

**International Criminal Law:
Legal Responses to Mass Atrocity and War Crimes**
Indiana University School of Law
Fall 2008

I. General Considerations

1. Introduction: What is International Criminal Law?

themes of the course – ‘international,’ ‘criminal,’ and ‘law’ – location of ICL within international law, human rights, and the globalized state system; concepts, scope, values, aspirations and limits of ICL

Read:

ICLP 1-6, 17-30

CoW 8-16 (Prefaces)

excerpts from ICTY, ICTR, and ICC websites (6 pp.)

Stephen, Court Wants Exemplary Karadzic Trial, BBC (3 pp.)

International Military Tribunal, Nuremberg – Defendants (photograph)

Okervill River, The War Criminal Rises and Speaks (1 page)

CoW 86-92 (Chechnya), 110-4 (Colombia), 76-83 (Cambodia), 252-9 (Iran-Iraq War)

We will consider what is uniquely ‘international’ about ICL – how does its international character change its purposes, methods and possibilities, or our expectations for it? Look at the website excerpts to consider what claims, aspirations, and self-image ICL’s institutions and actors have of themselves and their enterprise: are they justified? worthwhile? attainable? what do they not do? How are those claims and expectations likely to play out in the Karadžić trial?

The readings on Chechnya, Colombia, Cambodia and Iran-Iraq are intended as spurs to initial discussion: What sorts of crimes occur in these wars? what responses make sense? what kinds of problems do these conflicts raise for an institutional project of ICL?

1. ICTY website

BRINGING JUSTICE TO THE FORMER YUGOSLAVIA THE TRIBUNAL'S CORE ACHIEVEMENTS

<http://www.un.org/icty/glance/index.htm>

1. SPEARHEADING THE SHIFT FROM IMPUNITY TO ACCOUNTABILITY

In the words of the United Nations Secretary General Kofi Annan, during his visit to the Tribunal in 1997,

"impunity cannot be tolerated, and will not be. In an interdependent world, the Rule of the Law must prevail."

- By holding individuals accountable regardless of their position, the ICTY's work has dismantled the tradition of impunity for war crimes and other serious violations of international law, particularly by individuals who held the most senior positions, but also by others who committed especially grave crimes
- Thanks to the ICTY, the question is no longer *whether* leaders should be held accountable, but rather *how* can they be called to account
- The effect of criminal prosecutions and proceedings on leaders, be they civilian or military, local or national, is their removal from office permanently if found guilty
- By trying individuals on the basis of their *personal* responsibility, be it direct or indirect, the ICTY *personalizes* guilt. It accordingly shields entire communities from being labelled as collectively responsible for others' suffering
- For the first time in legal history, an indictment was filed, by the ICTY Prosecutor, against an acting Head of State, Slobodan Milosevic, for crimes allegedly committed while he was in office. Other individuals holding the highest political and military office have also been indicted
- This paves the way for the reconciliation process within the war-torn societies of the former Yugoslavia

2. ESTABLISHING THE FACTS

- As the work of the ICTY progresses, important elements of a historical record of the conflicts in the former Yugoslavia in the 1990's have emerged. Facts once subject to dispute have been established beyond a reasonable doubt by Judgements
- Trials at the ICTY have covered crimes and incidents across the former Yugoslavia and throughout the conflicts in the 1990's
- Admissions of guilt from a number of accused have also contributed to the establishment of the facts, too. In his Plea Agreement, Dragan Obrenovic provided valuable insider military information and cooperated well beyond what was required under the Agreement. Obrenovic made the following statement during his Sentencing Hearing,
"In Bosnia, a neighbor means more than a relative. In Bosnia, having coffee with your neighbor is a ritual, and this is what we trampled on and forgot. We lost ourselves in hatred and brutality. And in this vortex of terrible misfortune and horror, the horror of Srebrenica happened."
"I will be happy if my testimony helps the families of the victims, if I can spare them having to testify again and relive the horrors and the pain during their testimony. It is my wish that my testimony should help prevent this ever happening again, not just in Bosnia, but anywhere in the world."
- The determination beyond reasonable doubt of certain facts is crucial in combating denial and preventing attempts at revisionism
- It is now not tenable for anyone to dispute the reality of the crimes that were committed in and around Bratunac, Brcko, Celebici, Dubrovnik, Foca, Prijedor, Sarajevo, Srebrenica, and Zvornik

to name but a few. As other trials are completed, further facts will be established regarding these and other areas in the former Yugoslavia

3. BRINGING JUSTICE TO THOUSANDS OF VICTIMS AND GIVING THEM A VOICE

- Through its work, by holding senior individuals responsible for the crimes committed in the former Yugoslavia, the Tribunal is bringing a sense of justice to the many thousands of victims across the region
- Victims play a crucial role in the proceedings at the Tribunal as witnesses, contributing to the process of establishing the truth by talking to investigators and/or by giving testimony in court. In many cases, this requires considerable courage on the part of the witness
- To date, over 3,500 witnesses have taken the opportunity to tell their stories while testifying in court. Through this, they have contributed to the creation of elements of a historical record. The Prosecution has also interviewed 1,400 other potential witnesses. This has given victims and witnesses a real sense that they and their communities are involved in the work of the Tribunal
- The ICTY guarantees that the suffering of victims across the former Yugoslavia is acknowledged and not ignored
- One witness, a 54 year-old housewife from Bosnia and Herzegovina who testified in the trial of the three men she held responsible for the death of her husband and her neighbours stated: "I really wanted to go to The Hague. I wanted to see the [three defendants] and to ask them why they did it. Why did they kill all these people? Why did they destroy our village? We had such good relations. We were good neighbors. I just wanted one of them . . . to tell me why they did that."

4. THE ACCOMPLISHMENTS IN INTERNATIONAL LAW

- During the 10 years that the Tribunal has been in existence, it has expanded the boundaries of international humanitarian and international criminal law. It has proved that efficient and transparent international justice is viable
- The ICTY has been a pioneering institution that has set a large number of legal and institutional precedents:
 - It has expanded upon the legal elements of the crime of grave breaches of the Geneva Conventions of 1949 by further defining the test of overall control, identifying the existence of an *international armed conflict*, and also the extended and exact definition of *protected persons* under the Conventions
 - It has narrowed the differences that are perceived between the *laws or customs of war* applicable in internal and in international conflicts, thus approaching both standards for the *protection of individuals*
 - It has identified a *general prohibition of torture* in international law which cannot be derogated from by a treaty, internal law or otherwise
 - It has made significant advances in international humanitarian law pertaining to the legal treatment and *punishment of sexual violence* in wartime
 - It has specified crucial elements of the crime of *genocide*, in particular the definition of the *target* of such crime, a group or part if a group of individuals
 - It has made several pivotal determinations with regard to crimes against humanity committed against civilians, in particular that this crime can be committed not only as part of, but also just *during* an armed conflict, thus identifying a wide scope of protection
 - It has specified the definitions of *enslavement* and *persecution* as parts of crimes against humanity, resulting in the first convictions after World War II for enslavement on the basis of a broadened definition

- It has identified and applied the modern doctrine of criminal responsibility of superiors, so-called command *responsibility*, clarifying that a formal superior-subordinate relationship is *not* necessarily required for criminal responsibility
- In the same vein, it has removed uncertainty about the *level of knowledge* to be expected from a superior, whose subordinates were about to commit crimes he did not prevent, or about crimes actually committed by them
- It has made numerous contributions to procedural law issues, some of which are in the areas of protective measures for witnesses, the confidentiality and disclosure of information relevant for the national security of States, guilty pleas of accused, and duress as a defence
- Finally, a number of other legal and technical facts about the Tribunal are relevant too:
 - It was the first tribunal established under Chapter VII of the UN Charter as a measure to maintain international peace and security
 - It was the first truly international war crimes tribunal
 - It was the first international criminal court to enforce the existing body of international humanitarian law, and in particular judicially determine its customary law aspects
 - It has created an independent system of law, comprising of elements from adversarial and inquisitory criminal procedure traditions
 - It has established the most modern court facilities in the world, the layout and technical equipment of which will be copied and taken as a model in other modern courtrooms, for example the ICC and the Special Court for Sierra Leone
 - It has established, developed and maintained an effective victims and witnesses programme
 - It has established a unique legal aid system, and groomed a group of defence attorneys highly qualified to represent accused in war crimes proceedings
 - The Tribunal has created a Judicial Database of all its jurisprudence, soon to be available on the internet, providing access to a vast amount of decisions and orders in and international procedural and criminal law

5. STRENGTHENING THE RULE OF LAW

- In November 1995, upon the conclusion of the Dayton peace agreement, the Tribunal's then President, Antonio Cassese, commented as follows:

"Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand."
- The Tribunal has been an incentive to reform the judiciaries in the former Yugoslavia and has been a catalyst for the creation of specialized war crimes courts in the region
- Courts across the former Yugoslavia have and will continue to benefit from the Tribunal's invaluable experience in dealing with war crimes
- To support the process of strengthening the Rule of Law, the Tribunal is actively involved in training legal professionals from the former Yugoslavia to enable them to deal with war crimes cases and be able to enforce international legal standards in their local systems
- As it is implementing its completion strategy, the Tribunal has given a new dimension to the principle that its jurisdiction runs concurrent to national courts by putting into place mechanisms for the transfer to national courts in the former Yugoslavia of some ICTY cases
- Through its central role in the so-called *Rules of the Road* system, the ICTY Prosecution has reviewed over 900 investigations files from prosecution offices in Bosnia and Herzegovina to verify that the inquiries were justified and whether any were related to ICTY cases in order to ensure freedom of movement across Bosnia and Herzegovina by preventing arbitrary arrests of individuals on war crimes charges
- The Tribunal's existence and achievements have promoted respect for the Rule of Law across the former Yugoslavia, vital for long-term stability

•The ICTY Judges and staff have extensively shared their expertise with those involved in the development of other international courts, such as the ICC and the Special Court for Sierra Leone

THE COST OF JUSTICE

•The Tribunal's budget covers activities that would not be undertaken by a court in a national system, for example the running and management of its Detention Unit; the legal aid system; the witness protection and assistance programme; the capacity to translate documents and interpret proceedings; the ability to organize travel of investigators to collect evidence and interview witnesses; and the capacity to secure evidence, buildings, detention facility and staff

•The expense of bringing to justice those most responsible for war crimes and for helping to cement the Rule of Law in the former Yugoslavia pales in comparison to the true cost of the crimes: the lives lost, the communities devastated, the private property ransacked and the cultural monuments and buildings destroyed forever

•Bringing justice and accountability to the former Yugoslavia represents an investment in the peace and future of south-eastern Europe

2. ICTR website

<http://65.18.216.88/default.htm>

Relevance for Peace and Justice

- **NEVER AGAIN.** African countries must absorb the lessons of the Rwanda genocide in order to avoid a repetition of the ultimate crime" on the continent. Weak institutions in many African countries have given rise to a culture of impunity, especially under dictatorships that will do anything to cling to power.
- **EVOLUTION OF POLITICAL AND LEGAL ACCOUNTABILITY.** It is usually individuals in power or authority that can in practice commit genocide and crimes against humanity. This is the first time high-ranking individuals have been called to account before an international court of law for massive violations of human rights in Africa. The Tribunal's work sends a strong message to Africa's leaders and warlords. By delivering the first-ever verdicts in relation to genocide by an international court, the ICTR is providing an example to be followed in other parts of the world where these kinds of crimes have also been committed.
- **COOPERATION OF AFRICAN COUNTRIES.** The accused persons in the custody of the Tribunal in Arusha have been arrested and transferred from more than 15 countries. Several countries in Africa have increasingly cooperated with the Tribunal in the discharge of its mandate. There appears to have been a progressive realization in these countries that they cannot allow fugitives from international justice in their domain.
- **ENFORCEMENT OF PRISON SENTENCES.** The Tribunal prefers, to the extent possible, enforcement of its sentences in Africa, for socio-cultural reasons. This will also have greater deterrent effect in the continent. By providing jails for the Tribunal's genocide convicts, African countries would be demonstrating a serious commitment to the rule of law. On 12 February 1999, the Republic of Mali became the first country to sign an agreement with the ICTR to provide prison facilities for the enforcement of the Tribunal's sentences. A similar agreement was signed with Benin on 26 August 1999. Negotiations with other African countries are nearing conclusion.
- **POLITICAL, MORAL AND MATERIAL SUPPORT** by African countries for the court is essential. Much depends upon the ultimate success or failure of the ICTR because it is dealing with crimes committed in Africa, with more than 500,000 victims. African countries and Governments should make the point that the lives of these victims are as important as those of victims of mass atrocities everywhere by giving a higher profile to the work of the International Tribunal for Rwanda. The Tribunal's work is providing important precedents for the future International Criminal Court and various national jurisdictions. It is making a fundamental contribution to international peace and justice in the twenty-first century.

3. ICC website

About the Court

<http://www.icc-cpi.int/about.html>

The International Criminal Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. The ICC is based on a treaty, joined by 106 countries.

The ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, for example if formal proceedings were undertaken solely to shield a person from criminal responsibility. In addition, the ICC only tries those accused of the gravest crimes.

In all of its activities, the ICC observes the highest standards of fairness and due process. The jurisdiction and functioning of the ICC are governed by the Rome Statute.

ICC Newsletter #06, November 2005

http://www.icc-cpi.int/library/about/newsletter/index_11.html

Message of the President

The ICC has issued its first warrants of arrest. On 13 October, Pre-Trial Chamber I unsealed five warrants of arrest against senior leaders of the Lord's Resistance Army for alleged crimes committed in Uganda since July 2002. The gravity of the alleged crimes included in the warrants is an important reminder to each of us of the need for an international criminal court.

In my recent presentation of the first report of the ICC to the UN General Assembly, I emphasised that if the ICC is to contribute to the aim of ending impunity for the most serious crimes of international concern, it requires cooperation in all phases of its operations.

The Court's investigations, for example, are occurring in situations of ongoing conflict. Cooperation is needed in such areas as ensuring security of Court staff, victims and witnesses; arranging adequate transportation, logistics and communications; and preserving and providing evidence. In order for the Court to commence its first trials, persons subject to warrants by the Court must be arrested and surrendered into its custody. Sentences handed down by the Court will have to be enforced. In that regard, the Court welcomes the first agreement on enforcement of sentences between a State Party and the ICC signed by Austria in October 2005. Given the Court's limited jurisdiction, universality is a necessary part of progressing towards the goal of ending impunity. The Court was very pleased, therefore, that Mexico ratified the Statute in October.

The ICC welcomes the opportunity to engage in a constructive and open dialogue at the upcoming Session of the Assembly of States Parties. In particular, the Court needs input from States on the broader issues which affect the Court's ability to carry out its mandate. We are open to this communication and look forward to a productive Session.

(Philippe Kirsch, President)

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Court wants exemplary Karadzic trial

By Chris Stephen

The arrest of Radovan Karadzic has given Hague Tribunal prosecutors the chance to win a landmark case against a man accused of orchestrating the horrors of the Bosnian war.

The tribunal has already jailed generals, warlords and paramilitary thugs in cases that have revolutionised international justice, but it has yet to convict one of the masterminds.

Many think that chance was missed with the case of former Yugoslav President Slobodan Milosevic.

Accused of orchestrating three separate wars in Bosnia, Croatia and Kosovo, Milosevic's trial dragged on so long - four years - that in March 2006 he died of heart failure before it could finish.

For supporters of the court, the arrest of Mr Karadzic gives prosecutors a second chance.

Civilians targeted

The crimes the former Bosnian Serb president is accused of ordering are already seared into the public consciousness.

First is the siege of Sarajevo, where about 12,000 people, including 1,000 children, were killed by indiscriminate Serb shelling and sniper fire.

Then there are charges that he set up the camps into which Bosnian Muslims (Bosniaks) were herded to be tortured, starved and killed.

And thirdly is the 1995 massacre at Srebrenica, where Serb forces rounded up and killed up to 8,000 unarmed Bosniak men and boys, burying their bodies in mass graves in forests around the town.

Mr Karadzic is accused of ordering these crimes as part of a plan to "ethnically cleanse" Bosnia. In the war Serb extremists expelled non-Serbs from areas they considered to be Serb territory.

Proving the atrocities themselves will be the easy part: the horrors of the Bosnian war have already been copiously documented in earlier trials.

Convictions came after prosecutors wove a complex tapestry of evidence combining eyewitnesses, radio intercepts, satellite photographs, captured Serb documents and DNA taken from mass graves.



Radovan Karadzic is accused of ordering "ethnic cleansing"

KARADZIC AT THE HAGUE



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'I taught Karadzic'
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Footage of Karadzic in disguise emerges
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Sarajevo under siege at height of war
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More difficult may be pinning the crimes on Mr Karadzic, who may argue that as the civilian head of his self-proclaimed state, he had no control over the army.

Prosecutors insist he shared responsibility with his former army commander, Ratko Mladic, indicted on many of the same charges, and still at large in Serbia.

Genocide definition

Particularly difficult may be proving the most serious accusation, that of genocide.

Nicknamed the "crime of crimes", genocide is a difficult charge to make stick because it requires proof not just of atrocities, but that these atrocities were part of an attempt to "destroy in whole or in part" a specific group - in other words, prosecutors have to get inside the mind of the accused.



Sarajevo was under siege for nearly four years

Hague judges have already ruled that ethnic cleansing, despite its brutality, did not amount to genocide, because the intention was to deport rather than annihilate the Bosniaks.

Only with Srebrenica have they agreed genocide took place. But even here the only two genocide convictions, of former Serb army officers, were for the lesser offences of complicity or aiding and abetting genocide.

But prosecutors are confident that with Mr Karadzic, they will secure a full-blown genocide conviction, arguing that he was the architect of the slaughter.

Easing the workload for the court, the UN has already decided that the court's 2010 closure date will be extended to allow trials of Mr Karadzic and other indictees to finish.

Mr Karadzic, facing a possible life sentence if convicted, is unlikely to make it easy for the prosecutors, having said that he plans to run his own defence.

Milosevic did the same thing, as was his right, causing serious delays to proceedings.

Rights groups meanwhile see a political dimension to the case, hoping that if it goes well it will persuade sceptical world leaders that war crimes justice is a cause worth backing.

Mr Karadzic is not the only high-profile defendant on trial in The Hague. A few miles away, in premises rented from the International Criminal Court, the Sierra Leone Special Court is trying former Liberian President Charles Taylor on charges that equal Mr Karadzic's for brutality.



Bosnian Serb forces waged a brutal campaign against Bosniaks and Croats

Former Hague tribunal prosecutor Richard Goldstone once described the international community as his "arms and legs", arguing that without the backing of world leaders, he was powerless to secure the arrest of top suspects.

It was these "arms and legs", in the form of pressure from the European Union, that helped drive Serbia to arrest Mr Karadzic.

But critics say such pressure is missing in the case of Sudan, where the United Nations has refrained from sanctions to force Khartoum to hand over its president, Omar al-Bashir, accused last week by International Criminal Court prosecutors of genocide.

Good results in the Karadzic and Taylor cases will, rights groups say, be a powerful advertisement for the cause of international justice.

"Two good trials are needed," says Richard Dicker, director of international justice at New York-based Human Rights Watch. "By 'good trials' I mean a sharp posing of contradictory evidence. These

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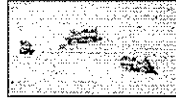
Chris Stephen is author of Judgement Day: The Trial of Slobodan Milosevic, published by Atlantic Books in 2004.

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4. International Military Tribunal, Nuremberg – Defendants



5. Okervill River, The War Criminal Rises and Speaks

(from *Down the River of Golden Dreams*, 2003)

<http://www.jound.com/okkervil/lyrics/thewarcriminalrisesandspeaks.html> (adjusted text)

<http://webjay.org/iteminfo/5378467/15679724560f92e60f79f977d125f59d> (audio)

The heart wants to feel. The heart wants to hold. The heart takes past Subway, takes past Stop and Shop, takes past Beal's, and calls it "coming home." The heart wants a trail away from "alone," so the heart turns a sale into a well-worn milestone. The heart wants towards hard-won soft furniture, fought-for fast food, defended end table that holds paperbacks and back U.S. News. The mind turns an itch into a bruise, and the hands start to twitch when they're feeling ill-used. And you're almost back now, you can see by the signs; from the bank you tell the temperature and then the time, and the billboard reads some headlines. The head wants to turn, to avert both its eyes, but the mind wants to learn of some truth that might be inside reported crimes. So they found a lieutenant who killed a village of kids. After finishing off the wives, he wiped off his knife and that's what he did. And they're not claiming that there's any excusing it; that was thirty years back, and they just get paid for the facts the way they got them in. Now he's rising and not denying. His hands are shaking, but he's not crying. And he's saying "How did I climb out of a life so boring into that moment? Please stop ignoring the heart inside, oh you readers at home! While you gasp at my bloody crimes, please take the time to make your heart my home: where I'm forgiven by time, where I'm cushioned by hope, where I'm numbed by long drives, where I'm talked off or doped. Does the heart want to atone? Oh, I believe that it's so, because if I could climb back through time, I'd restore their lives and then give back my own: tens of times now its size on a far distant road in a far distant time where every night I'm still crying, entirely alone." But the news today always fades away as you drive by, until at dinnertime when you look into her eyes, lit by evening sun - that, as usual, comes from above that straight, unbroken line, the horizon - its rising seems a given, just like your living. Your heart's warm and kind. Your mind is your own. So our blood-spattered criminal is inscrutable; don't worry, he won't rise up behind your eyes and take wild control. He's not of this time, he fell out of a hole.