McEvoy (2007) and Latour (2010) have illustrated, the production of law is constituted through – and reliant upon – a wealth of non-legal actors, spaces and materials. The ideal of separation is structured around the imaginary of legal exchanges as unsullied by wider social and political interests, and in the case of the CBiH through its representation by international agencies as an institution that is autonomous of international agendas with a jurisdiction over the entirety of BiH’s territory. But as we have discussed, the nature of the CBiH’s establishment, the constitution of its judiciary and even the selection of the building have challenged this account of purity and separation.
But exploration of the performance of law points to a more profound challenge to the fantasy of the birth of a new court than simply its imaginary separation from social life. Rather than understanding legal exchange as a textual or linguistic exercise, the paper’s focus on hybridity has explored the embodied and material events through which legal interactions have been performed. These exchanges pointed to the masculine bravado of the defence lawyer, the anxious and intimidated witness and the crumpled and unclear identification card. They also illuminate the fallacy of novelty that encircles this institution. When seen through a hybrid lens the court is not ‘new’ at all. It is rather in a state of decay, since – as the quotation above states – witnesses are dying, mass graves are decomposing, evidence is lost, faded and absent. As we have seen, law operates through the interaction of living and non-living beings, each subject to the corrosion of simply existing. This is particularly acute in the case of transitional justice, where crimes are being addressed from previous political regimes sometimes years, if not decades, after the crimes are alleged to have taken place. The imaginary of a ‘nascent’ legal institution is permissive of a paternalistic approach by international agencies, mirroring similar processes of infantilism within post-colonial development programmes (see, for example, Dogra, 2011). Presenting an institution as ‘new’ allows legacies, both material and ideological, to be side-lined in a desire to promote a multi-ethnic future, despite the on-going antagonisms of the past.

Understanding the court as decaying has political consequences. The sluggish nature of war crimes trials was seen during the research to suit certain political parties in BiH who have mounted staunch attacks on the CBiH on the grounds of supposed bias towards those loyal to one ethnic cause or another (for example see Nezavisne novine, 2012). The difference between the temporalities of law and politics have allowed politicians to present attempts at legal redress as ponderous, incompetent and biased. In addition, the concept of decay also foregrounds the wider limitations of using law as the central instrument of transitional justice after conflict. Where the Truth and Reconciliation
Commission in South Africa combined legal redress with processes of truth telling and amnesty, the focus on retributive approaches in BiH has limited the possibilities of achieving a wider public archive of verdicts and testimony (previously conceived as a central outcome of transitional legal processes in BiH, see Campbell, 1998). In order to advance the truth-telling aspects of the CBiH greater focus needs to be placed on the fragile and precarious nature of the legal process, not as a form of rationality that operates in isolation from wider social or material encumbrances, but rather a form of social process that is beholden to the spaces, materials and bodies of legal practice.
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1 The leading civilian organisation implementing 1995’s General Framework Agreement for Peace (Dayton Accords).
2 For example, “[f]or the first three years of the five-year transitional period (2005-2007), the [trial] panels were composed of a presiding national judge and two international judges. In the second two years (2008 and 2009) the number of international judges reduces to one per panel, and by the end of the transitional period...all remaining internationals will be replaced by national judges” (Adbulhak, 2009, 339). At the time of writing international judges remained on certain panels but they are due to be phased out at the beginning of 2013.
3 Official Gazette of Bosnia and Herzegovina, 3/03
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Figure 1: Courtroom 6 at the Court of Bosnia and Herzegovina [author’s own]